Federal Court of Appeal	 CANADA	Cour d'appel fédérale

Date: 20101028

Docket: A-494-09

Citation: 2010 FCA 287

CORAM: **BLAIS C.J.**
EVANS J.A.
SHARLOW J.A.

BETWEEN:

F. MAX E. MARÉCHAUX

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 28, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on October 28, 2010.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 28, 2010)

EVANS J.A.

[1] F. Max E. Maréchaux participated in a "leveraged donation" scheme. The essence of the scheme was that, for an expenditure of $30,000, he received a charitable donation tax receipt for $100,000, and claimed a tax credit of $44,218, a potential return on his outlay of nearly 50% in a matter of months. Very little of the money was retained by charities to advance their purposes.

[2] Mr Maréchaux appeals to this Court from a decision of the Tax Court of Canada (2009 TCC 587), in which Justice Woods dismissed his appeal against his tax reassessment for the 2001

taxation year. The Judge concluded that the Minister of National Revenue had correctly disallowed Mr Maréchaux a tax credit of $44,218 that he had claimed under section 118.1 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 in respect of a gift of $100,000 to a charitable foundation. The Judge's reasons contain an agreed statement of facts describing the scheme's pre-determined and interconnected transactions, which need not be repeated here.

[3] The basis of the Judge's decision was that Mr Maréchaux had not made a "gift", a term which is not defined in section 118.1 but has its general legal meaning. She adopted a definition by Linden J.A in *The Queen v. Friedberg*, 92 DTC 6031 (FCA) at 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.

She held that Mr Maréchaux had not made a "gift" within the meaning of section 118.1, because he made the payment to the foundation expecting to receive, and in fact did receive, a significant benefit, namely an interest-free loan of $80,000 from a lender (not the foundation), repayable in twenty years.

[4] In addition, Mr Maréchaux paid $10,000 of his $30,000 outlay to the lender for a security deposit, an insurance policy, and the lender's fees: the "put option". He exercised his right under the scheme to assign to the lender the security deposit and the insurance policy in full discharge of the loan.

[5] Mr Maréchaux argued that the Judge made four errors in concluding that he had not made a gift and was therefore not entitled to a tax credit in respect of his $100,000 payment.

[6] First, he says, a benefit provided in return for a payment only prevents it from being a gift if the benefit is provided by the donee. In the present case, the benefit received by Mr Maréchaux – the interest-free loan and the "put option" – were provided by the lender, not the donee (that is, the foundation), and the Judge made no finding that the lender and the donee were not at arm's length.

[7] This is a question of law on which the standard of review is correctness. However, we are not persuaded that the Judge got the law wrong. Counsel cited no authority for the proposition that only a benefit provided to an alleged donor by the donee can prevent a payment to a charity from being a gift for the purpose of section 118.1. Nor do we see any principled reason in the present context for disregarding a benefit simply because it was provided by a third party, particularly where, as the Judge found in this case, the "donation" was conditional on the provision of the benefit.

[8] Second, Mr Maréchaux submits that the interest-free loan did not constitute a significant benefit so as to prevent the payment to the charitable foundation from being a gift. Since this is a question of fact or mixed fact and law, the Court will interfere with the Judge's conclusion only if satisfied that it is vitiated by palpable and overriding error.

[9] In our opinion, there is ample evidence in the record to support the Judge's finding that the $80,000 interest-free loan was a significant benefit to Mr Maréchaux and that it was provided in return for the "donation" to the foundation. It seems to us self-evident that a person who has the use of borrowed money, repayable in twenty years time, without having to pay interest has thereby

received a significant benefit. The interest-free loan in this case enabled Mr Maréchaux to transfer $100,000 to the foundation without having to use more than $30,000 of his own assets or to pay interest on a commercial loan for the balance.

[10] Third, Mr Maréchaux says that the Judge erred in regarding the "put option" as a benefit that disqualified the payment from being a gift because there was no guarantee that he would be issued an insurance policy payable in the event that the invested security deposit had not grown after twenty years to the amount of the loan. Hence, any benefit was speculative.

[11] We disagree. Even if the promoters did not undertake that a policy would be issued, participants in the scheme, including Mr Maréchaux, had good reason to believe that it would. Further an insurance policy was in fact issued to Mr Maréchaux who assigned it and the security deposit to the lender in full satisfaction of the $80,000 loan. On these facts, the Judge cannot be said to have committed a palpable and overriding error in finding that the "put option" was a significant benefit provided to the donor by the lender in return for the payment.

[12] Fourth, Mr Maréchaux argues that, if the Court concludes that he obtained a benefit in return for the payment to the foundation, he should still receive a tax credit in respect of his cash "donation" of $20,000. The Judge rejected this argument as well (at para. 49):

> There is just one interconnected transaction here, and no part of it can be considered a gift that the appellant gave in expectation of no return.

We see no reviewable error in this conclusion.

[13] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-494-09
(AN APPEAL FROM THE JUDGMENT OF THE HONOURABLE MADAM JUSTICE J. M. WOODS FROM THE TAX COURT OF CANADA, DATED NOVEMBER 12, 2009, IN DOCKET NO. 2006-410 (IT)(G))	
STYLE OF CAUSE:	F. MAX E. MARÉCHAUX v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 28, 2010
REASONS FOR JUDGMENT OF THE COURT BY:	(BLAIS, EVANS, SHARLOW JJ.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

APPEARANCES:

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