Federal Court of Appeal | Cour d'appel fédérale

Date: 20160908

Docket: A-353-15

Citation: 2016 FCA 225

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

DENISE ARSENAULT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on April 13, 2016.

Judgment delivered at Ottawa, Ontario, on September 8, 2016.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal of a Tax Court of Canada decision (2015 TCC 179) whereby the Court essentially confirmed an assessment issued by the Minister of National Revenue (the Minister) under the authority of section 325 of the *Excise Tax Act*, R.S.C. 1985 (5th Supp.), c. E-15

(the Act). The assessment was issued after the appellant was given a gift by her husband, Jean-Noël Gagné, of the undivided half interest in a building, while Mr. Gagné had outstanding debt with the Canada Revenue Agency. The sole question in this appeal is whether the appellant could be held responsible for her husband's tax debt on the grounds that he had transferred to her his undivided half interest in the building, without consideration.

[2] For the following reasons, I am of the opinion that the appeal should be allowed. Although the trial judge correctly identified the applicable legal principles and carefully weighed the parties' arguments, I am of the view that the trial judge could not determine that the husband's gift of his undivided half interest in the building was a gift *mortis causa*. Although this is a legal situation that entails some ambiguity, a comprehensive analysis of the contract and the circumstances under which it arose convinces me that the gift at issue was made as a gift *inter vivos* involving the husband's obligation to the wife. Consequently, the transfer of the undivided half interest in the building was made in consideration of the partial extinguishment of this obligation, and section 325 of the Act does not apply.

I. Facts

[3] The appellant and Jean-Noël Gagné were married in 1984. Their marriage contract, dated July 5, 1984, contains the following stipulations:

> [TRANSLATION] CLAUSE 3
>
> In consideration of marriage, the future husband gives to the future wife, from the date of the solemnization of their marriage, a gift inter vivos and in fee simple of all of the furnishings and household items he currently owns. These assets have a

current value of TWELVE THOUSAND DOLLARS ($12,000.00) according to the spouses' own declaration.

The future husband furthermore agrees to maintain and modernize, as needed, during the marriage, up to the above-mentioned value, the furnishings and household items included in the gift in question.

Those assets given pursuant to this clause that are modernized or replaced by the future husband shall belong to the future wife effective as of the time of their replacement or modernization.

Those assets given pursuant to this clause and those acquired through modernization or replacement must be used for the purposes of the household and to furnish the family's primary residence.

CLAUSE 4

The future wife makes a gift mortis causa to the future husband of all furnishings and household items intended for household use that are part of the above-mentioned gifts and that she still possesses upon her death, as well as those acquired by herself or those modernized or replaced using her own money.

This gift mortis causa shall be revoked in the event that a judgment of nullity of marriage, of judicial separation or of divorce is granted between the spouses by a competent court.

CLAUSE 5

In consideration of marriage, the future husband makes to the future wife, from the date of the solemnization of their marriage, a gift inter vivos and in fee simple of the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) which shall become payable upon the death of the future husband. The future husband nevertheless reserves the right to pay the said sum, in whole or in part, at any time during the marriage, either in a dollar amount or by transfer to the future wife of movable or immovable property.

The future wife shall levy the most liquid assets from among the future husband's estate to collect any amount outstanding upon the husband's death, with the understanding that the proceeds of the future husband's life insurance policies for which the future wife is named as the beneficiary must be applied in payment of and deducted from the balance of this gift.

CLAUSE 6

In the event that the future wife's death precedes or coincides with the death of the future husband, all gifts inter vivos herein made by the future husband to the future wife shall be revoked insofar as they have not been executed.

> Consequently, the future wife's representatives shall not be able to require their execution.
>
> CLAUSE 7
>
> If a judgment of separation from bed and board or of divorce is rendered between the spouses by a competent court, the gift inter vivos set out in CLAUSE 5 shall be revoked insofar as it shall have not been executed.

