Docket: 2012-754(IT)G

BETWEEN:

WILLIAM KAUL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *Ian N. Roher*, 2013-1882(IT)G on December 7, 8, 12 and 13, 2017 and January 16, 2018, at Toronto, Ontario

Before: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant:	Irving Marks Adam Brunswick Matthew Sokolsky Ellad Gersh
Counsel for the Respondent:	Jenna L. Clark Erin Strashin Amit Ummat

---

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1998, 1999 and 2000 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

The appeal for the 2000 taxation year with respect to the Appellant, William Kaul, shall be sent back for reassessment on the sole basis that the capital gains claimed by him for this taxation year be deleted.

Signed at Ottawa, Canada, this 18th day of January, 2019.

"E.P. Rossiter"

Rossiter C.J.

Docket: 2013-1882(IT)G

BETWEEN:

IAN N. ROHER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of *William Kaul*, 2012-754(IT)G on December 7, 8, 12 and 13, 2017 and January 16, 2018 at Toronto, Ontario

Before: The Honourable Eugene P. Rossiter, Chief Justice

Appearances:

Counsel for the Appellant:	Irving Marks Adam Brunswick Matthew Sokolsky Ellad Gersh
Counsel for the Respondent:	Jenna L. Clark Erin Strashin Amit Ummat

---

JUDGMENT

The appeals from the assessments made under the Income Tax Act for the 1998, 1999, 2000, 2001, 2002, 2003 and 2004 taxation years are dismissed, with costs, in accordance with the attached Reasons for Judgment.

The appeals for the 2001, 2002 and 2003 taxation years with respect to the Appellant, Ian Roher, shall be sent back for reassessment on the sole basis that capital gains claimed by him for those years be deleted.

Signed at Ottawa, Canada, this 18th day of January, 2019.

"E.P. Rossiter"

Rossiter C.J.

TABLE OF CONTENTS

Citation: 2019 TCC 17
Date: 20190118
Docket: 2012-754(IT)G

BETWEEN:

WILLIAM KAUL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2013-1882(IT)G

AND BETWEEN:

IAN N. ROHER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Rossiter C.J.

I. Introduction

[1] William Kaul and Ian Roher (the "Appellants") are the two remaining lead litigants in a group of related appeals before the Court. The sole issue in the appeals is the fair market value of art that was purchased and subsequently donated by the Appellants in an art donation program that was in operation from 1998 to 2003 (the "Artistic Program"). The Artistic Program was promoted and operated by a number of entities over the years including Artistic Ideas Inc., Artistic Expressions Inc. and Artistic Ideals Inc. (hereinafter collectively referred to as "Artistic").

[2] The Artistic Program operated as described in the facts hereinafter.

[3] The issue is what is the fair market value of the art donated by the Appellants on the donation date? Expert evidence is fundamental to determining the fair market value of the donated art.

[4] When this matter came to trial the Appellants attempted to adduce expert reports prepared by two appraisers, Ms. Edith Yeomans and Charles Rosoff, both of whom had been retained by Artistic to provide appraisals for the Artistic Program during the relevant years (the "Appraisers"). The reports were excluded by a ruling of this Court. There was a confidential motion presented to Justice D'Arcy of the TCC which I was not privy to. Following Justice D'Arcy's ruling most of the lead litigants, save and except the Appellants, had settled their appeals with Canada Revenue Agency ("CRA"). Before continuing with their appeals, the Appellants brought a motion seeking an advance ruling as to whether the appraisers could testify as "participant experts" as to the original appraisals for the truth of the contents (the "Appraiser's Reports"). I rendered a decision on June 2, 2017 allowing or otherwise directing pursuant to Rule 145 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688 as amended (the "Tax Court Rules") that Ms. Yeomans may testify as a participant expert with respect to the content of her Appraisal Report that she had already compiled during her involvement in the Artistic Program. As for Mr. Rosoff, there was not sufficient evidence before the Court at time to make a similar direction although it appeared that he prepared a similar appraisal as Ms. Yeomans.

[5] The trial proceeded with evidence from both Ms. Yeomans and Mr. Rosoff as "participant experts". For the reasons following I would dismiss the appeals.

II. Facts and Evidence

[6] Trial evidence came in through the following witnesses:

A. Mark Pearlman ("Pearlman"), one of the directors and principals of Artistic;

B. Paul Sloan ("Sloan"), an American businessman and art dealer who supplied the art used in the Artistic Program;

C. Jeffrey Sackman ("Sackman"), one of the original Appellants in the group appeal who participated in the Artistic Program;

D. Edith Yeomans ("Yeomans"), an appraiser of art used in the Artistic Program;

E. Charles Rosoff ("Rosoff"), an appraiser of art used in the Artistic Program; and

F. April Cornell ("Cornell"), the Executive Director of the Ontario Foundation for Visually Impaired Children ("OVIC"), one of the charities which received art donated by the Artistic Program.

The testimonies of the witnesses were largely consistent with the findings of Justice Paris in *Artistic Ideas Inc. v Minister of National Revenue*, 2008 TCC 452 (the "GST Proceeding").

[7] The parties also submitted a Partial Agreed Statement of Facts, setting out many of the undisputed facts in this case.

Artistic Program

[8] Artistic was conceived and marketed to Canadian taxpayers as a tax savings investment vehicle.

[9] The Artistic Program operated in two phases. From the inception of the Artistic Program in the fall of 1998 to February 28, 2000, participants typically paid approximately $3,500 for a group or unit of 11 works of art. After February 28, 2000, participants in the Artistic Program paid up to $3,750 for their selection of art.

[10] Typical Artistic promotional material for the 1998 taxation year set out the following information:

1. Minimum investment amount: $3,500

2. Donation receipt: $10,000

3. Tax Savings: $5,029 (43% return)

[11] Prior to February 28, 2000, a participant in the Artistic Program would buy art in a group or unit of 11 prints, 10 of which would go to a charity of his or her choice that was pre-arranged by Artistic. The extra art piece would be retained by

the participant personally. A participant never had the choice of purchasing just a single print. According to Pearlman, only art that was appraised to have a fair market value of $1,000 Cdn or more would be included in any particular group. Regardless of the actual appraisal, charitable donation receipts would be issued based on a fair market value of $1,000 per print donated, even if a print was valued at higher than the $1,000 threshold. This was done to avoid the application of any capital gains tax in respect of the donations by taking advantage of the personal-use property provisions existing at the time.

[12] After February 28, 2000, due to amendments in the personal-use property provisions, art donations were no longer exempt from the application of capital gains tax. Participants would still purchase art by group, but the size of any particular group shrank while the price per group increased. Charitable donation receipts were then issued based on the actual appraised fair market value of the art. Participants would pay the capital gains tax based on the difference between the price they paid in respect of the art and the value indicated on the donation receipts.

[13] According to Pearlman's testimony, in both phases, a group purchased by a particular participant would not be the same as a group donated to the charities. Most of the time, when multiple groups were purchased, Artistic employees would split up the groups so that different prints within these groups would be donated to a variety of charities. There was a small exception - if a participant purchased only a single group, then that entire group would be donated to a single charity untouched, aside from the one retained by the participant. Apparently this did not happen often. Usually purchases were for multiple groups or units. Pearlman testified that this was done out of the concern that the prints might be perceived as being purchased and donated in bulk, and thereby having a deflating impact on the fair market value of the prints, which was determined based on the value of the prints transacted individually at the retail market level.

[14] At all times, Artistic personnel were also allowed to make substitutions to the prints in any particular group. According to Pearlman, such substitutions were mostly done for the purpose of replacing damaged pieces with other pieces of equal value. Occasionally, substitutions were made to replace pieces that were missing or otherwise unavailable in the inventory.

[15] The Artistic Program was marketed by word of mouth to participants through, mostly their financial advisors, accountants, and occasionally lawyers. At no point was the Artistic Program marketed to the public at large. Because of this

selective marketing channel, the participants were largely individuals who paid income tax at the highest marginal tax rates. Indeed the Artistic Program appeared to be so selective that Sackman in his own daily discourse coined the phrase "qualified investors", that is, individuals who reached a certain income level could invest or participate in the Artistic Program.

Origin of the Artistic Program – Sloan and Pearlman

[16] The lithographic prints used in the Artistic Program were supplied by Sloan, a resident of California. Sloan testified to his involvement in the Artistic Program in the GST Proceeding as well as this trial.

