Federal Court of Appeal  Cour d'appel fédérale

Date: 20131206

Docket: A-442-12

Citation: 2013 FCA 283

CORAM: **EVANS J.A.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

KATHRYN KOSSOW

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 17, 2013.

Judgment delivered at Ottawa, Ontario, on December 6, 2013.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: EVANS J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

[1] Kathryn Kossow appeals from the September 14, 2012 judgment issued by Justice Valerie Miller of the Tax Court of Canada (*Kossow v. Canada*, 2012 TCC 325), which dismissed the appeal of Ms. Kossow from reassessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for the 2000, 2001, and 2002 taxation years. The reassessments concerned Ms. Kossow's

participation in a leveraged charitable donation program and the Minister of National Revenue's decision to deny her claim for tax credits based on payments made to the program.

[2] For the reasons that follow, I would dismiss Ms. Kossow's appeal.

I. Facts

[3] In 2000, 2001, and 2002, Ms. Kossow participated in a leveraged charitable donation program on the basis that the money would be used to finance the purchase of art for a registered charity.

[4] I will set out first how the donation program relevant to this appeal operated, and then Ms. Kossow's participation in the program.

How the Donation Program Worked

[5] The charitable donation program was promoted by Berkshire Funding Initiatives Limited and Talisker Funding Limited. Berkshire organized the fundraising program and Talisker provided loans to participants so they could make payments that it was hoped would entitle them to charitable donation tax credits. Talisker itself borrowed money from a Canadian lender in order to provide these loans and then borrowed from an offshore lender to repay the original Canadian lender. The program's participants, including Ms. Kossow, would then combine their own cash with the proceeds of a loan from Talisker to make a payment to a registered charity, Ideas Canada Foundation. Ideas Canada Foundation was structured to flow money through to other charities, rather than carrying on its own charitable activities.

[6] Fully 88% of the total money paid to Ideas (the remainder covered fundraising fees and administrative costs) flowed through an escrow account with a law firm pursuant to a series of directions. The money was used to purchase art for the MacLaren Art Centre. MacLaren had no control over 87.5% of the money, receiving only 0.5% free of the direction of others. The art, and the price that the MacLaren would pay for the art, was decided upon by the promoters of the program and their associates. A considerable amount of evidence was led at trial with respect to the acquisition of these various art works and whether the prices paid for these works were reasonable and whether these transactions were in fact legitimate. It is unnecessary for the purposes of this appeal to summarize this evidence in any detail.

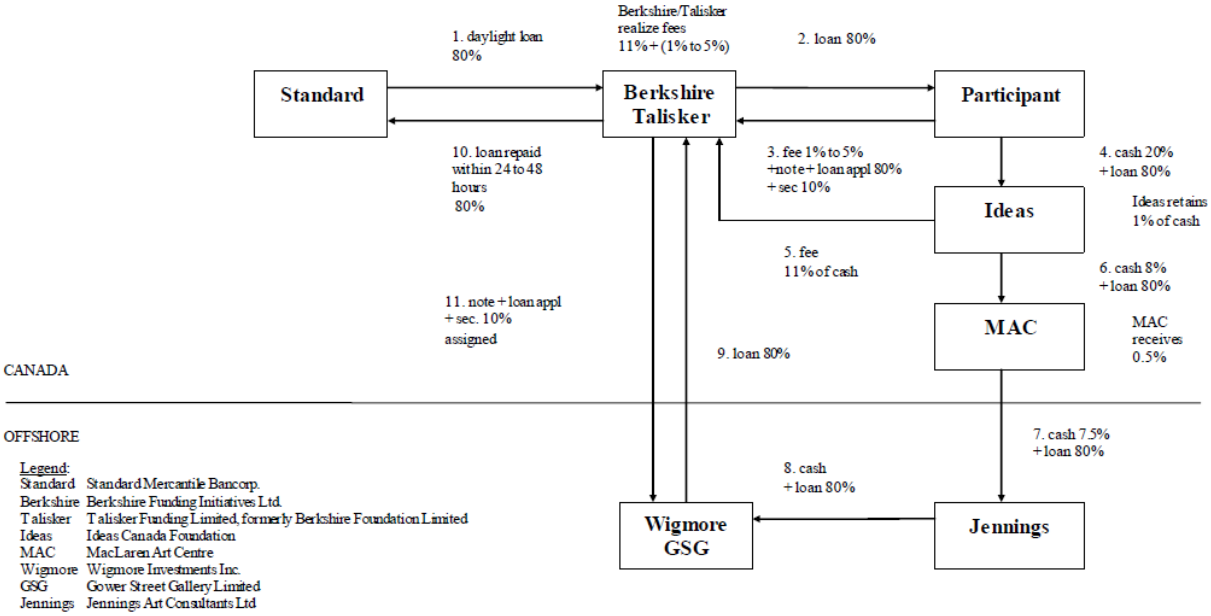
[7] It is fair to say that money transferred quickly between the promoters, companies, financial institutions, and charities in order to finance the program. The judge set out the complicated chain of transactions undertaken by the promoters as follows:

