

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20201110**

**Docket: A-377-19**

**Citation: 2020 FCA 195**

**CORAM: NOËL C.J.  
STRATAS J.A.  
LEBLANC J.A.**

**BETWEEN:**

**YELLOW POINT LODGE LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard by online video conference hosted by the registry on September 29, 2020.

Judgment delivered at Ottawa, Ontario, on November 10, 2020.

**REASONS FOR JUDGMENT BY:**

**NOËL C.J.**

**CONCURRED IN BY:**

**STRATAS J.A.  
LEBLANC J.A.**

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**REASONS FOR JUDGMENT**

**NOËL C.J.**

[1] This is an appeal brought by Yellow Point Lodge Ltd. (Yellow Point or the appellant) from a decision of the Tax Court of Canada (2019 TCC 178) wherein Visser J. (the Tax Court judge) confirmed the assessment issued by the Minister of National Revenue (the Minister) with respect to its 2014 taxation year. By this assessment, the Minister denied the ecological gift deduction of \$1,553,374 claimed by Yellow Point for that year pursuant to paragraph 110.1(1)(d)

of the *Income Tax Act*, R.C.S. 1985, c. 1 (5th Supp.) (the Act) on the ground that the carryforward period within which the deduction could be claimed ended in 2013.

[2] The issue to be decided is whether the gift in issue was made in 2008, when the gifted property was disposed of, or in 2009, when all the requirements for claiming the tax relief associated with the gift were fulfilled.

[3] Until now, it has always been understood that for the purposes of the Act, gifts are made when the gifted property is disposed of by the donor in favour of the donee, an event that is separate from the fulfilment of the requirements entitling the donor to the tax relief associated with the making of a qualifying gift. The appellant initially agreed with this view as it claimed the tax relief associated with the ecological gift in 2008 when the gifted property was disposed of. It now contends that paragraph 110.1(1)(d) introduces into the Act a novel concept of a gift which does not materialize until all the requirements for claiming the tax relief associated with the gift are met, in this instance, 2009.

[4] Moving the gift from its 2008 to its 2009 taxation year would allow the appellant to carry forward the unclaimed portion of the ecological gift deduction to its 2014 taxation year and erase income of \$1,553,374, practically triple the income earned in the prior years.

[5] Before us, the appellant alleges that in refusing to hold that the gift was made in 2009, the Tax Court judge misconstrued paragraph 110.1(1)(d). It maintains that a contextual construction

of this provision confirms that although the gifted property was disposed of in 2008, the gift was not made until the following year.

[6] According to the Crown, the Tax Court judge correctly held, based on a purposive analysis of paragraph 110.1(1)(d), that the gift was made in 2008, when the gifted property was disposed of.

[7] For the reasons that follow, I would dismiss the appeal.

[8] The provisions of the Act that are relevant to the analysis are set out in the Annex to the reasons.

## **I. Facts**

[9] The appellant is a corporation owning lands in their natural state, except for a lodge and cabin resort it operates. On June 6, 2008, the appellant granted a covenant for the disposition of a part of its lands (the gifted property) in equal proportion (50% each) to The Land Conservancy of British Columbia (TLC) and Nanaimo & Area Land Trust Society (NALT) (Statement of Agreed Facts, Appeal Book, p. 51, paras. 4-6; Reasons, para. 2). The interests in the lands were transferred to TLC and NALT on the same day (Copy of General Instrument, Document Number FB179685, Appeal Book, p. 59).

[10] At the end of its 2008 taxation year (on December 31), the appellant did not have in hand the documents establishing that an ecological gift had been made for purposes of paragraph 110.1(1)(d), namely:

- A statement of fair market value of an ecological gift pursuant to the Act (the fair market value certificate) and a certificate of ecologically sensitive land, both issued by the federal Minister of the Environment (also referred to as the certificates); and
- Tax receipts from TLC and NALT.

For that reason, it did not claim the tax relief associated with the making of an ecological gift in its 2008 tax return (Letter from Parkes & Moysey Chartered Accountants, Appeal Book, pp. 92-93; Statement of Agreed Facts, Appeal Book, pp. 53-54, para. 15).

[11] During its 2009 taxation year, the appellant received from the Minister of Environment the fair market value certificate valuing the covenant at \$5,810,000 and the certification that the gifted land was ecologically sensitive. The appellant later received tax receipts from TLC and NALT, each in the amount of \$2,905,000 and representing 50% of the fair market value of the covenant (Statement of Agreed Facts, Appeal Book, pp. 52-53, paras. 10-13).

[12] On May 19, 2010, the appellant provided these documents to the Minister and requested that its 2008 taxation year be reassessed in order to recognize its ecological gift of \$5,810,000.

By claiming a resulting deduction under paragraph 110.1(1)(d) of \$382,779, the appellant would reduce its income for that year to nil. As well, the appellant recognized that it had realized a capital gain of \$5,626,496 from the disposition of the gifted property during that year and claimed the corresponding exemption pursuant to paragraph 38(a.2), thereby reducing the taxable portion of the gain to zero. On July 27, 2010, the Minister reassessed the appellant's 2008 taxation year accordingly (Statement of Agreed Facts, Appeal Book, p. 54, paras. 16-17; Letter from Parkes & Moysey Chartered Accountants, Appeal Book, pp. 92-93).

[13] The appellant subsequently claimed yearly deductions with respect to the gifted property pursuant to paragraph 110.1(1)(d) in the amounts of \$474,673, \$495,339, \$496,252, \$519,720, \$468,055 for its 2009 through 2013 taxation years respectively (Statement of Agreed Facts, Appeal Book, pp. 54-55, para. 18).