[4] On December 18, 1990, the appellant and her husband expressed by notarial act their wish to not be subject to articles 462.1 to 462.13 of the *Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39, which established the 1980 *Civil Code of Québec* (CCQ (1980)), regarding the family patrimony of spouses. They took the opportunity to amend some clauses of their marriage contract at the same time. The first paragraph of the third and fifth clauses, as well as the seventh clause, were thus replaced by the following stipulations:

> [TRANSLATION] CLAUSE 3
>
> In consideration of marriage, the husband makes a gift inter vivos and in fee simple of all of the furnishings and household items he currently owns, valued at THIRTY THOUSAND DOLLARS ($30,000.00).
>
> CLAUSE 5
>
> In consideration of marriage, the husband makes a gift inter vivos and in fee simple to the wife who accepts, of a sum of THREE HUNDRED THOUSAND DOLLARS ($300,000), which will become payable upon the husband's death.
>
> The husband nevertheless reserves the right to pay the said sum, in whole or in part, at any time during the marriage, either in a dollar amount or by transfer to the wife of movable or immovable property.

CLAUSE 7

> If a judgment of separation from bed and board or of divorce is rendered between the spouses, any gifts executed between the spouses under their marriage contract shall be divided in half with the agreement that the spouses' principal family residence must be considered as having been given in half to the spouse who is not its registered owner.

[5] On September 26, 2008, the appellant's husband transferred to her, by notarial deed, his undivided half interest in a building. The subject matter of the contract is defined as an [TRANSLATION] "irrevocable gift inter vivos to his wife." The contract states, among other things, that [TRANSLATION] "the present gift is made in execution of the gifts indicated in the appearers' marriage contract, and in particular, in execution of a sum of FORTY THOUSAND DOLLARS ($40,000.00) indicated in the said marriage contract, in respect of which the donee grants release to the donor." When he made that gift, the appellant's husband owed $49,962.07 to the Canada Revenue Agency, following an unpaid assessment for the amount of net tax that the company Construction J.N. Gagné Inc. (of which he was the director) should have paid for the periods from 2003 to 2009.

[6] Given that Mr. Gagné's only asset was his undivided half of the property that he transferred to the appellant, the appellant became liable, under section 325 of the Act, for the amount owed by her husband. The appellant submits that the gift in the marriage contract constitutes a gift *inter vivos*, meaning that her husband, while alive had a living obligation owed to her. She submits that the gift received in 2008 was therefore given in consideration of the discharge of a part of this marriage contract obligation. The Minister, however, is of the view that the gift provided for in the marriage contract is in fact a gift *mortis causa*, payable only upon the husband's death, which would mean that the gift of the property was given for free.

II. The impugned decision

[7] After having identified the relevant legislative provisions, the judge explained that the only issue was whether the gift was *mortis causa* or *inter vivos*. The respondent accepted that if it was indeed an *inter vivos* gift, the assessment would not hold. Before addressing this issue, however, she addressed the appellant's additional argument that the burden rested with the respondent to prove the existence of Mr. Gagné's debt.

[8] Citing a previous Tax Court of Canada decision (*Mignardi v. The Queen*, 2013 TCC 67, [2013] TCJ No. 66), the judge reiterated that the burden of proof is not to be shifted lightly, and that the Minister is not be required to prove the existence of a tax debt, except in the event that the Minister has particular knowledge of the facts pertaining to this debt. In that case, the judge was of the opinion that there was no need to shift the burden of proof since the tax debtor was the appellant's husband and the appellant was able to obtain the information needed to challenge the underlying assessment. In any case, the respondent had entered into evidence a certificate stating the amount owed by the corporation owned by Mr. Gagné, and had established that this amount had not been paid. She was therefore of the opinion that there was no evidence to show that the original assessment in respect of Mr. Gagné was erroneous. That finding was not appealed from.