> (a) The advances from Standard [the Canadian lender] were deposited to the bank account of Irwin Singer ("Singer"), in trust, who directed the TD Bank to credit the advances to the bank account of Talisker.
>
> (b) Talisker directed the TD Bank to combine the advances from Standard with the amounts paid to it "as agent" and issue bank drafts to Ideas in the names of each of the Participants for 100% of their Donation. Talisker gave the TD Bank a list of the Participants' names with the Donation made by each Participant.
>
> (c) Ideas directed the TD Bank to deposit the proceeds of the bank drafts to its bank account. It then authorized the TD Bank to debit its account for 88% of the Donations and deliver a cheque or bank draft for this amount to Fasken on account of a gift to be made by Ideas to MacLaren.
>
> (d) Ideas directed Fasken to deposit 88% (on some occasions 86%) of the Donations to an escrow account held in trust for the MacLaren. (Ideas paid Berkshire 11% of the Donations

> for its fundraising services. The remaining 1% of the Donations was used by Ideas to pay its expenses and salaries and to make donations to charities chosen by Sanderson [the Executive Director of the Ideas Foundation].)
>
> (e) The MacLaren authorized and directed Fasken to pay all amounts received from Ideas, except 0.5%, to Jennings Art. The 0.5% was paid to the MacLaren for its building fund.
>
> (f) Jennings Art directed Fasken to pay amounts to GSG. I assume that Jennings Art received a commission but the percentage was not put into evidence.
>
> (g) GSG directed Fasken to pay "the amounts as may from time to time be requested" in writing by Wigmore Investments Limited ("Wigmore").
>
> (h) Wigmore directed Fasken to pay Talisker those amounts which Fasken had received on its behalf from GSG. According to the evidence, I conclude that GSG received at least 80% of the Donations and it directed that the Loan Amounts be paid to Wigmore who directed that they be paid to Talisker. Elizabeth Sumption in Barbados gave directions for both GSG and Wigmore. According to Beach, these amounts were Wigmore's advances to Talisker under their loan agreement.
>
> (i) Talisker directed Fasken to deposit the amounts received from Wigmore into Talisker's bank account at the TD Bank.
>
> (j) Talisker directed the TD Bank to credit 80% of the Donation (the Loan Amount) to the account of Irwin Singer in trust.
>
> (paragraph 53, footnotes removed)

[8] The judge also set out this series of transactions in a chart format in Appendix A to her reasons. For ease of reference, I reproduce it here:

Berkshire Program



[9] The "essence" of the program, as described by the judge, was that "little cash was given to a few charities and the MacLaren was required to acquire art from the creators of the Program with the Donations allocated to it" (paragraph 61).

Ms. Kossow's Participation in the Program

[10] Section 118.1 of the *Income Tax Act* permits individual taxpayers to claim a tax credit for gifts made to registered charities and other qualified organizations in order to offset income tax payable:

118.1 (1) In this section,	118.1 (1) Les définitions qui suivent s'appliquent au présent article.
…	[…]
"total charitable gifts", of an individual for a taxation year, means the total of	« total des dons de bienfaisance » En ce qui concerne un particulier pour une

all amounts each of which is the eligible amount of a gift (other than a gift the eligible amount of which is included in the total Crown gifts, the total cultural gifts or the total ecological gifts of the individual for the year) made by the individual in the year or in any of the five preceding taxation years (other than in a year for which a deduction under subsection 110(2) was claimed in computing the individual's taxable income) to a qualified donee, to the extent that the amount was not included in determining an amount that was deducted under this section in computing the individual's tax payable under this Part for a preceding taxation year;	année d'imposition, le total des montants représentant chacun le montant admissible d'un don (sauf un don dont le montant admissible est inclus dans le total des dons à l'État, le total des dons de biens culturels ou le total des dons de biens écosensibles du particulier pour l'année) qu'il a fait au cours de l'année ou d'une des cinq années d'imposition précédentes (mais non au cours d'une année pour laquelle il a demandé une déduction en application du paragraphe 110(2) dans le calcul de son revenu imposable) à un donataire reconnu, dans la mesure où la somme n'a pas été incluse dans le calcul d'une somme déduite en application du présent article dans le calcul de son impôt payable en vertu de la présente partie pour une année d'imposition antérieure.