[17] Sloan first became acquainted with Pearlman in the mid-90s as they together promoted a software tax shelter called Protosource to Canadians. Sloan testified that he was not aware that Protosource was a tax shelter, a statement clearly contradictory to Pearlman's evidence in this trial and in the GST proceeding, in which Pearlman gave evidence that Protosource was apparently conceived by Sloan as well. Protosource was also not Sloan's first tax shelter venture. Prior to Protosource, he had apparently been involved in promoting several tax shelters in the U.S.

[18] For the Artistic Program, Pearlman testified that Sloan, after the Protosource venture, first approached Pearlman and Alan Grossman, the other principal of the Artistic Program, about potentially setting up a tax shelter using art he had left over from an art gallery he once owned. Sloan denied that it was his idea and stated that he merely agreed to supply the art for donation purposes.

[19] Pearlman initially had some concerns about the Artistic Program. One concern was the capital gains tax on the donations and the other was the fair market value of the art to be used in the Artistic Program. Pearlman thought the first concern was cleared up by Graham Turner, a tax lawyer who provided a legal opinion in connection with the Artistic Program and the second concern was resolved by obtaining appraisals from two independent appraisers.

[20] Subsequently, the Artistic Program kicked off on a verbal agreement or mutual understanding between Sloan and Artistic's principals that Artistic would act as Sloan's agents in promoting the Artistic Program to Canadian investors and would earn a commission on any art sold. The profits would be shared basically on a 50-50 basis.

Source of the Art

[21] Sloan incorporated two companies for the purposes of supplying art to the Artistic Program - Coleman Fine Arts ("Coleman") and Silver Fine Arts ("Silver"). Coleman supplied the art in 1998, 1999, and 2000, while Silver supplied the art in 2000, 2001, and 2002.

[22] Prior to his involvement in the Artistic Program, Sloan carried out a very successful career as an art dealer. In the 1980s, he worked as a sales manager for Jackie Fine Arts, which had acquired the rights to some of the works of the renowned Spanish Artist, Pablo Picasso. Later he became a partner in Dyanson, a retail art gallery chain that went public and, at one point in time, operated 12 galleries in the U.S.A. Some of the Dyanson inventory was sourced from Jackie Fine Arts, including works of Picasso. When Dyanson was later sold in 1995 to London Fine Arts, an art gallery based in Detroit, Michigan, Sloan retained more than 100,000 pieces of art from Dyanson and stored them in a warehouse in California ("Dyanson Inventory").

[23] Initially, most of the art used in the Artistic Program came from the Dyanson Inventory. Later, prints were sourced from various artists and art galleries directly. Some of the artists were: Charles Lynn Bragg, Charles Bragg, Jim Jonson, and Wayne Ensrud. Coleman and Silver paid approximately $20 to $40 U.S. for a print from these artists. Coleman and Silver also acquired art from galleries such as the Ro Gallery and the Museum Master International Ltd.

The Appraisal and Donation Process

[24] As part of the purchase price, participants received streamlined services from Artistic and Sloan, which included but were not limited to:

1. arranging for charities;
2. appraisal;
3. shipping;
4. quality inspection; and
5. the eventual donation.

In addition to supplying the art, Sloan was responsible for the shipping and delivery of print samples to the appraisers to appraise. Initially, there were two appraisers involved, Lesley Fink and Yeomans. Generally, prints that Yeomans appraised had values of $1,000 Cdn or more, which were included in the groups

offered for sale. Yeomans would provide verbal assurances based on her research, followed by formal written appraisals in the early months of the following year. Later, Rosoff, who was recommended by Yeomans to Artistic, replaced Fink as the second appraiser as Pearlman felt that Fink's appraisal was wildly unreliable. Any prints that met Yeomans' valuation would then be sent to Rosoff for a second opinion.

[25] Under the Artistic Program, the participants would sign three documents: (i) a Purchase Agreement; (ii) an Agency Agreement; and (iii) a Deed of Gift.

[26] The participants would enter into an agency agreement with Artistic pursuant to which Artistic would act as the agent responsible for finding charities willing to issue donation receipts for $1,000 per print in the pre-February 28, 2000 period, and later for the appraised fair market value in the post-February 28, 2000 period.

[27] The participants would also enter into a purchase agreement with Coleman or Silver, whereby they would select the group to purchase based on the title of the one print within that group which they would intend to keep and which image was made available for their viewing. Participants would also select from a pre-arranged list of charities the ones to which they would like to donate.

[28] Under the Deed of Gift, the participants would then indicate the charities they wished to benefit and would authorize Artistic to arrange for the donation.

[29] Once Artistic received payment from a purchaser, it would then contact Sloan to ensure that there was sufficient inventory to fill the order. After the year-end, Sloan would ship the art to Artistic's office in Toronto. There, the art would be inspected, sorted, repackaged as discussed above, and shipped to the selected charities along with the Deeds of Gift and a letter stating the value of the prints and requesting that they issue the charitable receipts as previously agreed. Artistic would then hold onto the charitable receipts until the final written appraisals were received, a copy of which were then forwarded to the charities. (The Respondent called into question the extent of the charities' knowledge about the value of the prints prior to issuing the receipts.)

[30] Finally, Artistic would also send a copy of the final appraisals and the charitable receipts to the respective participants who would then use them in the filing of their tax returns.

Jeffrey Sackman

[31] Sackman, one of the original Appellants, testified to his participation in and understanding of the Artistic Program. He struck me as an intelligent businessman with an extensive background in the film industry.

[32] Sackman learned of the Artistic Program through his accountant, Elliot Richmond. He had relied on his accountant and the professional tax opinion rendered by Fraser Milner. In 1998 and 1999 he purchased 10 and 40 groups of art through the Artistic Program, respectively for $35,000 and $140,000, respectively which he donated to charities in exchange for donation receipts totaling $510,000.

[33] Sackman testified that the idea of the Artistic Program was to purchase art in bulk at a wholesale price and to donate the art to charities based on their fair market value, which was the highest price that each print can garner in the retail market.

[34] Sackman recalled vaguely the name of Sloan and possibly a warehouse in California, but otherwise had no knowledge of where the prints he purchased were sourced.

Edith Yeomans

[35] Pursuant to the Order of this Court reported in *Kaul v R*, 2017 TCC 55, Yeomans testified to her involvement in the program as a "participant expert". Yeomans' testimony was limited to the facts and opinions she formed during her involvement with Artistic as an appraiser. I have reproduced the relevant paragraphs of that decision:

> 5 Ms. Yeomans and Mr. Rosoff are two of the appraisers engaged by Artistic to value the lithographic prints that were transacted in the Artistic Program.
>
> 6 Ms. Yeomans was based in Toronto and was the primary appraiser who had set the Program in motion. From 1998 to 2003, she conducted appraisals of every single title purchased and donated by participants in the Artistic Program.
>
> 7 Ms. Yeomans was a licenced appraiser accredited by the American Society of Appraisers. Her qualifications as an appraiser in fine arts were not in dispute during a *voir dire* held in November 2016 for the purpose of qualifying her as an expert witness before this Court.

8 During the *voir dire*, Ms. Yeomans testified that prior to her involvement with Artistic, she had been approached several times by other art donation programs. She turned them down because they required her to certify or "rubber stamp" certain values to their art that were not determined by her independent judgment and expertise, but were instead dictated by them.

9 She testified that she took the job with Artistic because it did not impose on her this requirement as a condition of her retainer. She knew that the Program was basically a buy-low-donate-high concept. She also knew that the threshold required of her appraisals was approximately $1,000 CAD per piece. Nevertheless, she was the person responsible for determining, in her capacity as the appraiser, the fair market value of a particular title in USD and consequently, whether that title met the threshold. Those that she determined met or exceeded the threshold were included in the Program for selection by the participants; and those that she determined were below the threshold were discarded. She was retained by Artistic at an hourly rate, irrespective of the valuation opinions that she would reach in any particular case.

10 Her appraisal process normally involved the direct inspection of art at the offices of Artistic and conducting research on the art, including the artist, the type of art, and etc. She then came to an initial value conclusion based on a market-comparison approach whereby she would compare the sales data of, for example, the same or similar art from the same artist in the U.S. market. She accessed this information through direct communication with art dealers, commercial galleries and etc. She inspected samples of every single title that was purchased and donated by participants in the Program, but not every single reproduction of every title. She would communicate her preliminary value conclusions to Artistic either verbally or by fax.