[9] As to the main issue, the judge first summarized the case law on the distinction between gifts *inter vivos* and gifts *mortis causa*, specifically citing *Hennebury v. Hennebury*, [1981] C.A. 136 (C.A. Qué.) [*Hennebury*]. In that case, the Quebec Court of Appeal determined that a marriage contract stipulating that the gift was irrevocable, subject to a right of return in

favour of the donor in case the donee predeceased the donor, and providing for the donee to forfeit the dower in consideration, constituted a gift *inter vivos*. According to the Court, these points showed that the donor had indeed irrevocably divested himself of the assets in question by concluding the marriage contract. After careful consideration of several other cases decided by Quebec courts on this issue, Madam Justice L'Heureux-Dubé, who was with the Court of Appeal at that time, ruled the gift at issue to be a gift *mortis causa* since the marriage contract included no mention that the gift was irrevocable, the wife did not forfeit the dower in consideration of the gift, and there was no right of return in favour of the husband in case his wife were to predecease him. She also pointed out that the contract clearly stipulates that the gift shall become payable only upon the husband's death. The judge therefore allowed the appeal for the sole purpose of reducing the assessment amount as requested by the respondent, to the amount of $10,109.67, with costs.

III. Issue

[10] The sole issue in this case is whether the trial judge erred in determining that the gift set out in the marriage contract dated July 5, 1984, as modified by the marriage agreement signed by the parties on December 18, 1990, constitutes a gift *mortis causa* and not a gift *inter vivos*.

IV. Analysis

[11] First of all, the applicable standard of review must be determined. In the light of the submissions presented by the appellant in support of her appeal, it appears clear to me that the

issue is not so much whether the trial judge committed an error of law by incorrectly interpreting the relevant provisions of the *Civil Code of Québec*, S.Q. 1991, c. 64 (CCQ), as well as the relevant case law and doctrine, but rather whether the trial judge erred in the application of legal principles to the marriage contract between the appellant and Mr. Gagné. As the Supreme Court acknowledged in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at paragraphs 50 and 53, [2014] 2 SCR 633, this is a question of mixed fact and law. In this case, as in many other similar cases, the point is to determine the parties' intentions in the light of the contractual wording—a matter that is essentially based on the facts and is unlikely to impact future cases. Consequently, the standard of review will be that of palpable and overriding error.

[12] It is also important to identify the applicable legislative provisions. Given that the marriage contract and the marriage agreement pre-date the entry into force of the CCQ in 1994, the *Act Respecting the Implementation of the Reform of the Civil Code*, S.Q. 1992, c. 57 must be governs. Section 2 of this Act reiterates the general principle that new legislation has no retroactive effect and cannot, therefore, change the conditions for creation or extinction of a previously created or discharged legal situation, or the effects already produced by such a legal situation. Additionally, section 3 provides logically that new legislation applies, from the time of its entry into force, to existing legal situations. If these provisions were all that was to be taken into account, then the CCQ would need to be applied in order to decide this dispute.

[13] However, section 4 of the *Act Respecting the Implementation of the Reform of the Civil Code* provides for an exception to the principle of the immediate effect of new legislation. Indeed, section 4 provides that the former legislation subsists where transitional rules are used to

determine the rights and obligations of the parties to a contract that was already in effect at the time the CCQ came into force. That provision reads as follows:

4. In contractual situations which exist when the new legislation comes into force, the former legislation subsists where supplementary rules are used to determine the extent and scope of the rights and obligations of the parties and the effects of the contract.	4. Dans les situations juridiques contractuelles en cours lors de l'entrée en vigueur de la loi nouvelle, la loi ancienne survit lorsqu'il s'agit de recourir à des règles supplétives pour déterminer la portée et l'étendue des droits et des obligations des parties, de même que les effets du contrat.
However, the provisions of the new legislation apply to the exercise of the rights and the performance of the obligations, and to their proof, transfer, alteration or extinction.	Cependant, les dispositions de la loi nouvelle s'appliquent à l'exercice des droits et à l'exécution des obligations, à leur preuve, leur transmission, leur mutation ou leur extinction.