[11] The judge set out the steps which a participant in the program, such as Ms. Kossow, would complete in order to participate:

> To become a Participant in the Berkshire Program, the Appellant was required to complete the following steps, which she did in 2000, 2001 and 2002:
>
> (a) sign a Pledge to Ideas for the full amount of her Donation;
>
> (b) make a Loan Application for a 25 year, interest-free loan equal to 80% of her Donation to Talisker (I will refer to this as the "Loan Amount");
>
> (c) sign a cheque for 20% of her Donation made payable to Talisker "as agent";
>
> (d) pay Talisker a security deposit equal to 10% of her Loan Amount which was to be invested for the purpose of increasing to the Loan Amount in 25 years;
>
> (e) pay Talisker a loan processing fee of 1-5% of the Donation;

> (f) sign a document called a promissory note for the Loan Amount, due 25 years from the date on the note.
>
> (paragraph 49).

[12] Pursuant to the terms of the donation program, Ms. Kossow's payments to Ideas were funded by 20% cash from her and 80% from a 25-year, interest-free loan. She also paid fees to the promoters for processing her loans and organizing the program. She claimed tax credits of $20,046 (2000), $24,060 (2001), $20,045 (2002) in respect of payments to Ideas totaling $50,000 (2000), $60,000 (2001), and $50,000 (2002).

[13] The judge set out Ms. Kossow's disbursements and receipts as follows at paragraph 44 of her reasons:

Year	Donation	Loan Amount	20% of Donation	Security Deposit	Loan Processing Fee	Charitable Receipt
2000	$50,000	$40,000	$10,000	$5,000	$2,000	$50,000
2001	$60,000	$56,400	$12,000	$6,000	$2,400	$60,000
2002	$50,000	$40,000	$10,000	$5,000	$2,000	$50,000

II. Procedural History

[14] On September 4, 2004, the Minister reassessed Ms. Kossow and disallowed 80% of the tax credit claimed each year. On September 9, 2005, the Minister issued a subsequent reassessment, disallowing the entire tax credit received for the 2002 tax year.

[15] The case was heard on its merits before the judge over a period of ten days in spring and summer 2011, with reasons issued in the fall of 2012.

[16] In her reasons, the judge set out the factual context of the program and Ms. Kossow's participation in it. She then set out the issues to be decided as the following:

> The issues in this appeal are: (a) whether the Donations made by the Appellant were gifts within the meaning of subsection 118.1(1) of the *Income Tax Act* (the "*Act*"); (b) whether the general anti-avoidance rule is applicable to deny the tax credits to the Appellant; and, (c) who has the onus of proving the Minister's assumptions when those assumptions involve third parties (paragraph 3).

[17] Ms. Kossow's evidence before the Tax Court was to the effect that she participated in the program in order to make a larger donation than she would have been able to give without the leveraged portion and that the tax savings were a secondary consideration. Notwithstanding this evidence, the judge disagreed and held that "the tax savings were the Appellant's principal reason for making the Donation" (paragraph 65). The judge did accept that Ms Kossow was "not aware of most of [the] individuals or the transactions" involved in the program (paragraph 62).

[18] The judge held that the jurisprudence of this Court in *Maréchaux v. The Queen*, 2010 FCA 287 (*Maréchaux*) governed and found that Ms. Kossow did not make a gift within the meaning of section 118.1 of the *Income Tax Act*. She held that "[t]he 25 year interest-free loans were 'significant benefits' which she received in return for making her Donations" (paragraph 69) and "[t]hat a benefit flowed to Ms. Kossow in return for her Donation is sufficient to demonstrate that her Donation did not constitute a gift" (paragraph 70).

[19] The judge also addressed a submission made by Ms. Kossow's counsel that the Ontario Court of Appeal, in the case of *McNamee v. McNamee*, 2011 ONCA 533 (*McNamee*), had stated that at common law, a gift was only vitiated by the donor's receipt of consideration if the donee

provided it. The judge disagreed, holding that to apply a family law case about whether property had been gifted or not from a family member, would be "misinterpret[ing] its scope" (paragraph 73).