11 There was no evidence of any communications between Ms. Yeomans and the Appellants or any of the participant donors.

12 Following her initial value conclusions, she would provide two Appraisal Reports to Artistic: (i) a long-form report that included the appraisals of all titles that she had appraised for the Program; and (ii) a short-form report that only included titles that were chosen for the Program, i.e., those that met the threshold. The purpose of the Appraisal Reports was, largely, to put into writing the preliminary verbal value conclusions that had already been reached by Ms. Yeomans. Other than the length as a result of the number of titles that were included, the content of the two Appraisal Reports were otherwise no different. Only the short-form reports were later provided to the participant donors and to the charities.

13 The Appraisal Reports have been disclosed to the Respondent since the very beginning. However, the Appellants refused to produce Ms. Yeomans'

> working papers and any supporting documents on the basis that litigation privilege attached to those documents.

[36] At the beginning of Yeomans' testimony, the Appellant sought to introduce into evidence the working papers created by Yeomans during her appraisal. The Respondent objected on the grounds that initially litigation privilege was asserted over these documents and pursuant to rule 96 of the *Tax Court Rules*, leave of the Court was required before these documents could be introduced as evidence at trial. The Appellant did not seek leave at any time prior to the hearing. Finding that the Respondent would suffer prejudice if the working papers were introduced into evidence without an adjournment to allow time for review, and that any further delay was not in the interests of justice, I did not allow the working papers to be admitted into evidence.

[37] Yeomans provided valuation reports for Artistic in 1998-2003. Her reports state that the appraisals were completed in accordance with the standards set by the American Society of Appraisers and the International Society of Appraisers. Her reports state that they comply with the Uniform Standards of Professional Appraisers Practice ("USPAP").

[38] Yeomans reports state the definition of fair market value, which she applied when appraising the artwork. In her examination-in-chief, Yeomans confirmed that this definition was the definition of fair market value contained in CRA publications and the definition was in agreement with the definition stated in *Henderson v Minister of National Revenue*, [1973] CTC 636, [1973] FCJ No. 800. The report provided an appraised value for each piece, as well as a "total FMV" determined as the aggregate value of the works appraised.

[39] Yeomans testified the definition of fair market value required her to reach value conclusions based only on what a piece of artwork would fetch when sold in an open and unrestricted market to an ultimate end user consumer unaffected by external factors. Yeomans used the market data approach in her appraisal reports. Her reports do not provide any discussion on why the market data approach was selected over alternative approaches.

[40] The retail market was selected by Yeomans as the appropriate comparator market. Depending on where the individual artist most commonly exhibited their works, either the commercial gallery market in the United States or Japan was considered. In her examination-in-chief, Yeomans described the three common markets that she considered before deciding on the retail market. These markets

were: the commercial gallery retail market; auction retail and wholesale sales; and private treaty sales. No evidence was provided on why the retail market was selected over other markets. The geographical location of the retail market selected was the location where the artist most commonly exhibited.

[41] The reports listed the sources considered by Yeomans when appraising the works. Yeomans' testimony on which sources she considered was consistent with the sources listed in her reports. Yeomans stated that only after considering all the listed sources did she determine which market was the appropriate comparator market for a given artist.

[42] Yeomans testified that she contacted commercial galleries, one of which was Ro Gallery. The Respondent questioned the reliability of the valuation conclusions based on the information provided by Ro Gallery on the basis that Ro Gallery provided artwork to Coleman and Silver, and these sales were not mentioned in Yeomans' report. USPAP standards require that an appraiser consider previous sales that occurred within a reasonable time period.

[43] Where a gallery had a website, Yeomans also relied on the information on the website, including the list prices of the artwork. In cross-examination, the Respondent put it to Yeomans that relying on list prices was contrary to the USPAP, as list prices are not an accurate indicator of actual sales prices. Yeomans agreed with the Respondent that list prices are generally not representative of actual sales. Yeomans did, however, state that in the case of online sales, the listed price could be relied on, as online sales do not provide any opportunity for price negotiation.

[44] Yeomans also relied on two publications. The first was ArtNet Online, a predominantly North American, but worldwide database of auction sales. The second was InformArt, a publication which provided information on sales of reproduction pieces.

[45] The final source of information was the artists themselves. Yeoman testified that where ever possible she would contact the artist, who would provide information on sales of the same or similar works. During cross-examination, the Respondent questioned the reliability of sales figures self-reported by the artist, and put it to Yeomans that artists have self-interest in their work being appraised at a high value. Yeomans rejected this generalization, and characterized artists as forthcoming with previous sales, and rarely instead providing statements as to what they think a piece is worth. Yeomans stated that the main motivation of an artist is

to be appreciated and have their work purchased at a fair price. This statement is suspect as it is both contrary to common sense, and inconsistent with the evidence before me as given by Sloan.

[46] The Appellants and the Respondent both agree that Yeomans' report was deficient in that it did not fully comply with the USPAP standards. The Appellants take the view however that the non-conformity of the valuation report only speaks to the form of the report. The Respondent's view is that the non-conformity with the USPAP standards brings into question the valuation conclusions contained in the report.

Charles Rosoff

[47] The Appellant had previously attempted to call Rosoff as a litigation expert. Rosoff's expert report did not comply with the *Tax Court Rules* and therefore Rosoff was not accepted by this Court as a litigation expert. Pursuant to the *Kaul* order, the Appellant also introduced Rosoff as a "participant expert". His testimony was limited by the same constraints as the testimony of Yeomans.

[48] Overall, I found Rosoff to be reluctant to answer questions, sometimes to the point of being evasive. Rosoff's was often deliberate in his answers, seemingly out of a desire to protect his reputation as a respected independent appraiser, while also attempting to avoid an answer that would be damaging to the Appellants' case.

[49] The Respondent's position is that Rosoff's report is deficient for largely the same reasons as Yeomans' report. Furthermore the Respondent questions the reliability of Rosoff's conclusions on the basis that he was not independent of Yeomans, and relied on her research and sources. Rosoff did not list any of his sources in his report. This may bring into question the credibility of Rosoff's opinion on the FMV of the donated art.

April Cornell

[50] Cornell, the former executive director of OVIC, a charity which received donations from the Artistic Program in 2000, testified as a witness for the Respondent. Cornell testified to the charity's participation and understanding of the program. Cornell's duties as executive director of OVIC included the management and administration of OVIC's programs and services, including the financial administration of OVIC. She struck me as a straightforward, honest and forthcoming individual.

[51] OVIC was a registered charity that existed until 2012. In 2012 OVIC merged with Surrey Place Centre, an existing charitable organization which provides similar programming within Toronto. Shortly thereafter, OVIC was dissolved.

[52] Cornell testified that in 2000, 85–87% of OVIC's funding came from grants from the Ontario Ministry of Community and Social Services and the Municipalities where it provided services and programming. The remainder of the funding needed to cover OVIC's operating budget was raised through OVIC's fundraising activities. Cornell stated that OVIC needed to continuously raise funds on a year-to-year basis to ensure that the charity could cover its operating budget. It was due to this need to cover operating costs that OVIC became involved with Artistic.

[53] OVIC became involved with Artistic through correspondence between Alan Grossman of Artistic and William Findlay, President of OVIC Board of Directors. Cornell testified that she had no direct communication with Artistic, except for one telephone conversation at the end of 2000, when Artistic contacted her to solicit OVIC's participation in the program for 2001.

[54] According to the testimony of Cornell, OVIC would issue receipts without having received a copy of an appraisal report. OVIC relied on the Deeds of Gift and correspondence from Artistic to issue the receipts. In 2000, the sole year which OVIC accepted donations from the Artistic Program, an appraisal report was not received until the following year. Cornell expressed concern about issuing receipts without the appraisal reports, but these receipts were issued anyway. Only Yeomans' report was received by OVIC, a second independent appraisal report prepared by Rosoff was never sent to OVIC. The appraisal report received by OVIC did not contain any information on the prints actually donated to OVIC, however, other appraisal reports prepared by Yeomans did value the donated prints. The value of the donated prints as per Yeomans' report was consistent with the value provided to OVIC by Artistic.

[55] Cornell testified that the donated prints were never sold by OVIC. In 2010 based on the research of the board, the prints had a value of $100 each. In 2010 the prints were delivered to Waddingtons, an auction house in Toronto, to be sold. The prints were returned unsold in 2013. In cross-examination, Cornell admitted that no professional valuation of the prints was done and further clarified that Waddingtons was not an auction house specializing in print or reproduction artwork.

[56] Cornell testified that OVIC received $11,000 from Artistic.