[14] In filing its income tax return for the 2014 taxation year, the appellant claimed a further ecological gift deduction of \$1,553,374. By assessment issued on July 28, 2015, the Minister disallowed this deduction on the basis that the five-year carryforward period available for the claimed deduction expired in 2013 (Statement of Agreed Facts, Appeal Book, p. 55, paras. 19-21).

[15] The assessment was subsequently confirmed and the appeal before the Tax Court judge ensued.

## II. Decision under Appeal

[16] The Tax Court judge began by noting that the sole issue was whether the appellant can claim a deduction pursuant to paragraph 110.1(1)(d) for its 2014 taxation year. Therefore, a determination must be made as to when the “gift was made” by interpreting the carryforward rules for ecological gifts in paragraph 110.1(1)(d) (Reasons, paras. 13, 16).

[17] According to the Tax Court judge, the appellant’s contention that the “gift was made” in 2009 upon the fulfilment of the requirements for the making of an ecological gift was without merit because the wording of paragraph 110.1(1)(d) provides otherwise (Reasons, para. 19). The Tax Court judge agreed with the Crown that the criteria set out in this provision for claiming a deduction must be considered separately (Reasons, paras. 21-22).

[18] He first sought to determine whether a gift had been made. After pointing to the absence of a statutory definition, the Tax Court judge adopted the meaning set out by this Court in *The Queen v. Berg*, 2014 FCA 25, [2014] 3 C.T.C. 1 [*Berg*] at paragraph 23, citing *Friedberg v. R.* (1991), 92 D.T.C. 6031, 135 N.R. 61 (F.C.A.) at p. 6032: “a gift is a voluntary transfer of property owned by a donor to a [donee] in return for which no benefit or consideration flows to the donor” (Reasons, para. 22). Relying on this definition, the Tax Court judge concluded that the gift was made when the appellant granted the covenant to TLC and NALT on June 6, 2008 (Reasons, para. 23). The other requirements set out in paragraph 110.1(1)(d) were not “part of the determination of when a gift has been made” (Reasons, para. 25).

[19] The Tax Court judge then embarked upon a purposive analysis. He began by stating that his interpretation was in line with “the text of paragraph 110.1(1)(d) and the context of the Act read as a whole” (Reasons, para. 26). He went on to explain that the text of paragraph 110.1(1)(d), subsection 110.1(2) and subsection 110.1(5) is clear to the effect that the “making of the gift” is not conditional upon the fulfilment of qualifying requirements for the deduction. It is an event separate from the process of obtaining the prerequisite certificates (Reasons, paras. 26-29).

[20] According to the Tax Court judge, subsections 118.1(10.2) to 118.1(12) of the Act, which frame the process for obtaining the fair market value certificate from the Minister of the Environment pursuant to paragraph 110.1(1)(d) and provide appeal rights for taxpayers, also suggest that the making of the gift is a separate event (Reasons, paras. 30-38). For instance, subsection 118.1(10.2) provides that a taxpayer who “disposes or proposes to dispose of a property” can request that the Minister of the Environment determines the fair market value of the property and subsection 118.1(10.5) requires the Minister to issue a fair market value certificate “to the person who made the disposition”. In his view, both these provisions suggest that the issuance of the fair market value certificate is independent from the making of the gift (Reasons, paras. 31, 34).

[21] Finally, the Tax Court judge underlined the fact that subsection 118.1(11) requires the Minister to reassess in order to give effect to the fair market value certificate once it is issued. It follows that even if there are delays in the final determination of the fair market value of the



gifted property, donors can benefit from the deduction during the full carryforward period allowed by paragraph 110.1(1)(d) (Reasons, para. 37).

[22] The Tax Court judge went on to hold that the making of the gift is unequivocally separate from the other requirements that must be met in order for the deduction to be allowed. The gift is made when it is legally effected (Reasons, para. 41). This provides certainty since the making of the gift and the beginning of the deduction period coincide and do not depend on the issuance of certificates, an occurrence that can be delayed by the administrative process (Reasons, paras. 42-43; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paras. 11-12).

[23] Thus, according to the Tax Court judge, paragraph 110.1(1)(d) allowed the appellant to claim the ecological gift deduction for its 2008 through 2013 taxation years and so the appellant's 2014 taxation year falls outside the carryforward period (Reasons, para. 44).

### **III. Position of the Appellant**

[24] The appellant first argues that the Tax Court judge erred in holding that the meaning of the expression, "gift was made", in subparagraph 110.1(1)(d)(iii) is clear. Contrary to what the Tax Court judge held, these words are ambiguous (Memorandum of the Appellant, paras. 34-36). Given this, the Tax Court judge ought to have conducted a contextual and purposive analysis of paragraph 110.1(1)(d) before concluding that the private law definition of gift applies. This is because "tax legislation may recharacterize contractual or economic transactions for its own

purposes by overriding the legal categories established by the common law and the civil law” (Memorandum of the Appellant, paras. 37-38, citing *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838 at para. 45).

[25] The appellant recognizes that the private law definition of gift applies generally to gifts made under the Act, in which case the gift is made when the property is transferred (Memorandum of the Appellant, para. 44, citing *Berg* at para. 23). However, the present case involves a specific category of gifts created by the Act—namely ecological gifts—that are subject to a distinct treatment (Memorandum of the Appellant, para. 45). In order to encourage the preservation of habitat and biodiversity, this specific regime provides a favourable tax treatment to donors of ecologically sensitive lands upon the fulfilment of criteria set out in paragraph 110.1(1)(d) and subsection 110.1(2) (Memorandum of the Appellant, paras. 46-47).