III. Issues

[20] In my view the issues for determination on this appeal are as follows:

1. Was the judge correct in law concluding that the facts of this case are not distinguishable in any relevant way from *Maréchaux*, so that she was bound to conclude that the appellant had not made any gifts for the purposes of s. 118 of the *Income Tax Act*?
2. Were the reasons given by the judge sufficient to permit meaningful appellate review?
3. Did the inclusion of materials not admitted into evidence by the judge but included in the court record cause prejudice requiring intervention by this Court?
4. Does the general anti-avoidance rule in section 245 of the *Income Tax Act* apply to restrict Ms. Kossow from using the tax credits?

IV. Standard of Review

[21] Questions of law are to be reviewed on the standard of correctness, while questions of fact are to be reviewed on the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2003 SCC 33 at paragraphs 8, 10).

[22] As stated in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, "[t]he textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a

question of law but the application of these provisions to the facts of a case is necessarily fact-intensive" (paragraph 44).

V. Analysis

Application of *Maréchaux*

[23] Before this Court, counsel for Ms. Kossow has advanced a number of arguments; however, the fundamental question to be determined in this matter is whether the judge was correct in following the decision of this Court in *Maréchaux* and, as a result, holding that the Appellant had not made any gifts pursuant to section 118.1 of the *Income Tax Act*.

[24] In *Maréchaux*, this Court dealt with a leveraged charitable donation program that was strikingly similar to the program considered in this case, particularly in so far as a substantial part of the purported gift was funded by an interest-free loan provided by the promoters (who were not the donees) on terms that were part of a series of interconnected contractual arrangements. The Federal Court of Appeal adopted the well-known definition of a gift as set out in *The Queen v. Friedberg*, 92 D.T.C. 6031 (F.C.A.) (*Friedberg*) for the purposes of section 118.1 of the *Income Tax Act* as

> […] 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 (at 6032).

[25] In my view, *Maréchaux* stands for two propositions, as follows:

> (a) a long-term interest-free loan is a significant financial benefit to the recipient; and
>
> (b) a benefit received in return for making a gift will vitiate the gift, whether the benefit comes from the donee or another person.

[26] I turn now to the facts of this case and the application of these principles.

[27] It is evident from the facts of this case that several long-term interest-free loans formed part of the leveraged-donation programme entered into by Ms. Kossow. The judge found, and I agree, that

> [t]he Appellant was able to transfer $50,000, $60,000 and $50,000 to Ideas by using only $17,000, $20,400 and $17,000 of her own money in 2000, 2001 and 2002 respectively. She accomplished this without having to pay interest on a commercial loan for the difference (paragraph 69).

[28] The result was that Ms. Kossow received a significant financial benefit as the recipient of a long-term, interest-free loans. That benefit did not come from the donee but from Talisker as a result of her participation in the donation program. The interest-free loan and the donation were two components of an arrangement consisting of a series of interconnected transactions, as illustrated by the chart set out in Appendix A to the reasons of the judge (reproduced above). Counsel for Ms. Kossow submitted that the chart did not accurately reflect all aspects of the program. However, in my view, the judge made no palpable and overriding error in finding as a fact that there was only one interconnected transaction in this case. Indeed, it appears to me that this was the only reasonable conclusion that was open to her given the evidence before her.

[29] As noted by the judge, in *Maréchaux*, the Federal Court of Appeal found that Mr. Maréchaux did not make a gift within the meaning of section 118.1 of the *Income Tax Act* because he made his payment to the charitable foundation expecting to receive a "significant benefit" in return. The "significant benefit" received in *Maréchaux* was an interest-free loan from a third party lender (paragraph 9). Ms. Kossow received a 25 year interest-free loan from Talisker and her

donations were conditional upon being approved and receiving her interest-free loans. This resulted in the cash and leveraged components of the program and the donations being interconnected. In my view, the relevant facts of this case are so similar to the facts of *Maréchaux* that the judge did not err in law in reaching the same conclusion. Where cases are similar in nature, it is fundamental to the idea of justice that they receive the same treatment: *Canada (Citizenship and Immigration) v. Thamotharem*, 2007 FCA 198 at paragraph 61, *Sanofi-Aventis v. Apotex Inc.*, 2013 FCA 186 at paragraphs 77 to 81.

[30] Ms. Kossow argued before the judge and before this Court that the Ontario Court of Appeal in *McNamee* had superseded *Maréchaux* in at least one respect, namely, that the significant benefit received by a donor must come from the donee and not from a third party. I do not agree with this position.