[57] With respect to the $11,000 given by Artistic to OVIC, this was apparently to offset storage and insurance for the intended art. That OVIC did not pay for insurance or storage with this money is not determinative. The Respondent did not suggest that the characterization of this payment was a sham or window dressing. I need not make any such determination. Had the Respondent done so, the evidence before me falls short of establishing such a characterization.

[58] While I found Cornell a credible witness, I need not rely on her evidence to reach my decision. This is for two reasons. First, while Cornell's testimony suggests that OVIC did not directly rely on the appraiser's reports when issuing donation receipts, Artistic did rely on these reports when providing OVIC with the information relied on. Second, accepting that the fair market value of the donated artwork was $100 per print in 2010, does not say anything about what the fair market value may have been almost a decade earlier when the prints were donated.

III. Issues

[59] The principal issue before the Court is the fair market value of the donated artwork. In determining the question there are three questions to be considered:

1. What is the relevant market?
2. What is the identity of the assets in question? and
3. What is the fair market value based upon the evidence before the Court?

IV. Applicable Law

[60] The Appellants had sought a donation tax credit for the donation of artwork in excess of the price they paid to acquire that artwork. Reference must be made to the definition of "total charitable gifts" as set out in subsection 118.1(1) of the *Income Tax Act* (the "*Act*"):

> **total charitable gifts**, of an individual for a particular taxation year, means the total of all amounts each of which is the eligible amount — to the extent it is not otherwise included in determining an amount that is deducted under this section in computing any individual's tax payable under this Part for any taxation year — of a gift (other than a gift any part of the eligible amount of which is included in the total cultural gifts or the total ecological gifts of any individual for any taxation year) that is made

(a) to a qualified donee,

(b) in a taxation year that is not a year for which an amount is deducted under subsection 110(2) in computing the individual's taxable income, and

(c) if the individual is

(i) not a trust,

(A) by the individual, or the individual's spouse or common-law partner, in the particular year or any of the five preceding taxation years,

(B) by the individual in the year in which the individual dies if the particular year is the taxation year that precedes the taxation year in which the individual dies, or

(C) by the individual's estate if subsection (5.1) applies to the gift and the particular year is the taxation year in which the individual dies or the preceding taxation year, or

(ii) a trust

(A) by the trust in the particular year or any of the five preceding taxation years,

(B) by the trust if

(I) the trust is an individual's estate,

(II) subsection (5.1) applies to the gift, and

(III) the particular year is a taxation year

1. in which the estate is the individual's graduated rate estate, and

2. that precedes the taxation year in which the gift is made, or

(C) by the trust if

> (I) the end of the particular year is determined by paragraph 104(13.4)(a) because of an individual's death,
>
> (II) the gift is made after the particular year and on or before the trust's filing-due date for the particular year, and
>
> (III) the subject of the gift is property that is held by the trust at the time of the individual's death or is property that was substituted for that property; (*total des dons de bienfaisance*)

[61] This provision provides that an individual's total charitable gifts in a year are the total of all amounts each of which is the fair market value of the gifts made by the individual in the year or in any five immediately preceding years. The "total charitable gifts" amount arrived at then becomes part of the calculation for the deduction by the individual for gifts as set out under subsection 118.1(3) of the *Act*.

[62] The key to the applying of subsection 118.1(1) of the *Act* is the application of the definition of fair market value. In *Canada (Attorney General) v Nash*, 2005 FCA 386, 2005 DTC 5696, the Federal Court of Appeal stated the following in relation to the applicable fair market value test when it quoted the *Henderson Estate* appeal:

> 8. The well-accepted definition of fair market value is found in the decision of Cattanach J. in *Henderson Estate and Bank of New York v. M.N.R.* 73 D.T.C. 5471 at 5476:
>
> > The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand.

> Although Cattanach J. expressed the caution that his words did not constitute an "exact" definition, the extent to which his words have been adopted in the jurisprudence without change over some thirty years suggests that his approach, although not necessarily exhaustive, is now considered to be the working definition.

[63] The Federal Court of Appeal went on to state at paragraph 12, in part, as follows:

> …
>
> > The meat of that definition (Henderson) is the highest price reasonably expected if an asset is sold in the normal method in the ordinary course of business in a market without undue stress composed of willing buyers and sellers. That describes precisely the mode of valuation made by Tropper.
>
> …

[64] The above-noted definition has been the definition which was applied by the Federal Court of Appeal in the above-noted case, as well in *Klotz v The Queen*, 2005 FCA 158, 2005 DTC 5279.

[65] The analysis conducted below applies the *Henderson* test, as it relates to the fair market value of the donated art in question on the date on which the art was donated.

V. Analysis

[66] The evidence in this trial focused on the fair market value of the donated art and the applicable market utilized by the appraisers in arriving at the fair market value of the donated art. Both Yeomans and Rosoff were “participant experts”, not litigation experts as contemplated by the General Procedure Rules. They were found not to be independent and objective and their reports were not accepted by the Court but they were allowed to give evidence as participant experts.

[67] I have concluded that the fair market value in this case is the price paid by the Appellants for the art which they subsequently donated and not the appraised value as presented by the Appellants through the evidence of Yeomans and Rosoff. I quote Associate Chief Justice Bowman (as he then was) in *Klotz v The Queen*, 2004 TCC 147, 2004 DTC 2236, at paragraph 46:

> The respondent's approach is in my view more realistic. Mr. Alasko described the sale to the appellant by Curated as a wholesale or bulk transaction. No doubt the respondent would have preferred to have him say it was a retail sale but in the final analysis it does not really matter what one calls it. It is what it is. It was a sale of 250 prints for $75,000 between two arm's length parties. The gift was a virtually contemporaneous disposition of the same 250 prints. What better evidence is there of what the 250 prints were worth at that time? Why chase the will o' the wisp of an elusive and largely hypothetical fmv through the trendy up scale art galleries of New York and ignore the best evidence that is right there before your very nose? The problem with the claim here, whereby property is acquired for $5 to $50, sold to the appellant for $300 and claimed to have a fmv two days later of $1,000, is that it is devoid of common sense and out of touch with ordinary commercial reality. [Emphasis added]

[68] Based on *Henderson*, the following questions are to be considered: (1) Whether the art is to be valued as individual pieces or as a group? (2) Was the art assessed based on the principle of an open and unrestricted market? (3) Does the evidence support the Appellants' position that the artwork was assessed at fair market value?

Nash and *Klotz* - Differences

[69] However before dealing with the above questions, the fundamental one of which relates to the fair market value, I must deal with the Appellants' suggestion that there are four significant differences between this case and the *Nash* and *Klotz* cases:

1. The artwork was not bought by donors as a group, but as individual pieces.

2. The artwork donated was already in existence in the case at bar and not produced just for the Artistic Program, therefore there was a pre-existing retail market for the art.

3. There was positive evidence of a pre-existing retail market.

4. There was an explanation given as to why the donated value was higher than the price actually paid for the art in question.

1) The Artwork was donated in groups

[70] The Respondent argued that the facts show that the assets in question were valued as groups as opposed to individual prints. The evidence on this point is particularly compelling.

(1) The Respondent referred to some documentation of the Appellant's own making - promotional material of the Appellant, a document entitled Artistic Expressions, 99 (Exhibit R-4, Volume 1, Tab 1B, page 1). This document was a piece of promotional material which described the opportunity to "donate art to various charities and receive a substantial tax incentive". The minimum investment was shown to be for $3,500 and it was noted at the end of the promotional material:

> After purchasing eleven pieces of art each investor will be able to donate up to ten of the pieces. Each work of art has an appraised market value of at least $1,000, investors will choose to donate ten pieces of art which will achieve tax savings of $4,875 on a piece of art valued at approximately $1,000.

This shows that there was a minimum investment amount of $3,500 which is basically $3,500 for the group that is eleven pieces as opposed to x number of dollars per piece of individual art.

(2) There was an "agency agreement", which was a standard agency agreement, between Artistic Ideas Inc., and each prospective donor. The agency agreement of March 31, 1999 between Artistic Ideas Inc., and Jeffrey Sackman of Toronto (Exhibit R-4, Volume 6, Tab 16, pages 3-4) showed the obligation upon the agent was to (1) acquire prints from one or more sellers; (2) to seek out one or more charities; and (3) to obtain receipts satisfactory to the purchaser. This would indicate that it was an acquisition and a donation of groups of art, rather than individual pieces of art.