[26] In this regard, the appellant maintains that the expression, “gift was made”, in paragraph 110.1(1)(d) is ambiguous and must be interpreted in the context of subsections 110.1(2), 110.1(5), 118.1(10.2) and 118.1(10.5) in a manner that is consistent with the ecological gift regime (Memorandum of the Appellant, paras. 41, 56). Such a contextual analysis demonstrates that the property is disposed of before the ecological gift is actually made (Memorandum of the Appellant, paras. 4, 57). Specifically, subsection 110.1(5), when read with subsection 118.1(10.5), shows that the fair market value at the time the gift is made is deemed to be the fair market value of the property at the time of its disposition as determined by the Minister of the Environment. If paragraph 110.1(1)(d) does not envisage two separate events, the deeming rule would serve no useful purpose (Memorandum of the Appellant, paras. 58, 61).

[27] According to the appellant, the Tax Court judge's suggestion that this interpretation would raise uncertainty as to the years in which the deduction can be claimed is ill-founded. Prospective donors can always request the determination of the fair market value of their property before the making of the gift (Memorandum of the Appellant, paras. 68-69). However, as the Tax Court judge said, if the deduction period starts at the time the property is disposed of, donors will not be able to claim their deductions until the conditions are met. Many years may elapse before the gift qualifies as an ecological gift (Memorandum of the Appellant, para. 75).

[28] The appellant refers to the Tax Court judge's assertion that this is not an issue because pursuant to subsection 118.1(11) the Minister is obligated to reassess the taxation years throughout the carryforward period. However, the appellant argues that a "bilingual interpretation" of this subsection reveals that the Minister has no obligation to reassess (Memorandum of the Appellant, paras. 81-85).

[29] Thus, the appellant maintains that the adoption of the private law definition of gift by the Tax Court judge, which may preclude a donor from benefitting from the full six-year deduction period, is incompatible with a textual and contextual analysis of paragraph 110.1(1)(d) and defeats the rationale of the ecological gift regime. The right to claim a deduction should not be subject to administrative discretion (Memorandum of the Appellant, paras. 88-89).

#### **IV. Position of the Crown**

[30] The Crown submits that the Tax Court judge correctly held that a gift is made when the property is transferred. Therefore, the criteria set out in paragraph 110.1(1)(d) must be examined separately. The issuance of the certificates by the Minister of the Environment does not affect the time when a gift is made (Memorandum of the Crown, paras. 23, 26).

[31] The Crown submits that the Tax Court judge correctly adopted the private law definition of gift following the teachings of this Court in *Berg*. As is the case for charitable gifts, ecological gifts are made when qualifying property changes hands under the common law (Memorandum of the Crown, paras. 27-28).

[32] The Crown further submits that the Tax Court judge's interpretation is consistent with the statutory framework under which the making of the gift is a separate event from its certification. As a supporting example, it refers to gifts of cultural property which require the certification from the Canadian Cultural Export Review Board before a deduction can be claimed. Under that regime, certification is a necessary step before the deduction can be claimed but is not a condition for the making the gift. As is the case for ecological gifts, the gift and the certification are two separate events (Memorandum of the Crown, paras. 31-33).

[33] The Crown submits that the Tax Court judge's interpretation is also supported by a reading of paragraph 110.1(1)(d) and its accompanying provisions. For instance, subsection 110.1(2) provides that the "making of the gift" must be "evidenced" by providing to the Minister

the tax receipt and the two certificates, thus suggesting that the “making of the gift” is an event that is separate from the fulfilment of other criteria. Furthermore, paragraph 38(a.2), providing that the capital gain for an ecological gift is nil, specifies that “the disposition is the making of the gift”, which suggests that the “the making of the gift [...] of a property described [...] in paragraph 110.1(1)(d)” occurs when the property is disposed of (Memorandum of the Crown, paras. 34-35).

[34] The Crown takes issue with the appellant’s contention that the Minister can refuse to reassess further to a fair market value certificate or a court decision being issued in a later year pursuant to subsection 118.1(11). Relying on *R v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, it argues that a proper interpretation of this provision reveals that the English version, which is clearly mandatory, should be preferred (Memorandum of the Crown, paras. 37, 40-41).

[35] Lastly, the Crown submits that the Tax Court judge’s interpretation of paragraph 110.1(1)(d) is consistent with the purpose of the ecological gift regime (Memorandum of the Crown, paras. 46-47). It provides donors with certainty as to when the deduction period begins and when it ends thus enabling them to claim the related deduction in a timely fashion (Memorandum of the Crown, para. 48).

## **V. Analysis**

[36] It is not contested that the gifted property was disposed of when the covenant was granted, during the appellant’s 2008 taxation year (Memorandum of the Appellant, para. 24;

Memorandum of the Crown, para. 51). A covenant is “property” under the Act (subsection 248(1)) and paragraph 110.1(1)(d) specifically recognizes the grant of a covenant on qualifying land as an ecological gift. Therefore, the sole issue is whether the Tax Court judge properly held that the ecological gift was made in 2008 when the gifted property was disposed of, rather than in the following year when the prerequisites for the associated tax relief were met. This is a pure question of statutory construction to be assessed on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

[37] Before addressing this issue, a few words about the term “disposition” are necessary. The notion of disposition is central to both the treatment of gifts under the Act and the capital gains regime as a whole because there can be no gain or loss under the Act without a disposition, whether deemed or real (see the definition of “capital property” in section 54; Vern Krishna, *Fundamentals of Canadian Income Tax*, vol. 1, 2nd ed. (Toronto: Thomson Reuters, 2019) at p. 531). The word “disposition” is defined in subsection 248(1) to include “any transaction or event entitling a taxpayer to proceeds of disposition of the property”. The expression, “proceeds of disposition”, in turn is defined as including, amongst other things “the sale price of property that has been sold” (section 54).