[31] I agree with the judge that *McNamee* did not purport to change the generally accepted definition of gift as set out in *Friedberg*. In *McNamee*, the Ontario Court of Appeal considered the arrangement between a father and a son and determined whether shares given by the father to a son in an estate freeze situation were as a result of any consideration being given to the father (the donor) from the son (the donee). The Ontario Court of Appeal in *McNamee* did not consider either a leveraged donation program or a situation where, through a series of interconnected transactions, a donor receives a significant benefit from a party other than the donee as part of an interconnected series of transactions that includes the purported gift.

[32] The result is that there is no conflict between the Federal Court of Appeal in *Maréchaux* and the Ontario Court of Appeal in *McNamee*, and there is no basis upon which this Court should depart from *Maréchaux*.

[33] It is my view that earlier decisions of this Court, particularly recent decisions, should be followed save in rare circumstances. The well known test, as set out in *Miller v. Canada (Attorney General)*, 2002 FCA 370, for this Court to overrule a decision of another panel of this Court is that the

> […] previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed…" (paragraph 10).

[34] The Federal Court of Appeal in *Maréchaux* did not overlook a relevant statutory provision nor did it fail to follow a case that ought to have been followed. Given my conclusion with respect to the lack of conflict between *Maréchaux* and *McNamee* I agree with the Crown that there is no need to re-visit *Maréchaux* in light of *McNamee*.

[35] In my view, the judge did not err in law or fact when she concluded that she was bound by the Federal Court of Appeal findings in *Maréchaux*.

Adequacy of Reasons

[36] Counsel for Ms. Kossow submitted that the judge's reasons failed to meet the test set out in *R. v. Sheppard*, 2002 SCC 26 at paragraph 55, in that they were neither transparent nor accessible and precluded meaningful appellate review. I find no merit in this submission. The judge's findings of the relatively few facts material to the question of law on which this appeal turns are

both comprehensible and complete. She was not obliged to set out every item of evidence on which she relied nor explain in detail why she ejected any evidence to the contrary.

Appeal Book Contents

[37] Counsel for Ms. Kossow also raised concerns at the hearing of this matter that the appeal book contained reference to a number of documents that were not admitted in evidence at trial. Just prior to the hearing of this appeal, the Crown informed both the Court and counsel for Ms. Kossow that it had inadvertently referred to three pages of material that were identified as potential exhibits but were ultimately not admitted into evidence. The Crown referred to this material in its Memorandum of Fact and Law at footnotes 28, 29 and 37. Ms. Kossow did not object to the contents of the appeal book prior to the appeal hearing. Her counsel advised the Court that she did not notice the references to documents not admitted as evidence in the footnotes prior to being advised of them by the Crown's letter to the Court.

[38] Ms. Kossow submitted to the Court that the matter should be referred back to a different judge for a new hearing as a result of these documents being in the Tax Court's file identified but not admitted as evidence in the proceeding. Ms. Kossow submitted that the judge may have considered these documents referred to in footnotes 28, 29 and 37 despite having found they were not to be admitted as evidence.

[39] In support of this position, reference was made to *Oberreiter v Akmali*, 2009 BCCA 557 (*Oberreiter*). This case involved a civil jury trial where a potentially prejudicial security videotape had been left with the jury during its deliberations even though portions of it had not been admitted

into evidence. The British Columbia Court of Appeal found that the irregularity may have affected the verdict given the potentially prejudicial nature of the videotape in question.

[40] In my view, *Oberreiter* does not compel a retrial of this matter. The judge made no reference to those documents in her decision. Nor is there any basis for rebutting the presumption that the judge knew the law, or for concluding that she had "forgotten" that she had ruled during the course of the trial that these documents were not to be admitted as evidence. A review of the documents indicates that they were inconsequential to the findings of fact made by the judge that are material to this appeal. Hence, there is no merit in Ms. Kossow's argument that she was prejudiced or that a reasonable person, informed of the facts, would conclude that she had been denied procedural fairness.

GAAR

[41] Having reached the conclusion that *Maréchaux* governs the facts at hand to disentitle Ms. Kossow to claim the charitable tax credits under section 118.1 of the *Income Tax Act*, it is not necessary to comment on this issue, and I decline to do so.

VI. Conclusion

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

"D.G. Near"

J.A.

"I agree
John M. Evans J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-442-12

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE V.A. MILLER DATED SEPTEMBER 14, 2012, NO. 2005-1974(IT)G

STYLE OF CAUSE:	KATHRYN KOSSOW v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 17, 2013
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	EVANS J.A. GAUTHIER J.A.
DATED:	DECEMBER 6, 2013

APPEARANCES:

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