(3) The agency agreement was then followed by a "purchase agreement" (Exhibit R-4, Volume 6, Tab 20(o), pages 5 to 7) between the original owner of the art, Coleman Fine Arts Limited and Sackman of March 31, 1999. The purchase agreement referred to the conveyance of all the rights, title and interest to the prints and referred to a purchase price payable by the purchasers set out in Schedule A. Note, there is no Schedule A attached. Also the purchase agreement stated that the prints could be stored at the premises of the vendor. Again they did not appear to be talking about individual prints but rather prints in total, as if they were a group.

(4) The "purchase agreement" was then followed by a document called an "order and instructions" (Exhibit R-4, Volume 6, Tab 19(h), pages 1 to 3). This was an order and instructions from Artistic Ideas with respect to the art in question. It required the donee provide their personal information and select a "group" of artwork the donee wished to purchase by circling and highlighting the "group number". This was followed by statements, "select the prints which you wish to receive"; "one only for each unit purchased, the other ten or more will be forwarded to the charity of your choice". These statements show the Appellants' were looking at the artwork as groups as opposed to individual prints. Further, the artwork was addressed as "units" in the order and instructions, for example one statement found in the order and instructions stated, "Note: single units may not be split between charities". The order and instructions did allow for a donee to individually donate each piece of artwork to a separate charity.

(5) In evidence it was clear that if there was a substitution to an individual piece of art within a group, then there was no change in price in the donation credit, receipt or deed of gift. All remain unchanged, even if there was a substitution for an individual piece of art.

(6) The "order and instructions" was followed by the "Artistic Ideas letter to a particular charity" (Exhibit R-4, Volume 6, Tab 17(o), page 1). The letter confirmed that a hundred pieces of art had been donated to their charity, the value of the art was $100,000 and the appraisals for each piece of art would follow under a separate cover.

(7) The "Artistic Ideas letter to a particular charity" was followed by an example of a "deed of gift" This particular example was dated June 3, 1999 from Artistic Ideas to a particular charity. The example deed of gift showed that the purchaser knew he was sending one hundred works of art from the Coleman Fine Art Limited collection to the charities, but did not know details for each individual print of art. Also, the example deed of gift confirmed that the charity knew it was getting one hundred prints but did not know the individual titles of the prints (Exhibit R-4, Volume 6, Tab 18(o), pages 2 to 5).

(8) In a read-in with respect to Sackman (undertaking 66 from the discovery transcript of Jeffrey Sackman of January 15, 2007), it was noted as follows:

> Further to the previous undertaking to confirm that in 2000 Mr. Sackman donated the 40 prints that were required as part of the 40 groups that were purchased in 1999 (the fourth eleven prints). Answer was yes.

(9) In correspondence from Artistic Ideas Inc. to a charity, December 13, 1999, Exhibit R-4, Volume 5, Tab 6(d), pages 1 and 2, it was noted that the minimum donation for each donor to each charity was the size of the group. The first paragraph of the letter read as follows:

> We have a number of contacts who are interested in making substantial donations of works of art. The amount any one investor donates will be a minimum of $10,000 in value (10 pieces). Some donations could be over a $100,000. The total amount of donations is difficult to determine at this time but should be in the millions of dollars.

(10) There was a correspondence from Artistic Ideas to a charity, dated February 22, 2000, Exhibit R-4, Volume 5, Tab 6(e), page 1, in which the charity received the deed:

> Please find enclosed the original deeds of gift for donations made to your charity through Artistic Ideas Inc. Some are original faxes (also valid) which will be replaced when the originals are sent in. Each deed is accompanied by a donation letter explaining the number of prints and their total value. Please sign each letter on the bottom and return it to me by fax immediately and then forward the originals by mail.

This letter was issued when receipts were issued.

Each participant received one receipt per group of prints as opposed to receipts for each individual print.

(11) The shuffling or shifting of prints would not affect the market value. Substitution was known. There was no evidence that substitution made any difference to the participants. The right of substitution was retained by Artistic. Artistic had discretion to substitute prints. Substitution would normally only occur if there was damage to a print or there were not enough prints. And when substitutions were made, they had no affect to the donation lists. No print list was attached to a deed of gift, the art was bought and donated as a group.

[71] The question is what was purchased by the donor and what was donated by the donor? It is evident that what was purchased by the donor were groups of prints, eleven in total. The donor would keep one print and donate the other ten. The prints were not purchased in groups of three, five or six, they were always purchased in groups of eleven or multiples of eleven from which the donor kept one and donated the others.

2) The Artwork donated was pre-existing

[72] This fact on its own is insufficient to distinguish these appeals from the established jurisprudence. In *Klotz* the artwork donated was also pre-existing. As Bowman ACJ, as he then was, noted in *Klotz*, pre-existing artwork that is traded in an existing market would potentially allow for evidence of comparable sales. However, the Appellants did not establish sufficient evidence of these sales. I am therefore not persuaded on this point that the appeals before me are distinguishable from the jurisprudence.

3) Positive Evidence of a pre-existing retail market

[73] I do not believe there was sufficient evidence to establish a pre-existing retail market. It appears to me there was a struggle by the appraisers to try and use this assertion to support their appraisals. As is following, I do not find either the appraisals by Yeomens or Rosoff as particularly credible.

4) Explanation for Donated Value Higher Than Price Actually Paid

[74] Although the participant experts did their best to explain why the donated value was higher than the price actually paid, I do not accept their evidence on that point. I refer again to the statement of Bowman ACJ, as he then was, in *Klotz* "…it is devoid of common sense and out of touch with ordinary commercial reality". It is as simple as that!

[75] For the above reasons, I find there is no significant difference between the appeals and the *Nash* and *Klotz* cases.

[76] A factor in applying the fair market value test is whether it was an open and unrestricted market. This was particularly important in the *Klotz* case as the Federal Court of Appeal at paragraph 4 stated as follows:

> The Tax Court Judge refused to accept the appraisal evidence of the taxpayer of the fair market value of the prints, on the basis that the appraiser had examined the wrong market. He held that the "magnitude of the mass market art donation program created its own market", and that the relevant market was not, as the taxpayer alleged, retail art galleries where pieces of art are sold individually.

[77] Further, in the *Nash* case, at paragraph 25, the Court stated:

> In this case, there was a market in which the specific groups of prints were traded. In 1997, CVI sold 35 out of 35 available groups, in 1998, 150 out of 155 available groups and in 1999, 298 out of 300 available groups. These sales indicate that there was a market for the specific groups of prints. Indeed, almost all the groups CVI had available for sale were sold. This was CVI's normal course of business. CVI and the taxpayers were dealing with each other at arm's length. There was no compulsion. CVI freely sold the groups and the taxpayers freely bought them. Contrary to Ms. Tropper's assertion, there was no evidence the market was not open. Approximately 480 transactions occurred over a three year period. There was no evidence of any qualification necessary to acquire prints from CVI or to donate them to the charities or universities.

5) *Henderson* Estate Test

a) Open and Unrestricted Market

[78] The simple limitations as to whom might be attracted to purchase or the limitations on the number of those selling art, i.e. lawyers, accountants or financial planners that were making the Artistic Program available, does not create or mean that it was a restricted market. Was the market open or closed? There was really no qualification for participation. The prices were communicated between the parties. There was no compulsion, no evidence of any particular qualification to acquire the art or to donate the art.

b) Art Assessed at Fair Market Value?

[79] In dealing with the key question of the fair market value of the art, the whole matter comes down to the credibility of the participant experts and their evidence. They were put forth to give evidence of the fair market value of the art at the time of their appraisals. Their credibility, of Yeomans and Rosoff, must be considered in detail.

[80] Did the Appellants provide reliable credible evidence as to fair market value of the art? The answer is no.

[81] The Respondent's counsel cross-examined both Yeomans and Rosoff extensively and effectively as participant experts on their appraisal reports.

[82] The Yeomans' report (Exhibit A-1, Volume 2, Tab 12) was dated as of February 28, 2000:

> (1) Yeomans acknowledged that her client was Artistic Ideas and that it was a complete appraisal. At page 431 it was noted that the report "is invalid if used for litigation purposes" yet Yeomans was not sure how to answer the question if the report is invalid now because it has been used for litigation purposes but she said that she stood by the report. When the report was prepared, it was not to be used for litigation purposes but now the report was presented to the Court for that very purpose, that is, litigation. Notwithstanding this obvious conflict, Yeomans asserted that she stood by the report even though it has been used for purposes contrary to her own report!
>
> (2) The Yeomans report noted that it was prepared using USPAP. Those standards were acknowledged by Yeomans as standards that applied to the report when prepared in 2000. The standards were identified as Exhibit R-11. In the standards there was a "Departure Rule" of which Yeomans was familiar, however, she was of the view it was in effect at the present time but was not in effect in 2000, and that it allowed for some departure from the standards requirements. It was noted however that there was no departure allowed to Rule 7-1, 7-2, 7-5, 8-1 and 8-2 and in fact there is an obligation under paragraph 8.2(*a*)(ix), 8.2(*b*)(ix), and 8.2(*c*)(ix) to clearly identify and explain any departure. No explanation was given by Yeomans for the departures from the USPAP.
>
> (3) When asked about what type of report it was, Yeomans advised that the report was not a "self-contained report" but rather a "summary report appraisal". There was no statement in the report that it was a summary report and not a self-contained appraisal. The report did not state what type of report it was. Yeomans subsequently changed her mind in evidence and said that it was a "self-contained report".