[14] The Minister of Justice at the time clarified the scope of that provision with the following comments:

> [TRANSLATION] This section prescribes general transitional measures specifically applicable to contractual situations that were in progress at the time when the new legislation came into force.
>
> The first paragraph introduces, with respect to these contractual situations, the rule of survival of the former supplementary law that subsists as to all matters pertaining to the determination of the contracting parties' rights and obligations or the legal impacts or consequences of their agreement.
>
> That is to say that each time one must, owing to the parties' silence or to ambiguity in the expression of their will, resort to the legislation to define the content and impacts of a contract entered into before the entry into force of the new legislation (which is still in force at the time); it is to the former legislation, which was in force on the date the contract was made, that one must refer, even if the facts that invite this definition are subsequent to the new legislation's entry into force.
>
> Québec, Ministère de la Justice, *Commentaires du ministre de la Justice : le Code civil du Québec*, t. 3, Québec, Publications du Québec, 1993, p. 7 [*Commentaires du Ministre*]

[15] Indeed, that is the position adopted by both parties in this case. Following a request to this effect made by the Court at the hearing, counsel for both parties submitted that the *Civil Code of Lower Canada* (CCLC) would need to be resorted to, to resolve this matter, given that the marriage contract and the modifying agreement were signed by the parties in 1984 and 1990 respectively, and therefore prior to the adoption of the CCQ. I am therefore of the opinion that the trial judge erred in this regard by applying the provisions of the CCQ.

[16] However, that error is inconsequential insofar as the provisions of the CCQ are equivalent to the former provisions and do not change the former legislation. As concerns article 1808 of the CCQ regarding gifts *mortis causa*, the *Commentaires du Ministre* document clarifies that this article is new but enshrines the former law found in articles 757 and 758 of the CCLC. As for article 1807 of the CCQ, it defines gifts *inter vivos* in accordance with the former case law and doctrine that were based on the first paragraph of article 777 of the CCLC. The following table shows the degree to which the CCQ retains essentially the same way as the CCLC regarding gifts *inter vivos* and *mortis causa*, while simplifying the provisions:

CCQ Provisions	CCLC Provisions
1807. A gift *inter vivos* is one whereby there is actual divesting of the donor, in the sense that the donor actually becomes the debtor of the donee. The divesting of the donor is not prevented from being actual by the fact that the transfer or delivery of the property is subject to a term or that the transfer is with respect to certain and determinate property which the donor undertakes to acquire or property determinate only as to kind which the	777. It is essential to gifts intended to take effect *inter vivos* that the donor should actually divest himself of his ownership in the thing given. [The consent of the parties is sufficient, as in sale, without the necessity of delivery.] The donor may reserve to himself the usufruct or precarious possession, or he may pass the usufruct to one person, and give the naked ownership to another, provided he divest himself

donor undertakes to deliver.	of his right of ownership. The thing given may be claimed, as in the case of sale, from the donor who withholds it, and the donee may demand the rescission of the gift in default of its being delivered, without prejudice to his damages in cases where he may claim them. [If without reservation of usufruct or of precarious possession, the thing given remain unclaimed in the hands of the donor until his death, it may be revendicated from his heirs, provided the deed has been registered during the lifetime of the donor.] The gift of an annuity created by the deed of such gift, or of a sum of money or other indeterminate thing which the donor promises to pay or to deliver, divests the donor in the sense that he becomes the debtor of the donee.
1808. A gift *mortis causa* is one whereby the divesting of the donor remains conditional upon his death and takes place only at that time.	757. Certain gifts may be made irrevocably *inter vivos* in a contract of marriage, to take effect, however, only after death. They partake of gifts *inter vivos* and of wills, and are treated of specially in the sixth section of the second chapter of this title. 758. Every gift made so as to take effect only after death, which is not valid as a will, or as permitted in a contract of marriage, is void.