[38] It follows that when property is disposed of by way of a sale, the most common means by which property changes hands, it is the transfer of ownership that gives rise to the disposition because this is the event that entitles the seller to the proceeds of disposition of the property sold (*MNR v. Wardean Drilling Ltd.*, [1969] C.T.C. 265, 69 D.T.C. 5194 (Ex. Ct. Can.); see also *Canada v. Construction Bérou Inc.*, (1999) 251 N.R. 115, [2000] 2 C.T.C. 174 (F.C.A.) at para.

6 (Desjardins J.A.) and paras. 11-13 (Létourneau J.A.), citing *Olympia and York Developments Ltd. v. The Queen*, [1981] 1 F.C. 691, [1980] C.T.C. 265 (“acquisition is the counterpart of disposition”).

[39] But what is the applicable rule when property is gifted rather than sold? It is generally accepted that, in such circumstances, the rule is the same: the disposition takes place when ownership of the gifted property is transferred from the donor to the donee under the common law or the civil law, as applicable. Subparagraph 69(1)(b)(ii) completes the equation by deeming the donor to have received proceeds of disposition equal to the fair market value of the gifted property. The appellant does not take issue with this.

[40] Rather it contends that paragraph 110.1(1)(d) carves out an exception to this rule. In its view, the words, “gift was made”, as they appear in that provision are equivocal. Although the gifted property was disposed of when the covenant was granted, the appellant maintains that a purposive analysis of paragraph 110.1(1)(d) shows that the gift was not made until the subsequent year when the required certificates and the appropriate receipts were filed with the Minister.

[41] I agree with the Tax Court judge that the question as to when a gift is made and when a gift qualifies for a deduction or an exemption under the Act are distinct questions and that the ambiguity that the appellant seeks to introduce into paragraph 110.1(1)(d) is wholly attributable to its failure to distinguish between the two.

[42] The question as to when a “gift was made” for purposes of paragraph 110.1(1)(d) is fully answered by paragraph 38(a.2). That paragraph provides, by referring specifically to ecological gifts, that “the disposition is the making of a gift”—“la disposition consiste à faire don” in the French text. This is a consecrated expression under the Act (see for instance subsection 40(1.01), clause 110.1(1)(a)(B) and subparagraph 127.52(1)(d)(i)). This is consistent with the wording used in subparagraph 69(1)(b)(ii) which speaks of a disposition “by way of gift *inter vivos*”—“au moyen d’une donation entre vifs” in the French text. These provisions are unequivocal: the gift and the disposition occur at once when ownership of the gifted property is transferred from the donor to the donee under the applicable private law.

[43] In the present case, the appellant recognizes that the gifted property was disposed of in 2008 and that, as a result, it realized a capital gain of \$5,626,496 in that year pursuant to subparagraph 69(1)(b)(ii). However, as noted, a disposition cannot take place without some triggering event, whether real or deemed. In this respect, the appellant can point to no event capable of giving rise to the disposition and the resulting capital gain that it reported in 2008, other than the making of the gift. Moreover, the appellant maintains that it properly claimed the ecological gift capital gain exemption for its 2008 taxation year, which can only be the case if an ecological gift was made in that year (paragraph 38(a.2)).

[44] I do not see how the appellant can at once maintain that the ecological gift was made in 2008 for purposes of claiming the capital gain exemption and in 2009 for purposes of claiming the related deduction, because both forms of relief flow from the same gift. There is no doubt that the appellant’s entitlement to the capital gain exemption and the related deduction did not



arise until 2009 when all the conditions set out in paragraph 110.1(1)(d) and subsection 110.1(2) were met, but this does not alter the time when the “gift was made”.

[45] The appellant’s further argument that the deeming provision set out in subsection 110.1(5) would be superfluous if the making of the gift and the disposition took place at once is equally untenable. The power conferred on the Minister of the Environment by this provision is to determine the fair market value of the gifted property “at the time the gift was made”. However the Minister may be called upon to make this determination prospectively with respect to a gift that has yet to be made (subsection 118.1(10.2)). In such a case the fair market value that is determined before the gift is made is deemed to be the fair market value “at the time the gift was made” as contemplated by subsection 110.1(5). That is why a legal fiction had to be resorted to.

[46] Finally, the Tax Court judge held that the existing process under subsection 118.1(11) allows a taxpayer to claim a deduction in the year in which the gift is made and in the five subsequent years, even if there are delays in the final determination of the fair market value of the gifted property.

[47] The appellant maintains that in so holding, the Tax Court judge wrongly held that the Minister was required to give effect to the final fair market value determination of the gifted property. It points to the fact that the French text of subsection 118.1(11) uses the word “peut” (“may”) in contrast with the English text which uses the word “shall”. According to the

appellant, the two versions are irreconcilable and the French text best reflects the intent of Parliament.

[48] For ease of reference, subsection 118.1(11) reads:

*Assessments*

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

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

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

Emphasis added

*Cotisations*

**118.1.** (11) Malgré les paragraphes 152(4) à (5), le ministre peut établir les cotisations ou les nouvelles cotisations voulues concernant l'impôt, les intérêts ou les pénalités payables par un contribuable en vertu de la présente loi pour une année d'imposition pour donner effet, selon le cas :

a) à un certificat délivré en vertu du paragraphe 33(1) de la Loi sur l'exportation et l'importation de biens culturels ou à une décision d'un tribunal résultant de l'appel prévu à l'article 33.1 de cette loi;

b) à une attestation délivrée en vertu du paragraphe (10.5) ou à une décision d'un tribunal résultant de l'appel prévu au paragraphe 169(1.1).

[emphasis ajoutée]

[49] While the permissive word “peut” (“may”) and the imperative word “shall” seem irreconcilable when looked upon on their own (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paras. 39-40), there is no discrepancy in this case. Both versions of subsection 118.1(11) compel the Minister to assess or reassess in order to give effect to a certificate or a court decision confirming or varying the certified fair market value. This is

clear when regard is had to the English text (it “shall be made”) and despite its phrasing, I believe that the French text (« le ministre peut [may] établir les cotisations ») is to the same effect.

[50] I come to this conclusion because the appeal provisions applicable to a challenge of the fair market value certificate issued by the Minister of the Environment make it clear that this certificate must be given effect to by way of assessment or reassessment.

[51] In this respect, I note that when an appeal is taken from a fair market value certificate pursuant to subsection 169(1.1), the Tax Court, this Court or the Supreme Court—if leave is granted—may confirm or vary the certificate pursuant to subsection 171(1.1). This treatment is the same as that applicable to an appeal from an assessment or a reassessment pursuant to subsection 171(1) with the added feature that, when the fair market value certificate is varied by judicial pronouncement, the fair market value determined by the Court is deemed to be the fair market value initially determined by the Minister of Environment. This process makes it clear that the Minister must give effect to the fair market value certificate when it goes unappealed, or to the ultimate judicial pronouncement when an appeal is taken from the certificate.

[52] Counsel for the appellant did not appear to take issue with this during the hearing but insisted that the Minister’s obligation to assess or reassess remains conditional on all the other requirements for a qualifying gift being met. No doubt that is so, but there is no reason to think that the Tax Court judge did not understand this to be the case. The sole point he made is that the obligation to assess makes it clear that donors are not prejudiced by the potential time-lag

between the year in which the gift is made and the year in which the fair market value of the gifted property is finally determined.

[53] Reverting to the text of subsection 118.1(11), the use of the word “peut” in the French version illustrates how “an official who is permitted to do a thing may, in addition, be obliged to do it” (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: Lexis Nexis, 2014) at p. 81). In this respect, the word “peut” accords with the statutory permission that is given to the Minister to assess out of time, but in no way detracts from the Minister’s obligation to do so when presented with a fair market value certificate or with a judicial pronouncement further to an appeal. Although the English text does not use the word “may” to denote the fact that the Minister is allowed to assess out of time, the statutory permission is equally present because the obligation to assess out of time necessarily brings with it the right to do so. So read, both texts require the Minister to abide by a fair market value certificate or the final court decision confirming it or varying it, and for that purpose, allow the Minister to assess out of time. I am satisfied that this reading best reflects the intention of Parliament.

[54] Therefore, the Tax Court judge was correct when he held that the existing process ensures that a taxpayer can claim a deduction in the year in which the gift is made and the subsequent five taxation years, even if there are delays in the final determination of the fair market value of the gifted property.

**VI. Disposition**

[55] I would dismiss the appeal with costs.

---

“Marc Noël”  
Chief Justice

“I agree  
David Stratas J.A.”

“I agree  
René LeBlanc J.A.”

## ANNEX

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

***Loi de l'impôt sur le revenu, L.R.C. 1985 (5e suppl.), ch. 1.***

## PART I

## PARTIE I

## Income Tax

## Impôt sur le revenu

## DIVISION B

## SECTION B

## Computation of Income

## Calcul du revenu

## SUBDIVISION C

## SOUS-SECTION C

## Taxable Capital Gains and Allowable Capital Losses

## Gains en capital imposables et pertes en capital déductibles

**38** For the purposes of this Act,

**38** Pour l'application de la présente loi :

...

[...]

**(a.2)** a taxpayer's taxable capital gain for a taxation year from the disposition of a property is equal to zero if

**a.2)** le gain en capital imposable d'un contribuable pour une année d'imposition, tiré de la disposition d'un bien, est égal à zéro si, selon le cas :

**(i)** the disposition is the making of a gift to a qualified donee (other than a private foundation) of a property described, in respect of the taxpayer, in paragraph 110.1(1)(d) or in the definition "total ecological gifts" in subsection 118.1(1), or

**(i)** la disposition consiste à faire don à un donataire reconnu (à l'exception d'une fondation privée) d'un bien visé, en ce qui concerne le contribuable, à l'alinéa 110.1(1)d) ou à la définition de « total des dons de biens écosensibles » au paragraphe 118.1(1),

**(ii)** the disposition is deemed by section 70 to have occurred and the taxpayer is deemed by subsection 118.1(5) to have made a gift described in subparagraph (i) of the property;

**(ii)** la disposition est réputée aux termes de l'article 70 avoir été effectuée, et le contribuable est réputé aux termes du paragraphe 118.1(5) avoir fait don du bien conformément au sous-alinéa (i);

...

[...]

**Definitions****Définitions****54** In this Subdivision,**54** Les définitions qui suivent s'appliquent à la présente sous-section.

...

[...]

**capital property** of a taxpayer means**immobilisations** S'agissant des immobilisations d'un contribuable :*(a)* any depreciable property of the taxpayer, and*a)* disposition de biens tous biens amortissables du contribuable;*(b)* any property (other than depreciable property), any gain or loss from the disposition of which would, if the property were disposed of, be a capital gain or a capital loss, as the case may be, of the taxpayer;*b)* tous biens (autres que des biens amortissables) dont la disposition se traduirait pour le contribuable par un gain ou une perte en capital.

...

[...]

**proceeds of disposition** of property includes,**produit de disposition** Sont compris dans le produit de disposition d'un bien :*(a)* the sale price of property that has been sold,*a)* le prix de vente du bien qui a été vendu;**SUBDIVISION F****SOUS-SECTION F****Rules Relating to Computation of Income****Règles relatives au calcul du revenu****Inadequate considerations****Contreparties insuffisantes****69 (1)** Except as expressly otherwise provided in this Act,**69 (1)** Sauf disposition contraire expresse de la présente loi :

...

[...]

*(b)* where a taxpayer has disposed of anything*b)* le contribuable qui a disposé d'un bien en faveur :

...

[...]

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

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

...

[...]

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

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

## DIVISION C

## SECTION C

### Computation of Taxable Income

### Calcul du revenu imposable

#### Deduction for gifts

#### Déductions pour dons applicables aux sociétés

**110.1 (1)** For the purpose of computing the taxable income of a corporation for a taxation year, there may be deducted such of the following amounts as the corporation claims

**110.1 (1)** Les montants suivants peuvent être déduits par une société dans le calcul de son revenu imposable pour une année d'imposition :

...

[...]

#### Ecological gifts

#### Dons de biens écosensibles

(d) the total of all amounts each of which is the eligible amount of a gift of land (including a covenant or an easement to which land is subject or, in the case of land in the Province of Quebec, a personal servitude (the rights to which the land is subject and which has a term of not less than 100 years) or a real servitude) if

(d) le total des montants représentant chacun le montant admissible d'un don de fonds de terre, y compris un covenant ou une servitude, visant un fonds de terre (la servitude devant être, si le fonds de terre est situé au Québec, une servitude personnelle d'une durée d'au moins 100 ans ou une servitude réelle) si, à la fois :

(i) the fair market value of the gift is certified by the Minister of the Environment,

(i) la juste valeur marchande du don est attestée par le ministre de l'Environnement,

(ii) the land is certified by that Minister, or by a person

(ii) selon l'attestation de ce ministre ou d'une personne



designated by that Minister, to be ecologically sensitive land, the conservation and protection of which is, in the opinion of that Minister or the designated person, important to the preservation of Canada's environmental heritage, and

(iii) the gift was made by the corporation in the year or in any of the five preceding taxation years to

(A) Her Majesty in right of Canada or of a province,

(B) a municipality in Canada,

(C) a municipal or public body performing a function of government in Canada, or

(D) a registered charity one of the main purposes of which is, in the opinion of that Minister, the conservation and protection of Canada's environmental heritage, and that is approved by that Minister or the designated person in respect of the gift.

...

### **Proof of gift**

(2) An eligible amount of a gift shall not be included for the purpose of determining a deduction under subsection (1) unless the making of

qu'il désigne, le fonds de terre est sensible sur le plan écologique, et sa préservation et sa conservation sont, de l'avis de ce ministre ou de cette personne, importantes pour la protection du patrimoine environnemental du Canada,

(iii) le don a été fait par la société au cours de l'année ou des cinq années d'imposition précédentes à l'une des personnes suivantes :

(A) Sa Majesté du chef du Canada ou d'une province,

(B) une municipalité du Canada,

(C) un organisme municipal ou public remplissant une fonction gouvernementale au Canada,

(D) un organisme de bienfaisance enregistré qui est approuvé par ce ministre ou par la personne désignée pour ce qui est du don et dont l'une des principales missions, de l'avis de ce ministre, est de conserver et de protéger le patrimoine environnemental du Canada.

[...]

### **Attestation des dons**

(2) Pour que le montant admissible d'un don soit inclus dans le calcul d'une déduction en application du paragraphe (1), le versement du don

the gift is evidenced by filing with the Minister

*(a)* a receipt for the gift that contains prescribed information;

*(b)* in the case of a gift described in paragraph (1)(c), the certificate issued under subsection 33(1) of the Cultural Property Export and Import Act; and

*(c)* in the case of a gift described in paragraph (1)(d), both certificates referred to in that paragraph.

...

### **Ecological gifts**

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

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

*(b)* where the gift is a covenant or an easement to which land is subject or, in the case of land in the Province of Quebec, a real servitude, the greater of

doit être attesté par la présentation au ministre des documents suivants :

*a)* un reçu contenant les renseignements prescrits;

*b)* s'il s'agit d'un don visé à l'alinéa (1)c), le certificat délivré en vertu du paragraphe 33(1) de la Loi sur l'exportation et l'importation de biens culturels;

*c)* s'il s'agit d'un don visé à l'alinéa (1)d), les deux attestations mentionnées à cet alinéa.

[...]

### **Dons de biens écosensibles**

**(5)** Pour l'application du sous-alinéa 69(1)b)(ii), du présent article et de l'article 207.31 au don visé à l'alinéa (1)d) qui est fait par un contribuable, le montant qui représente à la fois la juste valeur marchande du don au moment où il a été fait (ou, pour l'application du paragraphe (3), sa juste valeur marchande à ce moment, déterminée par ailleurs) et, sous réserve du paragraphe (3), son produit de disposition pour le contribuable est réputé correspondre au montant, fixé par le ministre de l'Environnement, qui représente :

*a)* s'il s'agit d'un don de fonds de terre, la juste valeur marchande du don;

*b)* s'il s'agit d'un don de covenant ou de servitude visant un fonds de terre, la servitude devant être une servitude réelle si le fonds de terre est situé au Québec, le plus élevé des montants suivants :

(i) the fair market value otherwise determined of the gift, and

(ii) the amount by which the fair market value of the land is reduced as a result of the making of the gift.