(4) In Exhibit A-1, Volume 1, Tab 9, page 232, the assigned use of the report was advisory only for Income Tax purposes. Yeomans knew that the program was for the purchase of art and donation of art. There was no mention that the appraisal was made for donation purposes and the report did not state that litigation was also the use of the report.

(5) The edition number of each piece of art identifies the piece of art, that is, the print that the appraisal applies to, but it does not say that the appraisal applied to a number of other prints.

(6) The report does not state that the appraisal was intended to apply to other prints not actually seen, or observed, by the appraiser.

(7) Yeomans was not aware of the ownership of the prints or the involvement of Sloan or Ro Galleries or Artistic Ideas. She knew a primary source for the art was Ro Galleries but the intended users would not be aware of the direct relationship between the suppliers, that is the art program, and one of the sources relied upon in the report for appraisal purposes.

(8) Yeomans was not aware of the ownership of the art at the time of its appraisal.

(9) Yeomans never spoke to the primary supplier of the art, Sloan and she never asked what Artistic Ideas had paid for the art, nor did she ask about the magnitude of the program or for any analysis of the donors with respect to the ultimate consumer.

(10) In looking at Exhibit R-12, The Standard 7-3B of the USPAP, Yeomans determined that the appropriate market is the determination of the appraiser depending upon where the property is used at. The standards required the appraiser to consider supply and demand, but there is no mention in the report of a flood of marketplace.

(11) Yeomans never sought, nor obtained, comparable sales for donation programs, or considered the fact that the art was for sale to the donor and then donated to the art charity.

(12) Yeomans was not aware of the roles of the various companies outsourced, nor was she aware that these properties were not sold in the

commercial galleries by the donors and she did not even know who the donors were.

(13) The report did not analyze the profitable legal and physical characteristics of the art as relevant to the purpose and the intended use of the appraisal.

(14) Yeomans noted that assemblage is not the same as aggregate value.

(15) Yeomans did not know the number of donors in the program nor the number of multiples donated into the program.

(16) Yeomans knew the purchase price of the art included shipping expenses, delivery costs of appraisals and finding a charity but this was not included in the report.

(17) Yeomans did not request any purchase documents.

(18) The report made no reference to agreements of purchase and sale.

(19) Yeomans did not know the number of multiple donations in the program and did not know Sloan had acquired the art.

[83] Notwithstanding all of the foregoing, Yeomans stood fast and felt that those multiple omissions on her part as a professional appraiser did not impact her opinion.

[84] I beg to differ with the view of Yeomans. The cross-examination of Yeomans was replete with hits to her credibility – it almost appeared like she was shell shocked when point after point of her report's shortcomings as noted were brought to bare. Of particular concern is the failure of Yeomans to live up to the performance standards of her profession as outlined by the USPAP. In short, Yeomans was a "hired gun". Yeomans crafted a report to make the client appear tax compliant- nothing more, nothing less. Yeomans had to shore up her report under cross-examination but it was too little too late. The report spoke for itself many years after it was completed and simply does not stand up to scrutiny. I find the report of Yeomans not complete, replete in its shortcomings and not compliant with the professional practice of her profession. It is unreliable and will be given very little, if any, weight by this Court.

[85] The other expert whose report was presented on a factual basis was Rosoff. He asserted that his report was prepared in accordance with the USPAP practices and procedures and his report followed the Code of Ethics of the American Society of Appraisers. He confirmed that in his view the Code of Ethics had been followed. A question was presented to him with respect to his report (Exhibit A-1, Volume 2, Tab 17), the appraisal of February 5, 2003, in relation to sources for the report. The effective date of the report was September 1, 2002 and it was noted that it did not contain a bibliography or a list of sources. In reading the report, the reader would not be aware of the sources which were relied upon in the report. Rosoff did not answer the question as to the sources, if any, or if the intended user of the report was to be aware of the sources. There was a question with respect to who was the intended user of the report and Rosoff advised that the intended user was Artistic Ideas. He knew the report would be provided to donors and charities and by extension it would be reasonable for the donor to get the report. Rosoff knew the donor would get the appraisal report but he could not say the same about charities. He noted that there was no reference to any extraordinary assumptions referred to in the report. He noted that the USPAP contained standard rules with respect to the appraisal standards and the rules are there to clarify and interpret the standards. And some rules are binding and some are specific but there was a Departure Rule which would allow the departure from specific rules rather than the binding rules.

[86] Rosoff noted that it was necessary to provide clear identification and explanation with respect to any departure from Rule 7 and that the summary report is governed by this particular rule. I found that Rosoff avoided answering questions to which there were obvious answers. For example, with respect to who was the intended user of the report, Rosoff stated that the intended user would not be known from the document as it was a summary report. But Artistic Ideas would have been the user. The reader would not know from reading the report that it was a summary report but Artistic Ideas knew that it was the second report and they wanted to make sure the first report (Yeomans report) was fair and reasonable.

[87] It was obvious who the intended user of the report was from the title of the report and the transmittal letter. What is important to the preparer of the report is reputation and credibility standards. Rosoff struggled with answers and avoided the obvious answers. He noted that there is a certain amount of kool-aid drinking in the USPAP and it was constantly changing. The organization was originally–created for real estate purposes and since then, has evolved with the changing rules to include personal property. When enquiring what is the purpose of having rules if they change all the time, he simply did not answer the question presented. Rosoff asserted the report was prepared for a price confirmation but this is not mentioned

anywhere in the report. There was also no analysis or reason to support the values in the report.

[88] Rosoff noted that the values were a snapshot of the activity at the time, but the fair market transactions did not reflect:

a. Distress sales; and

b. The fact that art sales are not open to everyone and were a non-arm's length transaction.

He knew the report was to be used for charitable contributions. He was of the view that so long as the information is meaningful and not misleading to the intended user you can put in whatever you want - credible results that are meaningful and not misleading. He also testified that if he had been told that the user was to be the CRA, the report would have looked totally different.

[89] I was not particularly impressed with the evidence given by Yeomans and Rosoff on their appraisals, done many, many years ago. Although they purported to be professional members of the American Society of Appraisers, they failed to live up to the standards and qualifications of the organization, or USPAP. They both just skated over USPAP and would not even acknowledge their mistakes. Rosoff in particular, attempted to avoid answering the obvious repeatedly. When the answers were obvious; he simply tried to bluster his way out of the presentation.

[90] It appears from the evidence that the appraisers deliberately turned away from other markets. At the same time, they claimed that they complied with the USPAP standards, but they did not comply with the USPAP standards. It is significant that both Yeomans and Rosoff purported to follow the USPAP standards and in their reports purported to certify that they followed the USPAP standards. But as noted earlier, they did not: (1) they did not refer to prior sales of the property; (2) there is no reference to providence; (3) there was multiples of the same print bought and dated; (4) there was no reference to the price paid by the donors; (5) the use of the art was not considered; and (6) no consideration was given to the impact of the flooded market place.

[91] It cannot be overlooked that the Ro Gallery was a source of much of the appraisal information used by Yeomans and Rosoff in assessing the fair market value of the art. Neither Yeomans nor Rosoff knew that the Ro Gallery was the

owner of much of the art which had been appraised and acquired by another, Sloan, and which was ultimately sold to the donors.

[92] Yeomans was also aware that she was required to analyze prior sales of the subject property that occurred within a reasonable and applicable period of time. This is particularly important because of the relationship between the Ro Gallery and those who sold the art to the donors in the first place. In *The Queen v Lavallee*, [1990] 1 SCR 852, the Court stated, at paragraph 84, in part, as follows:

> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point….

[93] All in all, I was not particularly impressed with the professionalism, nor the expertise of these particular appraisers. They may very well be knowledgeable with respect to the individual art or group pieces of art, but that expertise was not brought to bare in the preparation of the reports nor in the presentation of their evidence. As a result, I give very little weight to their overall evidence.