[17] Article 1839 of the CCLC provided that gifts provided for in a marriage contract could be *inter vivos* or *mortis causa*. A rich case law has developed around the provisions that define these two types of gifts, and it is not always easy to determine where we stand, given the

apparent conflicting statements found in certain decisions. If such is the case, it is not so much due to disagreement about the applicable principles, but rather due to the fact that the very language of the clauses whereby gifts are made is often ambiguous, and the presence or absence of a single word can sometimes have a major impact on the qualification of two clauses that are otherwise similar.

[18] The first important thing is that the designation the parties themselves give to a gift can be an indication or even a presumption, but it is not determinative of their intention. A gift deemed by the parties to be *inter vivos* may in fact be a gift *mortis causa*; the opposite can also occur, although it is more rare. (See in this regard R. Comtois, *Essai sur les donations par contrat de mariage*, Montréal, Le Recueil de droit et de jurisprudence, 1968, at page 139; P. Ciotola, *De la donation*, 2e éd., Montréal, Wilson & Lafleur, 2006 at page 22; *L.(R.) v. D.(H.)*, R.E.J.B. 1998-09725, at paragraph 7, 1998 CanLII 12594 (C.A. Qué.) [*L.(R.)*]; *Hennebury*, at page 5).

[19] The doctrine is to the effect that the main criterion for distinguishing between a gift *inter vivos* and a gift *mortis causa* is divestment. Other criteria also allow the two types of gifts to be distinguished from each other—including irrevocability, the words used in the civil union or marriage contract, the parties' intentions and the critical facts—but divestment is without a doubt the most important. Indeed, article 1807 of the CCQ adopts that criterion and makes it the key element of a gift *inter vivos*. Marilyn Piccini Roy aptly summarizes the law in this regard:

> [TRANSLATION] The fundamental criterion is the first one—that of divestment. Indeed, there can be no gift *inter vivos* unless, as part of the gifting process, the donor divests him or herself of his or her property rights to the thing given (article 1807 CCQ). The gift may be subject to a term, but the donor has an

> obligation, effective immediately and irrevocably, to deliver the thing given. He or she irrevocably becomes the donee's debtor, and cannot change his or her mind in the future. It would be a gift mortis causa if there was no actual divestment and no obligation to fulfill.
>
> *Les donations par contrat de mariage*, in Collection de droit 2015-2016, vol. 3 (Personnes, Famille et Successions), École du Barreau, Cowansville, Éditions Yvon Blais, at page 443.

[20] It is worth noting that *Hennebury*, above, a case decided by the Quebec Court of Appeal which remains the leading case as to the qualification of a gift, already placed a strong emphasis on divestment and used the criteria set out by the doctrine for distinguishing between gifts *inter vivos* and *mortis causa* under article 777 of the CCLC. In his above-mentioned work, upon which the judgement of the Court of Appeal in *Hennebury* is largely based, professor Comtois wrote that article 777 of the CCLC leaves no doubt as to the requirement of divestment: [TRANSLATION] "it is essential in gifts inter vivos that the donor actually divest him or herself of his or her property rights to the thing given" (*Essai sur les donations par contrat de marriage*, at page 124). Therefore, the trial judge correctly based his judgment on that case to resolve the dispute between the parties, and therefore committed no error in the identification of the applicable principles.

[21] The words "death" or "deceased" in a gift clause often introduce a great deal of uncertainty with regard to its qualification. As the doctrine holds, death can be considered a time limit for execution or a term, and therefore can affect the point at which the obligation must be fulfilled, or on the other hand, death can be considered the very condition for the existence or the consideration of the gift. In the first instance, the donor commits to paying the gift amount at a certain time, i.e., on the day of his or her death; as long as he or she agrees and becomes

obligated from the time of signing the contract to pay a set sum, even in future, it is indeed a gift *inter vivos* By contrast, the gift would be *mortis causa* if the donor assumed no obligation prior to his or her death, and if the condition of payability was death. In such cases, death will not be a simple term of execution but the very condition of payability (see P. Ciotola, *De la donation*, at pages 18–19; M. Piccini Roy, *Les donations par contrat de marriage*, at pages 445–446).

[22] What about the contract in this case? As previously mentioned, the judge ruled that the gift set out in clause 5 of the marriage contract (as modified by the notarial act dated December 18, 1990) was a gift *mortis causa*, basing this determination on four points: 1) There is no mention that the gift was irrevocable; 2) the fact that the wife did not forfeit the dower in consideration of the gift; 3) the absence of a right of return in favour of the husband in the event that his wife should predecease him; and 4) the stipulation that the gift would not become payable until the husband's death. If I were to look solely at clause 5 of the contract, I would be inclined to agree with the judge and to conclude that she did not make a reviewable error.

[23] As she highlights in her reasons, the Quebec Court of Appeal ruled that a clause very similar in its wording to clause 5 of the contract in this case constituted a gift *mortis causa* because it did not provide for any divestment or create any immediate obligation for the donor, and because the condition for payability was the donor's death (*Droit de la famille–2806*, E.Y.B. 1997-03067, 1997 CanLII 10107 (C.A. Qué.); see also *Droit de la famille – 2800*, [1997] J.Q. No. 3214, E.Y.B. 1997-02686 (C.A. Qué.)). Conversely, in *Hennebury*, the Court of Appeal ruled that death was not a purely suspensive condition and that the donor had irrevocably divested himself of the sums stated in the marriage contract based on the fact that the gift *inter*

vivos was irrevocable and payable at any time after the solemnization of the marriage, that a right of return had been stipulated in the event that the donee should predecease the donor, and that the donee forfeited the dower in consideration of the gift. The judge could base her determination on these cases.

[24] However, the contract must be read as a whole, as well as the notarial deed that followed in 1990, to determine the parties' true intentions. In this regard, a few comments are called for. First of all, I note that the parties used different terminology to identify the various gifts found in the contract: clause 3 and clause 5 provide for gifts *inter vivos*, while clause 4 refers to a gift *mortis causa*. From this, we can infer that the parties knew what they were doing and had clearly expressed their intention to create a gift *inter vivos* in clause 5 of the contract. Therefore, the presumption that a gift identified by the parties as being "inter vivos" is indeed this type of gift seems to me to be harder to refute. In this case, I do not believe that this presumption has been refuted, despite the somewhat ambiguous wording of clause 5.

[25] On the one hand, clause 6 provides for the partial return of the sum given, since the husband will be released from all obligations with regard to the amount of the gift he has not yet paid. It is true that this clause does not constitute a revocation of the full amount of the gift, and that the sums already paid will become part of the wife's estate. Perhaps it is for this reason that the judge cited the absence of a right of return in support of her conclusion that it was a gift *inter vivos*. The fact does remain that the right of return, even partial, is inconsistent with a gift *mortis causa*, given that a sum of which the donor has not divested him or herself cannot be "returned" to him or her. As professor Comtois wrote:

> [TRANSLATION] This right of return is inconsistent with a gift *mortis causa*. In the case of gifts *mortis causa*, the donee does not become the owner unless he or she survives the donor. It is therefore unnecessary for the donor to stipulate a right of return to ensure the recovery of assets. By contrast, the right of return is quite a natural clause in a gift *inter vivos*. Since the donor has ceased to be the owner, he or she wishes to ensure that, if the donee should predecease him or her, with or without children, the assets will return to the donor.
>
> R. Comtois, *Essai sur les donations par contrat de mariage*, p. 128. See also *Hennebury*, at p. 6

[26] The Court of Appeal reached the same conclusion in *L.(R.)*. In that case, one of the contract clauses stipulated that [TRANSLATION] "if the future wife should predecease the future husband before full payment is made of the stated sum of TEN THOUSAND DOLLARS ($10,000.00), the future husband shall be released from the obligation to pay any balance due or amount remaining on the said gift." Commenting on this clause, Mr. Justice Chamberland wrote:

> [TRANSLATION] The clause provides for the partial return of the sum given, that is to say the return of that which has not yet been paid. This clause would be of no use in the case of a gift *mortis causa* since, in such case, the donor would not yet have divested himself of the amount of the gift. The clause also reflects the existence of a current obligation, from which the parties wish to release the donor in the event that the donee should predecease him. The clause would be completely unnecessary in the case of a gift *mortis causa*. Lastly, the clause considers the possibility that the donor may have begun to pay that which he owed the donee, a situation *a priori* inconsistent with the existence of a gift *mortis causa*.
>
> *L.(R.)* at paragraph 9

[27] Lastly, the facts and circumstances surrounding the marriage contract seem to me to be of particular importance in determining the precise nature of the gift given in clause 5. The judge noted in her reasons that the wife had not forfeited the dower in consideration of the gift. Such a forfeiture is generally significant since it is more logical to forfeit a benefit or a right of

survivorship in exchange for a benefit at the present time than for a death benefit. Consequently, the absence of this forfeiture could lead one to conclude that this is truly a case of a gift *mortis causa*.

[28] However, that analysis does not take into account the crucial fact that the marriage contract was amended in 1990, specifically increasing from $25,000.00 to $300,000.00 the amount of the gift set out in clause 5. It is clear, upon reading the notarial deed, that the changes made to the marriage contract arose directly from the spouses' previously expressed desire to not be subject to articles 462.1 to 462.13 of the CCQ (1980) (now renumbered articles 414 to 426 of the CCQ) regarding the family patrimony of spouses.

[29] To me, it seems that there is no doubt that the substantial increase in the amount of the gift *inter vivos* is intended to compensate the wife for her forfeiture of the family patrimony. It is true that the change to clause 7 also has the same purpose, particularly with regard to the spouses' principal family residence. The family patrimony, however, extends far beyond the principal family residence, and includes, for instance, any other residence owned by the family, the furnishings therein, the vehicles and the benefits accrued during the marriage as part of a retirement plan. In this context, there is every reason to believe that the increased gift provided for in clause 5 had a very specific consideration and aimed to ensure the appellant's financial security. This, to me, seems to be a strong indicator of a gift *inter vivos*.

[30] Consequently, I am of the view that the gift pursuant to clause 5 of the marriage contract between Mr. Gagné and the appellant, as amended by the notarial act dated December 8, 1990,

must be considered a gift *inter vivos*. Although that provision, read in isolation, can be deemed a gift *mortis causa*, the marriage contract as a whole and the circumstances in which it was modified tip the scale in favour of it being a gift *inter vivos*. That is a reviewable error that calls for this Court's intervention.

V. Conclusion

[31] For the above-mentioned reasons, I am therefore of the opinion that the appeal should be allowed, that the Tax Court of Canada decision must be reversed, and that the notice of assessment issued to Denise Arsenault pursuant to section 325 of the *Excise Tax Act* should be vacated. The parties did not seek costs, and consequently, I will not award any.

"Yves de Montigny"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
A.F. Scott J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-353-15
(Appeal of a Tax Court of Canada decision (2015 TCC 179).)	
STYLE OF CAUSE:	DENISE ARSENAULT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. SCOTT J.A.
DATED:	SEPTEMBER 8, 2016

APPEARANCES:

Serge Fournier Geneviève Thériault-Lachance	FOR THE APPELLANT DENISE ARSENAULT
Marielle Brazzini	FOR THE RESPONDENT HER MAJESTY THE QUEEN

SOLICITORS OF RECORD:

BCF LLP Montréal, Quebec	FOR THE APPELLANT DENISE ARSENAULT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT HER MAJESTY THE QUEEN