## DIVISION E

### Computation of Tax

#### SUBDIVISION A

#### Rules Applicable to Individuals

##### 118.1

...

#### Determination of fair market value

**(10.1)** For the purposes of subparagraph 69(1)(b)(ii), subsection 70(5) and sections 110.1, 207.31 and this section, where at any time the Canadian Cultural Property Export Review Board or the Minister of the Environment determines or redetermines an amount to be the fair market value of a property that is the subject of a gift described in paragraph 110.1(1)(a), or in the definition “total charitable gifts” in subsection (1), made by a taxpayer within the two-year period that begins at that time, an amount equal to the last amount so determined or redetermined within the period is deemed to be the fair market value of the gift at the time the gift was made and, subject to subsections (6), (7), (7.1) and 110.1(3), to be the taxpayer’s proceeds of disposition of the gift.

(i) la juste valeur marchande du don, déterminée par ailleurs,

(ii) le montant appliqué en réduction de la juste valeur marchande du fonds de terre par suite du don.

## SECTION E

### Calcul de l’impôt

#### SOUS-SECTION A

#### Règles applicables aux particuliers

##### 118.1

[...]

#### Calcul de la juste valeur marchande

**(10.1)** Pour l’application du sous-alinéa 69(1)b(ii), du paragraphe 70(5), de l’article 110.1, du présent article et de l’article 207.31, dans le cas où la Commission canadienne d’examen des exportations de biens culturels ou le ministre de l’Environnement fixe ou fixe de nouveau le montant qui représente la juste valeur marchande d’un bien qui fait l’objet d’un don visé à l’alinéa 110.1(1)a ou à la définition de « total des dons de bienfaisance » au paragraphe (1) qu’un contribuable fait au cours de la période de deux ans commençant au moment où le montant est fixé ou fixé de nouveau, un montant égal au dernier montant ainsi fixé ou fixé de nouveau au cours de la période est réputé représenter à la fois la juste valeur marchande du don au moment où il a été fait et, sous réserve du paragraphe 110.1(3) et des paragraphes (6), (7)

et (7.1), son produit de disposition pour le contribuable.

### **Request for determination by the Minister of the Environment**

**(10.2)** Where a person disposes or proposes to dispose of a property that would, if the disposition were made and the certificates described in paragraph 110.1(1)(d) or in the definition “total ecological gifts” in subsection (1) were issued by the Minister of the Environment, be a gift described in those provisions, the person may request, by notice in writing to that Minister, a determination of the fair market value of the property.

### **Duty of Minister of the Environment**

**(10.3)** In response to a request made under subsection (10.2), the Minister of the Environment shall with all due dispatch make a determination in accordance with subsection (12) or 110.1(5), as the case may be, of the fair market value of the property referred to in that request and give notice of the determination in writing to the person who has disposed of, or who proposes to dispose of, the property, except that no such determination shall be made if the request is received by that Minister after three years after the end of the person’s taxation year in which the disposition occurred.

### **Ecological gifts — redetermination**

**(10.4)** Where the Minister of the Environment has, under subsection

### **Demande au ministre de l’Environnement**

**(10.2)** La personne qui dispose, ou se propose de disposer, d’un bien qui serait un don visé à l’alinéa 110.1(1)d) ou à la définition de « total des dons de biens écosensibles » au paragraphe (1) si la disposition était effectuée et les attestations visées à ces dispositions, délivrées par le ministre de l’Environnement, peut demander à ce ministre, par écrit, de fixer la juste valeur marchande du bien.

### **Obligation du ministre de l’Environnement**

**(10.3)** Sur réception de la demande, le ministre de l’Environnement fixe avec diligence, conformément au paragraphe 110.1(5) ou au paragraphe (12), selon le cas, la juste valeur marchande du bien mentionné dans la demande et en avise par écrit la personne qui a disposé du bien ou qui se propose d’en disposer. Toutefois, il n’est pas donné suite à la demande si celle-ci parvient à ce ministre une fois écoulée la période de trois ans suivant la fin de l’année d’imposition de la personne au cours de laquelle il a été disposé du bien.

### **Biens écosensibles — valeur fixée de nouveau**

**(10.4)** Une fois la personne avisée, conformément au paragraphe (10.3),

(10.3), notified a person of the amount determined by that Minister to be the fair market value of a property in respect of its disposition or proposed disposition,

*(a)* that Minister shall, on receipt of a written request made by the person on or before the day that is 90 days after the day that the person was so notified of the first such determination, with all due dispatch confirm or redetermine the fair market value;

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

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

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

#### **Certificate of Fair Market Value**

**(10.5)** Where the Minister of the Environment determines under subsection (10.3) the fair market value of a property, or redetermines that value under subsection (10.4), and the property has been disposed of to a qualified donee described in paragraph 110.1(1)(d) or in the definition "total ecological gifts" in subsection (1), that Minister shall issue to the person who made the

de la juste valeur marchande d'un bien relativement à sa disposition ou à sa disposition projetée, les règles suivantes s'appliquent :

*a)* sur réception d'une demande écrite de la personne présentée au plus tard 90 jours suivant l'avis, le ministre de l'Environnement, avec diligence, confirme cette juste valeur marchande ou la fixe de nouveau;

*b)* ce ministre peut à tout moment, de sa propre initiative, fixer de nouveau la juste valeur marchande;

*c)* dans un cas comme dans l'autre, ce ministre avise la personne par écrit de la confirmation ou de la valeur fixée de nouveau;

*d)* la valeur fixée de nouveau est réputée remplacer celles qui ont été fixées ou fixées de nouveau antérieurement, à compter de la date où la valeur a été fixée pour la première fois.

#### **Attestation de la juste valeur marchande**

**(10.5)** Lorsque le ministre de l'Environnement fixe la juste valeur marchande d'un bien aux termes du paragraphe (10.3), ou la fixe de nouveau aux termes du paragraphe (10.4), et qu'il a été disposé du bien à un donataire reconnu visé à l'alinéa 110.1(1)d) ou à la définition de « total des dons de biens écosensibles » au paragraphe (1), ce ministre délivre à la personne ayant disposé du bien

disposition a certificate that states the fair market value of the property so determined or redetermined and, where more than one certificate has been so issued, the last certificate is deemed to replace all preceding certificates from the time at which the first certificate was issued.

### **Assessments**

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

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

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

## **DIVISION J**

### **Appeals to the Tax Court of Canada and the Federal Court of Appeal**

#### **Appeal**

**169**

...

#### **Ecological gifts**

une attestation de la juste valeur marchande du bien ainsi fixée ou fixée de nouveau. En cas de délivrance de plus d'une telle attestation, la dernière est réputée remplacer les précédentes à compter de la date de délivrance de la première attestation.

### **Cotisations**

**(11)** Malgré les paragraphes 152(4) à (5), le ministre peut établir les cotisations ou les nouvelles cotisations voulues concernant l'impôt, les intérêts ou les pénalités payables par un contribuable en vertu de la présente loi pour une année d'imposition pour donner effet, selon le cas :

*a)* à un certificat délivré en vertu du paragraphe 33(1) de la Loi sur l'exportation et l'importation de biens culturels ou à une décision d'un tribunal résultant de l'appel prévu à l'article 33.1 de cette loi;

*b)* à une attestation délivrée en vertu du paragraphe (10.5) ou à une décision d'un tribunal résultant de l'appel prévu au paragraphe 169(1.1).

## **SECTION J**

### **Appels auprès de la Cour canadienne de l'impôt et de la Cour d'appel fédérale**

#### **Appel**

**169**

[...]

#### **Dons de biens écosensibles**

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

### **Disposal of Appeal**

**171 (1)** The Tax Court of Canada may dispose of an appeal by

- (a)* dismissing it; or
- (b)* allowing it and
  - (i)* vacating the assessment,
  - (ii)* varying the assessment, or
  - (iii)* referring the assessment back to the Minister for reconsideration and reassessment.

### **Ecological gifts**

**(1.1)** On an appeal under subsection 169(1.1), the Tax Court of Canada may confirm or vary the amount determined to be the fair market value of a property and the value determined by the Court is deemed to be the fair market value of the property determined by the Minister of the Environment.

**(1.1)** Le contribuable qui dispose d'un bien dont la juste valeur marchande a été confirmée ou fixée de nouveau par le ministre de l'Environnement aux termes du paragraphe 118.1(10.4) peut, dans les 90 jours suivant le jour où ce ministre a délivré l'attestation prévue au paragraphe 118.1(10.5), interjeter appel auprès de la Cour canadienne de l'impôt pour faire modifier la valeur ainsi confirmée ou fixée de nouveau.

### **Règlement d'un appel**

**171 (1)** La Cour canadienne de l'impôt peut statuer sur un appel :

- a)* en le rejetant;
- b)* en l'admettant et en :
  - (i)* annulant la cotisation,
  - (ii)* modifiant la cotisation
  - (iii)* déférant la cotisation au ministre pour nouvel examen et nouvelle cotisation.

### **Dons de biens écosensibles**

**(1.1)** La Cour canadienne de l'impôt peut statuer sur un appel interjeté en vertu du paragraphe 169(1.1) en confirmant ou en modifiant le montant fixé, qui représente la juste valeur marchande d'un bien. La valeur fixée par la Cour est réputée être la juste valeur marchande du bien fixée par le ministre de l'Environnement.

## PART XVII

## Interpretation

## Definitions

## 248 (1)

...

**disposition** of any property, except as expressly otherwise provided, includes

(a) any transaction or event entitling a taxpayer to proceeds of disposition of the property,

...

**property** means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes

(a) a right of any kind whatever, a share or a chose in action,

(b) unless a contrary intention is evident, money,

(c) a timber resource property, and

(d) the work in progress of a business that is a profession;

## PARTIE XVII

## Interprétation

## Définitions

## 248 (1)

[...]

**disposition** Constitue notamment une disposition de bien, sauf indication contraire expresse :

(a) toute opération ou tout événement donnant droit au contribuable au produit de disposition d'un bien;

[...]

**biens** Biens de toute nature, meubles ou immeubles, corporels ou incorporels, y compris, sans préjudice de la portée générale de ce qui précède :

(a) les droits de quelque nature qu'ils soient, les actions ou parts;

(b) à moins d'une intention contraire évidente, l'argent;

(c) les avoirs forestiers;

(d) les travaux en cours d'une entreprise qui est une profession libérale.



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-377-19

**APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE HENRY A. VISSER DATED AUGUST 28, 2019, DOCKET NO. 2016-3838(IT)G**

**STYLE OF CAUSE:** YELLOW POINT LODGE LTD.  
v. HER MAJESTY THE QUEEN

**PLACE OF HEARING:** HEARD BY ONLINE  
VIDEOCONFERENCE

**DATE OF HEARING:** SEPTEMBER 29, 2020

**REASONS FOR JUDGMENT BY:** NOËL C.J.

**CONCURRED IN BY:** STRATAS J.A.  
LEBLANC J.A.

**DATED:** NOVEMBER 10, 2020

**APPEARANCES:**

Dominic C. Belley  
Nicolas Benoît-Guay

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