[94] What evidence is there before the Court with respect to the fair market value? The Respondent did not adduce any evidence before the Court on a positive basis on this point but relied upon their assumptions in their respective pleadings attached as Schedule A.

[95] The information extracted by the Respondent either through cross-examination of witnesses such as Sloan, Pearlman or Cornell plus transactional documents, as well as other documents, indicate that the fair market value of the art was most certainly not the fair market value presented by the Appellants.

c) Art Valued as Individual Pieces or as a Group?

[96] Given my conclusion on the fair market value argument, I do not believe to address this aspect of *Henderson*. I refer back to the statement of former Chief Justice Bowman in *Klotz*, *supra*, referred to in paragraph 67 hereof. The Appellants attempted to establish the art was appraised individually. I believe this was done solely for the purposes of documenting the tax shelter being sold to the public. The

fact of the matter was the appraisals really mean nothing. They are unreliable and not credible as I have found. The artwork was acquired in bulk, pedaled in bulk, sold in bulk, packaged in bulk and delivered in bulk – bulk being eleven (11) pieces at a time. The appraisals were window dressing at best.

VI. Conclusion

[97] On the whole of the evidence, I find that the Appellants have not met the burden of destroying the relevant assumptions relied upon by the Respondent. The cornerstone of the Appellants' case was the participant experts, Yeomans and Rosoff. I highly question their credibility as reviewed. I have therefore put little weight, if any, on their questionable fair market value of the art. I therefore dismiss the appeals, with costs, in favour of the Respondent and order that the Appellant, Ian Roher's matter be sent back for reassessment on the sole basis that capital gains claimed by Ian Roher for 2001, 2002 and 2003 taxation years be deleted and that the capital gains claimed by William Kaul for the taxation year of 2000 be deleted. A date will be fixed to have argument on costs forthwith.

Signed at Ottawa, Canada, this 18th day of January, 2019.

"E.P. Rossiter"

Rossiter C.J.

SCHEDULE "A"

Kaul Assumptions

15. In determining the appellant's tax liability for the 1998, 1999 and 2000 taxation years, the Minister made the following assumptions of fact:

Participation in the Artistic Ideas Donations Program

a) in 1998, 1999 and 2000 the appellant participated in an art donation program operated by Artistic Ideas Inc. ("Artistic");

b) Artistic is a corporation incorporated under the laws of Ontario;

c) Artistic's art donation program was marketed to Canadian taxpayers as a tax avoidance arrangement;

d) Artistic arranged for and provided statements of value for the prints purchased by the appellant (the "Statements");

e) the value of the prints, as set out in the Statements, exceeded the amount actually paid by the appellant by several times;

f) the Statements were prepared by Leslie Fink, Edith Yeomans and Charles T. Rosoff;

g) Artistic arranged for charities to accept the prints as donations and to issue donation receipts for the amounts set out in the Statements;

h) under the Artistic tax avoidance arrangement, taxpayers would purchase prints from a U.S. vendor through Artistic, donate the prints to charities as arranged by Artistic, receive charitable donation receipts for a value approximately three times higher than the taxpayers paid to acquire the art, and claim a tax credit based on the receipts (the "scheme");

i) the Artistic program began in 1996 and operated until at least 2001;

j) the vendor of the prints in 1998 and 1999 was Coleman Fine Arts;

k) the vendor of the prints in 2000 was Silver Fine Arts;

l) taxpayers who participated in the scheme typically paid up to $3,500 for a group of 11 prints in the 1996-1999 taxation years, and this arrangement continued until February 28, 2000; after February 28, 2000 taxpayers paid up to $3,900 for groups of varying sizes of prints;

m) in exchange for the amount paid for the groups of prints, the appellant received various services including: shipping for the art, storage of the art, finding a charity to accept the art, delivery of the art to that charity, arranging for an appraisal of the art for a value at least three times the price the appellant paid for the art, payment of a storage fee to the charity and the assurance that a donation receipt was issued to the appellant;

n) in his 1998, 1999 and 2000 taxation years, the appellant donated the prints to charities arranged by Artistic;

o) the charities issued donation receipts for the appellant's donations which reflected the amounts indicated in the Statements;

p) the appellant claimed a tax credit in respect of his donation of prints to the charities in his 1998, 1999 and 2000 taxation years (the "tax credit");

q) the appellant purchased the prints directly from Coleman Fine Arts in the 1998, 1999 and 2000 taxation years;

r) Coleman Fine Arts is a company incorporated in the state of California;

s) the amount set out on the charitable donation receipts exceeded the fair market value of the prints;

t) the fair market value of the prints at the time of the appellant's donation was no greater than the purchase price paid by the appellant;

The Donation of the Prints

1998

u) the cost of the prints to the appellant was no more than $7,000;

v) the groups purchased by the appellant included a total of 110 prints in the 1998 taxation year;

w) the appellant purchased the prints on December 17, 1998;

x) the appellant donated the prints on December 22, 1998;

y) the appellant retained 10 prints;

z) the remaining 100 prints were donated to the B'nai Brith Foundation ("B'nai Brith");

aa) the appellant obtained a receipt for $100,000 from B'nai Brith;

bb) the appellant submitted this receipt with his return of income for the 1998 taxation year;

cc) the appellant included $100,000 in respect of the prints he donated in calculating his total charitable gifts for the 1998 taxation year;

dd) the fair market value of the prints donated in 1998 was $7,000;

1999

ee) the cost of the prints to the appellant was no more than $7,000;

ff) the groups purchased by the appellant included a total of 110 prints in the 1999 taxation year;

gg) the appellant purchased the prints on December 15, 1999;

hh) the appellant donated the prints on December 3, 1999 and December 17, 1999;

ii) the appellant donated the prints to Regesh Family and Child Services ("Regesh"), Friends of Honduran Children ("Honduran Children"), Serpent River First Nation ("Serpent River") and Ballet Creole;

jj) the appellant obtained receipts in the following amounts:

i. $40,000 from Regesh;

ii. $30,000 from Honduran Children;

iii. $30,000 from Serpent River; and

iv. $10,000 from Ballet Creole;

kk) the appellant included $110,000 in respect of the prints he donated in calculating his total charitable gifts for the 1999 taxation year;

ll) the fair market value of the prints donated in 1999 was $7,700;

2000

mm) the cost of the prints to the appellant was no more than $44,694;

nn) the groups purchased by the appellant included a total of 271 prints in the 2000 taxation year;

oo) the appellant purchased the prints on February 24, 2000 and December 21, 2000;

pp) the appellant donated the prints in 2000;

qq) the appellant donated the prints to Regesh, Tel Aide Jewish Distress Line ("Tel Aide"), The ME Association of Ontario ("ME Association"), Honduran Children, Aladdin Children's Charity ("Aladdin"), Love Cry – The Street Kids Organization ("Love Cry"), The Hastings and Prince Edward County District School Board ("Hastings and Prince Edward County"), Don Mills Foundation for Senior Citizens ("Don Mills Foundation"), Univirus Research of

Canada ("Univirus") and Boys and Girls Clubs of Newfoundland and Labrador ("Boys and Girls Clubs");

rr) the appellant obtained receipts in the following amounts:

i. $10,000 from Regesh;

ii. $40,000 from Tel Aide;

iii. $30,000 and $85,778.76 from the ME Association;

iv. $30,000 from Honduran Children;

v. $85,778.76 from Aladdin;

vi. $85,778.76 from Love Cry;

vii. $64,334 from Hasting and Prince Edward County;

viii. $85,778.76 from Don Mills Foundation;

ix. $85,778.76 from Univirus; and

x. $85,778.76 from Boys and Girls Clubs;

ss) the appellant included $638,486 in respect of the prints he donated in calculating his total charitable gifts for the 2000 taxation year;

tt) the appellant carried forward a donation credit in the amount of $50,521 to his 2001 taxation year;

uu) the fair market value of the prints donated in 2000 was $44,694.

Roher Assumptions

16. In determining the appellant's tax liability for the 1998, 1999, 2000, 2001, 2002, 2003 and 2004 taxation years, the Minister made the following assumptions of fact:

Participation in the Artistic Ideas Donations Program

a) in the 1998, 1999, 2000, 2001, 2002, 2003 and 2004 taxation years, the appellant participated in an art donation program operated by Artistic Ideas Inc. ("Artistic");

b) Artistic is a corporation incorporated under the laws of Ontario;

c) Artistic's art donation program was marketed to Canadian taxpayers as a tax avoidance arrangement;

d) Artistic arranged for and provided statements of value for the prints purchased by the appellant (the "Statements");

e) the value of the prints, as set out in the Statements, exceeded the amount actually paid by the appellant by several times;

f) the Statements were prepared by Leslie Fink, Edith Yeomans and Charles T. Rosoff;

g) Artistic arranged for charities to accept the prints as donations and to issue donation receipts for the amounts set out in the Statements;

h) under the Artistic tax avoidance arrangement, taxpayers would purchase prints from a U.S. vendor through Artistic, donate the prints to charities as arranged by Artistic, receive charitable donation receipts for a value approximately three times higher than the taxpayers paid to acquire the art, and claim a tax credit based on the receipts (the "scheme");

i) the Artistic program began in 1998 and operated until at least 2001;

j) the vendor of the prints in 1998, 1999 and 2000 was Coleman Fine Arts;

k) the vendor of the prints in 2000, 2001 and 2002 was Silver Fine Arts;

l) taxpayers who participated in the scheme typically paid up to $3,500 for a group of 11 prints in the 1998-1999 taxation years, and this arrangement continued until February 28, 2000; after February 28, 2000 taxpayers paid up to $3,900 for groups of varying sizes of prints;

m) in exchange for the amount paid for the groups of prints, the appellant received various services including: shipping for the art, storage of the art, finding a charity to accept the art, delivery of the art to that charity, arranging for an appraisal of the art for a value at least three times the price the appellant paid for the art, payment of a storage fee to the charity and the assurance that a donation receipt was issued to the appellant;

n) in his 1998, 1999, 2000, 2001, 2002 and 2003 taxation years, the appellant donated the prints to charities arranged by Artistic;

o) the charities issued donation receipts for the appellant's donations which reflected the amounts indicated in the Statements;

p) the appellant claimed a tax credit in respect of his donation of prints to the charities in his 1998, 1999, 2000, 2001, 2002, 2003 and 2004 taxation years (the "tax credit");

q) the appellant purchased the prints directly from Coleman Fine Arts in the 1998, 1999 and 2000 taxation years;

r) the appellant purchased the prints directly from Silver Fine Arts in the 2000, 2001, 2002 and 2003 taxation years;

s) Coleman Fine Arts is a company incorporated in the state of California;

t) Silver Fine Arts is a company incorporated in the state of California;

u) the amount set out on the charitable donation receipts exceeded the fair market value of the prints;

v) the fair market value of the prints at the time of the appellant's donation was no greater than the purchase price paid by the appellant;

The Donation of the Prints

1998

w) the appellant paid $45,500 to purchase a group of 176 prints in the 1998 taxation year;

x) the appellant purchased the prints on December 24, 1998;

y) the appellant donated 160 prints on December 24, 1998;

z) the appellant retained 16 prints;

aa) the 160 prints were donated to The League for Human Rights/B'nai Brith ("B'nai Brith");

bb) the appellant obtained a receipt for $160,000 from B'nai Brith;

cc) the appellant included $160,000 in respect of the prints he donated in calculating his total charitable gifts for the 1998 taxation year;

dd) the fair market value of the prints donated in 1998 was $45,500;

1999

ee) the appellant paid $87,500 to purchase a group of 275 prints in the 1999 taxation year;

ff) the appellant purchased the prints on October 12, 1999;

gg) the appellant donated 266 prints on October 12, 1999;

hh) the appellant retained 9 prints;

ii) the 266 prints were donated to Parents Against Drugs ("PAD"), Friends of Honduran Children ("Honduran Children"), Tel-Aid Jewish

Distress Line ("Tel-Aid"), Ballet Creole and Regesh Family and Child Services ("Regesh");

jj) the appellant obtained receipts totalling $266,000:

kk) the appellant included $266,000 in respect of the prints he donated in calculating his total charitable gifts for the 1999 taxation year;

ll) the fair market value of the prints donated in 1999 was $87,500;

2000

mm) the appellant paid $70,000 to purchase a group of 220 prints in the 2000 taxation year;

nn) the appellant purchased the prints on February 22, 2000;

oo) the appellant donated the prints on February 22, 2000;

pp) the appellant donated 224 prints in the 2000 taxation year;

qq) 220 of the prints donated in the 2000 taxation year were acquired in that year, and the 4 additional prints were acquired in the 1999 taxation year;

rr) the appellant donated the prints to Regesh, Canadian Society for Yad Vashem ("Yad Vashem") and Univirus;

ss) the appellant obtained receipts in the following amounts:

i. $24,000 from Regesh;

ii. $70,000 from Yad Vashem; and

iii. $60,000 from Univirus;

tt) the appellant included $224,000 in respect of the prints he donated in calculating his total charitable gifts for the 2000 taxation year;

uu) the fair market value of the prints donated in 2000 was $70,000;

2001

vv) the appellant paid $94,162 to purchase a group of 233 prints in the 2001 taxation year;

ww) the appellant purchased the prints on May 11, 2001;

xx) the appellant donated the prints on May 14, 2001 and December 7, 2001;

yy) the appellant donated the 233 prints to Love Cry – The Street Kids Organization ("Love Cry"), National Children's Burn Society ("Burn Society"), Aladdin The Children's Charity ("Aladdin"), Yeshiva Gedola ("Yeshiva"), Univirus, ME Association of Canada ("ME Association"), Pride of Israel Synagogue ("Israel") and Congregation Ohr Penimi ("Ohr Penimi");

zz) the appellant obtained receipts in the following amounts:

i. $91,848 form Love Cry;

ii. $91,848 from Burn Society;

iii. $68,686 from Aladdin; and

iv. $68,866 from Yeshiva;

v. $68,886 from Univirus;

vi. $68,886 from ME Association;

vii. $136,868 from Pride of Israel; and

viii. $91,848 from Ohr Penimi;

aaa) the appellant included $650,318 in respect of the prints he donated in calculating his total charitable gifts for the 2001 taxation year;

bbb) the fair market value of the prints donated in 2001 was $94,162;

2002

ccc) the appellant paid $39,900 to purchase a group of 94 prints in the 2002 taxation year;

ddd) the appellant purchased the prints on October 10, 2002;

eee) the appellant donated the prints on October 10, 2002;

fff) the appellant donated 94 prints in 2002;

ggg) the appellant donated the 94 prints to Child Cyber Search ("Cyber Search"), Canadians Against Child Abuse ("CACA"), Our House and TOMA;

hhh) the appellant obtained receipts in the following amounts:

i. $90,082 from Cyber Search;

ii. $90,082 from CACA;

iii. $90,082 from Our House; and

iv. $90,082 from TOMA;

iii) the appellant included $360,329 in respect of the prints he donated in calculating his total charitable gifts for the 2002 taxation year, in addition to $60,605 carried forward from the 2001 taxation year; and

jjj) the fair market value of the prints donated in 2002 was $39,900;

2003

kkk) the appellant paid $46,875 to purchase a group of 250 prints in the 2003 taxation year;

lll) the appellant purchased the prints on October 14, 2003;

mmm) the appellant donated the prints on October 14, 2003;

nnn) the appellant donated 250 prints in 2003 taxation years to various charities;

ooo) the appellant obtained receipts with an aggregate appraised value of $586,168.80 in the 2003 taxation year;

ppp) the appellant included $569,271 in respect of the prints he donated in calculating his total charitable gifts for the 2003 taxation year;

qqq) the appellant carried forward $16,898 to his 2004 taxation year;

rrr) the fair market value of the prints donated in 2003 was $46,875;

2004

sss) the appellant included $16,898 in respect of the prints he donated in the 2003 taxation year; and

ttt) the fair market value of the prints donated in the 2004 taxation year was $0.

CITATION:	2019 TCC 17
COURT FILE NOs.:	2012-754(IT)G; 2013-1882(IT)G
STYLES OF CAUSE:	WILLIAM KAUL AND HER MAJESTY THE QUEEN IAN N. ROHER AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	December 7, 8, 12 and 13, 2017 and January 16, 2018
REASONS FOR JUDGMENT BY:	The Honourable Eugene P. Rossiter, Chief Justice
DATE OF JUDGMENT:	January 18, 2019

APPEARANCES:

Counsel for the Appellant:	Irving Marks
Counsel for the Respondent:	Jenna L. Clark

COUNSEL OF RECORD:

For the Appellant:

Name:	Irving Marks
Firm:	Robins Appleby LLP

For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada