BEWARE OF TAXPAYERS BEARING GIFTS

A CRITIQUE OF MEASURES IN THE INCOME TAX ACT TO PREVENT TAX AVOIDANCE THROUGH IN-KIND DONATIONS OF PROPERTY

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The tax system encourages charitable gifts with generous tax incentives. However, these rules have been easily abused, particularly for in-kind gifts where valuation can be inflated to maximize the credit to the taxpayer. Such abuse is costly to the government, and to the integrity of the tax system overall. The most prevalent abuse arises with assets whose value is easily manipulated (such as art and cultural property) or transacted in non-arm's length situations (such as private shares). While stricter and more complex anti-avoidance measures have been implemented to discourage taxpayers from abusing charitable credits, Parliament has also expanded the types of gifts which may qualify for preferential treatment. There is room for improvement in the current system.

Le système d'imposition encourage les dons de bienfaisance par de généreux incitatifs fiscaux. Toutefois, ces règles conduisent facilement à des abus, surtout pour les dons en nature, dont le contribuable peut gonfler la valeur pour maximiser son crédit. Ces abus coûtent cher au gouvernement et portent atteinte à l'intégrité du système fiscal. Dans la plupart des cas, il s'agit de biens dont la valeur est facilement manipulable (œuvres d'art ou biens culturels) ou échangeable dans des conditions de non-concurrence (actions privées). Bien qu'il y ait eu resserrement et complexification des mesures de contre-évasion afin de dissuader les contribuables de commettre ce genre d'abus, le Parlement a allongé la liste des types de dons pouvant constituer un traitement de faveur. Le système actuel laisse place à l'amélioration.

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"***(T)he tax lawyer can make a philanthropist of the meanest of men.***"[1]

1. Introduction

A long-standing tenet in tax law is that a taxpayer may arrange his or her affairs to minimize his or her tax payable.[2] One mechanism by which a taxpayer may reduce his or her tax payable in the *Income Tax Act*[3] is with tax credits, such as those for donations to charity. Charitable giving is widely regarded as beneficial to society in general, and so it continues to be incentivized through the tax system. However, charitable giving is circumscribed by strict rules to ensure the intended tax result (i.e.,

[1] Rod Watson, "Charity and the Canadian Income Tax: An Erratic History" (1985) 5:1 Philanthropist J 1.

[2] While a full review of this principle is beyond the scope of this paper, the oft-cited reference in Canada for this belief is: *Inland Revenue Commissioners v Duke of Westminster* (1935), [1936] AC 1 (HL).

[3] RSC 1985, c 1 (5th Supp) [the *Act*].

reduction in tax) is only given to taxpayers who are not trying to "game" the system.

It seems counterintuitive that a donation could be used for tax avoidance. After all, to qualify for a credit, the taxpayer must give something away. However, it is under this veil that taxpayers have entered complex transactions, expecting the smoke and mirrors of their generosity will detract from the purpose behind the transactions, which is usually an inflated donation credit which gives the taxpayers a benefit in excess of their donation. Certain types of gifts are more susceptible to such tax avoidance than others. This is because the nature of the asset being donated permits subjectivity in its valuation (such as art or other cultural property), or because the asset is typically transacted with non-arm's length parties (such as private company shares). Avoidance of tax can be achieved by exploiting these attributes unless anti-avoidance provisions are implemented. Parliament has enacted measures in the *Act* that try to achieve a fine balance between maximizing fiscal support for charities with minimizing the potential for unwarranted avoidance transactions; unfortunately, the safeguards are cumbersome and complex, and keep the door open for further avoidance.

In this paper, I review the mechanisms in place to limit the avoidance of tax through charitable giving incentives. Part II reviews the history and policy behind the charitable gift credit, while Part III provides an overview of how the credit is calculated. Part IV will review the guardrails in the *Act* to ensure that only gifts that enrich appropriate charities are recognized, for the appropriate amount, and at the appropriate time. Special rules pertaining to certain in-kind gifts, namely cultural property and non-qualifying securities, will be reviewed in detail, as well as how the "fair market value" of these gifts is determined. The anti-avoidance rules that have been implemented in recent years are reviewed as well. Part V looks forward to the future of charitable giving and what new roadblocks Parliament may encounter while policing donations of digital assets.

2. A look back: the history and policy goals behind charitable tax incentives

Incentives for charitable giving and special treatment of charities have been in place since the *Income Tax War Act*[4] was enacted in 1917 as a measure to raise revenue for the war. Deductions were permitted from income even at that time for donations to certain patriotic and war funds approved by

4 RSC 1927, c 97.

the Minister.[5] Over the next half century, the deductions were repealed and reinstated, limits were slowly increased, and eventually in 1988, the deduction for individuals was converted to the current charitable credit.

Tax credits are typically used to achieve objectives other than the collection of income tax from taxpayers, including the promotion of behaviour viewed as beneficial to society at large and the economy. One theory behind these incentives, commonly referred to as "tax expenditures", is that credits are simply another mechanism of government spending, and the measurement of how these incentives are used can reveal the impact that indirect government spending has on social programs.[6]

Charitable giving is one of the activities promoted through tax expenditures, and the cost to the government is high. In 2018 (the most recent year for which data was available at the time this paper was drafted), about 5.2 million individuals, 3000 trusts and 98,400 corporations claimed the credit.[7] The projected cost of the credit in 2021 is $3.24 billion for individuals and $72 million for corporations.[8] Given the cost of foregone revenue, the government must be confident that the credit is claimed in appropriate situations to achieve their policy goals of supporting charities to meet Canadians' needs, subsidizing the work done by charities and allowing Canadians to choose which causes they wish to support.[9]

The *Act* is always evolving in reaction to the creativity of taxpayers in interpreting its provisions and finding unintended interpretations and loopholes. One mechanism in which donation credits have been misused quite extensively is with in-kind donations, which have long been recognized and afforded the same treatment as cash gifts. They have also been a regular topic of discussion in the tax literature, receiving special

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5 *Ibid*, s 3(1)(c). See also Robert Easton Burns, "The Income War Tax Act, 1917: A Digest" (1917) at 8-9, online (pdf): *Wartime Canada* <wartimecanada.ca> [perma.cc/6M9U-TND5].

6 For example, see Stanley S Surrey, *Pathways to Reform: The Concept of Tax Expenditures* (Cambridge: Harvard University Press, 1973). One study showed that revenue foregone from tax expenditures is almost equivalent to the revenue collected in income tax; in other words, if tax credits were eliminated, the government might almost double its revenue. David Macdonald, "Out of the Shadows: Shining a light on Canada's unequal distribution of federal tax expenditures" (November 2016) at 27, online (pdf): *Canadian Centre for Policy Alternatives* <policyalternatives.ca> [perma.cc/G37J-JMGV].

7 Canada, Department of Finance, *Report on Federal Tax Expenditures—Concepts, Estimates and Evaluations 2021* (Ottawa: Her Majesty the Queen in Right of Canada, 2021) at 101, 110, online: <www.canada.ca/en/department-finance> [2021 Tax Expenditures].

8 *Ibid* at 101, 111.

9 *Ibid* at 100. See also Jinyan Li, Joanne Magee & J Scott Wilkie, *Principles of Canadian Income Tax Law*, 9th ed (Toronto: Thomson Reuters, 2017) at 383.

mention in the discussion on the comprehensive tax base that was the subject of the Carter Commission in 1966.[10]

Significant amendments were implemented into the *Act* a decade later to carve out a new category of assets, known as "cultural property", which would receive special recognition and treatment when sold or donated to cultural institutions. These amendments achieved a new objective of the government that arose out of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)[11] which mandates State protection of cultural property against dangers of theft, excavation and export from its borders and national and international cooperation of States to respect all nations' cultural heritage.

The Canadian government recognized the importance of adhering to these principles and in declaring its intention to join the UNESCO Convention, set out to create a system of laws for the protection of cultural property that would retain items within the country that are important to the national heritage, monitor the import and export of cultural property, incentivize people to voluntarily comply with the laws and carry out the cultural property laws in Canada in a manner respectful to the interests of other countries.[12] Thus, the *Cultural Property Export and Import Act*[13] was enacted to address Canada's commitment to these principles and created a new agency, the Canadian Cultural Property Export Review Board[14] to carry out this regime and review export permits for cultural property,[15] determine the amount of a fair cash offer to purchase cultural property[16] and certify cultural property for income tax purposes.[17] The

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10 Canada, *Report of the Royal Commission on Taxation*, vol 1 (Ottawa: Queen's Printer, 1966) (Chair: Kenneth Le M Carter), online (pdf): <publications.gc.ca> [perma.cc/JA3Q-NMW3].

11 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership or Cultural Property*, 14 November 1970, 823 UNTS 231 (1970) [UNESCO Convention].

12 Duncan Cameron, *An Introduction to the Cultural Property Export and Import Act: a report* (Ottawa: Department of Communications, 1980).

13 RSC 1985, c C51 [*CPEIA*].

14 *Ibid*, s 18.

15 *Ibid*, s 29.

16 *Ibid*, s 30.

17 *Ibid* and CRA Form T871. A review of the first two functions of the The Canadian Cultural Property Export Review Board [CCPERB] is beyond the scope of this paper. For an overview of the CPEIA, as well as other related regulations and legislation, see Memorandum D19-4-1 from Canada Border Services Agency (10 January 2022) online (pdf): *Canada Border Services Agency* <www.cbsa-asfc.gc.ca> [perma.cc/G3W4-AQ6D]. Also see Steven Nemetz, "Gifting Cultural Property in Canada: Testing a Tax Expenditure" (2007) 85:3 Can Bar Rev 457 at 464-470.

Act was amended at the same time to define cultural property and afford it preferential treatment when sold or donated to certain institutions. The amendments also confirm the authority of CCPERB and the processes set out in the *CPEIA* to administer the certification of cultural property for tax purposes.[18] The CCPERB provides a valuable third-party oversight function in the cultural property program, but the potential for abuse of the generous tax treatment of cultural property donations persists.[19]

Following the enactment of the cultural property rules, a number of "buy low, donate high" donation programs emerged where taxpayers would purchase items[20] from the program at a steep discount and then donate these items to predetermined charities which provided donation receipts at a purported fair market value of the product, which was always significantly higher than the cost to the taxpayers.[21] Other arrangements also arose where taxpayers would make "leveraged donations" to charities where, in exchange for a donation, the taxpayer would receive an interest free loan from the charity for most of the amount donated.[22] Parliament eventually added charitable donation schemes to the rules regarding "tax shelters"; however, cultural property was specifically exempt from these rules until recently.

It was in this policy climate that the scope of the charitable giving credit was expanded yet again in 1997 to extend preferential treatment to gifts of securities from a corporation where the shares are publicly traded on a designated stock exchange, which was further expanded in 2006 when these in-kind donations received a nil capital gain inclusion. The cost of foregone revenue arising out of this tax treatment of publicly traded securities is high, estimated to be $340,000,000 in 2021.[23] However, the preferential treatment of publicly traded securities is justified on the grounds that there is little risk of manipulation of their price for donation

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18 *Art Gallery of Ontario v Canada (Cultural Property Export Review Board)*, [1994] 3 FC 691 at 699, 80 FTR 231 (TD) reviews the scheme of *CPEIA* and *ITA*.

19 The donor of a gift of cultural property receives a nil capital gain inclusion as well as a credit against up to 100% of their income, which is far more generous than other charitable gifts, as discussed below.

20 Typically art, but other assets as well, such as medical supplies or computer software.

21 Some examples of these early art tax shelters include *Klotz v R*, 2004 TCC 147 [*Klotz*] and *Nash v Canada*, 2005 FCA 386 [*Nash*], as discussed elsewhere in this paper. There are also cases involving tax shelters promoting toothbrushes and school supplies (*Lockie v R*, 2010 TCC 142 [*Lockie*]) and other assets.

22 Some of the key cases in these leveraged donation schemes include: *Markou v Her Majesty The Queen*, 2019 FCA 299; *Kossow v R*, 2013 FCA 283 [*Kossow]*; *Berg v TR*, 2012 TCC 406 [*Berg*].

23 2021 Tax Expenditures, *supra* note 7 at 101.

purposes, as the listing of the shares on a stock exchange provides a relatively clear indicator of the fair market value of the shares. Also, their in-kind donations increased dramatically upon the introduction of the elimination of capital gains on their donation, so it appears their treatment is helping further the policy goals behind charitable giving.[24]

The same treatment of securities does not, however, extend to private company shares.[25] Instead, the 1997 Budget proposed penalties on the donee charity for accepting securities from a taxpayer with whom the charity does not deal with at arm's length.[26] The legislation that was implemented removed the penalty from the charity and imposed restrictions on the donor. The historical hesitation in rejecting donations of private shares lies in the uncertainty in their valuation, given the parties involved tend to not be operating at arm's length.[27] One of the concerns with donations of these assets is that the donor should not receive the benefit of the charitable credit until the charity receives the benefit of the property that has been donated, which is not objectively ascertainable until private shares are redeemed with an arm's length party in a reasonable period of time.[28]

Nevertheless, there have been multiple recommendations that capital gains be eliminated on the donation of private company shares. For example, the 2015 Federal Budget made such a proposal, but the details were not released until later in the year and an invitation for feedback was made,[29] which was applauded by many in the charitable industry[30] but spurned by others.[31] These measures were ultimately

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24 However, see David Duff, "Special Federal Tax Assistance for Charitable Donations of Publicly Traded Securities: A Tax Expenditure Analysis" (2003) 51:2 Can Tax J 925 at 933.

25 The *Act*, *supra* note 3, s 40(1.01).

26 Canada, Department of Finance, *Building the Future for Canadians Budget 1997* (Ottawa: Her Majesty the Queen in Right of Canada, 1997) at 200-201, online (pdf): <www.budget.gc.ca> [perma.cc/A54A-DM6Y] [1997 Budget].

27 *Remai Estate v R*, 2009 FCA 340 at para 56 [*Remai*]; *Odette Estate v The Queen*, 2021 TCC 65 at para 53 [*Odette*].

28 Canada, Department of Finance, *The Next Phase of Canada's Economic Action Plan A Low-Tax Plan for Jobs and Growth* (Ottawa: Her Majesty the Queen in Right of Canada, 2011) at 299, online (pdf): <www.budget.gc.ca> [perma.cc/3N79-BN5P].

29 Canada, Department of Finance, *Strong Leadership: A Balanced-Budget, Low-Tax Plan for Jobs, Growth and Security* (Ottawa: Her Majesty the Queen in Right of Canada, 2015), at 270, online (pdf): <www.budget.gc.ca> [perma.cc/W8A7-HSL5].

30 For example, Malcolm Burrows, "Donations involving Private Company Shares & Real Estate" (25 September 2015), online: *All About Estates* <allaboutestates.ca> [perma.cc/A8YA-8TG3].

31 Neil Brooks notes these proposed changes would further bias the charitable tax credit in favour of the wealthiest taxpayers: "Policy Forum: The Case Against Boutique Tax Credits and Similar Tax Expenditures" (2016) 64:1 Can Tax J 65 at 110-111.

not implemented. Most recently, the House of Commons Committee Report filed February 21, 2021, recommended eliminating capital gains on donations of private company shares and real property.[32] However, the Budget once again did not include the requested changes to the *Act*.[33] Such a change would obviously be welcome by charitable institutions and taxpayers, but given the expanding debt of the federal government, particularly given the pandemic response, and the existing challenges in policing the charitable donation credit, it is unlikely this preferential treatment will be granted to private shares anytime soon.

3. Calculation of the charitable tax credit

A) Gifts by individuals

An individual taxpayer may, in calculating his or her tax payable in a taxation year, claim a non-refundable credit determined by the taxpayer's total gifts, which include total charitable gifts, total cultural gifts and total ecological gifts, for the year.[34] However, the calculation rules are intricate and exceedingly wordy, with even noted tax scholars daring their readers to sit and read the provisions themselves.[35]

The value of the credit depends on the value of the eligible amount of the gift and the taxpayer's total taxable income. Gifts at $200 or less are calculated at the lowest personal tax rate which, at the federal rate, is 15%.[36] Gifts over $200 are taxed at the highest federal rate at 29% if the taxable income of the taxpayer does not exceed the threshold amount set out in paragraph 117(2)(e), being the amount of $200,000 for 2016, indexed to inflation thereafter, plus the highest applicable provincial rate.[37] However, if the taxpayer's total taxable income for the year is

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32 House of Commons, *Investing in Tomorrow: Canadian Priorities for Economic Growth and Recovery: Report of the Standing Committee on Finance* (February 2021) (Chair: Hon Wayne Easter), at 11, Recommendation #56, online (pdf): <www.ourcommons.ca> [perma.cc/G2J4-LTE6].

33 Canada, Department of Finance, *2021 Budget, A Recovery Plan for Jobs, Growth, and Resilience*, (Ottawa: Her Majesty the Queen in Right of Canada, 2021) online (pdf): <www.budget.gc.ca> [https://perma.cc/P6CD-JVRJ] [2021 Budget].

34 Pursuant to the definitions set out the *Act, supra* note 3, ss 110.1(1), 118.1(1). Note that gifts of cultural property will be reviewed in detail later in this paper. Ecological gifts will not be reviewed in any detail.

35 See for example: Arthur Drache, "The Complex New Charitable Tax Credit Provisions" (8 December 2015), online: *Drache Aptowitzer LLP* <drache.ca> [perma.cc/26A6-C5CC].

36 While the provincial rates vary from 4.00% in Nunavut to 20.00% in Quebec.

37 14.05% in Northwest Territories to 24% in Quebec. Note that the provincial rates in Ontario and Alberta differ from this general rule. All provincial income tax rates can be found at Canada, "Income tax rates for individuals—current and previous years"

greater than the threshold amount, and the taxpayer has income against which the credit may be offset, then any gifts over $200 are taxed at the individual's highest marginal tax rate.[38]

The credit may be claimed against up to 75% of an individual's taxable income for the year for the eligible amount of total charitable gifts, but up to 100% of the eligible amount of total cultural and ecological gifts. The limit is increased by 25% of the taxable capital gains arising on donations of appreciated capital property and capital cost allowance recapture from donations of depreciable capital property. The eligible amount of the total gifts made by the taxpayer may be credited in the taxation year in which the gift is made or carried forward to the next 5 taxation years.[39] Credits carried forward from a previous year must be used prior to credits earned later.[40]

Similar rules apply to gifts made by inter vivos trusts. The credit for a gift made by a trust may be allocated among the year in which the gift is made or carried forward for an additional five years.[41] However, if a gift is directed from a spousal, alter-ego, or joint partner trust on the death of the beneficiary whose death triggers the final year of the trust,[42] the credit for the gift may be claimed in the final return of said trust if the gift is made on or before the trust's filing due date for the year.[43]

The rules applying to testamentary gifts are more complex. Gifts arising because of the death of a taxpayer that occur after 2015,[44] directed by the

(18 January 2021), online: *Government of Canada* <www.canada.ca/en/revenue-agency>. This document shows that the provincial tax rate on the first $200 of gifts in Ontario is 5.05% while the rate on amount exceeding $200 is 11.16%, plus a two-tier surtax on the provincial rates payable.

38 Including graduated rate estates and qualified disability trusts as defined in s 122(3). Note that the applicable tax rate at this tier is equal to the highest combined federal and provincial tax rates. However, in Ontario, the combined credit is only equal to 50.41%, versus the combined highest marginal tax rate of 53.53%. All rates applying to the charitable donation credit are found at Canada, "Charitable donation tax credit rates" (24 January 2017), online: *Government of Canada* <www.canada.ca/en/revenue-agency>.

39 The *Act*, *supra* note 3, s 118.1(3) for individuals.

40 *Ibid*, s 118.1(2.1).

41 *Ibid*, s 118.1(1)(c)(ii)(A) "total charitable gifts".

42 Being the settlor's spouse in the case of a spousal trust, the settlor in the case of an alter-ego trust, and the settlor or the settlor's spouse in the case of a joint partner trust.

43 Which is 90 days from the death of trust's year end. See the *Act*, *supra* note 3, ss 118.1(1)(c)(ii)(C), 104(13.4).

44 Before 2016, the rules deemed gifts arising as a consequence of death to be made immediately before death and so would be claimed in the deceased's terminal return or prior year's return. This result was beneficial to offset the deemed disposition of the taxpayer's assets that occurs immediately before death: *ibid*, s 70(5). The surviving spouse

deceased taxpayer's will,[45] or via beneficiary designations for insurance policies[46] or registered products[47] are deemed by subsection 118.1(5) to be made by the deceased taxpayer's estate at the time the property which is the subject of the gift has been transferred to the qualified donee.[48] The rules dealing with testamentary gifts permit the allocation of the credit among various taxation years of the estate or the last two taxation years of the deceased taxpayer, depending on whether the estate qualifies as a "graduated rate estate" or not.[49]

As noted above, gifts of cultural property and publicly traded securities that are donated in-kind receive an additional incentive for donations. Any capital gain arising on the value of cultural or ecological property[50] or publicly traded securities[51] at the time of donation is deemed to be nil so there is no capital gain tax to be paid on the donation. Gifts of cultural and ecological property can also be credited against up to 100% of a taxpayer's income in the year. However, a gift of a non-qualifying security to a qualified donee is deemed to be nil pursuant to paragraph 118.1(13)(a) unless it stops being a "non-qualifying security", or it meets the definition of an "excepted gift" under subsection 118.1(19). Any capital gain that is deemed to be realized on the making of the gift of the non-qualifying security must be included in the income of the donor.[52]

If a gift of cultural property is made by the artist or the artist's estate directly,[53] then the artist or his or her estate is deemed to receive proceeds of disposition equal to the cost of the art and so the artist cannot claim either a business profit or loss for the work. However, the fair market value for the purpose of the donation credit continues to be the value as determined by CCPERB.[54]

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was also able to claim any unused credits, but unused credits could not be used by the estate.

45 The *Act*, *supra* note 3, s 118.1(4.1)(c).

46 *Ibid*, ss 118.1(15.2)(a), (4.1)(b). Note that these sections and the donation credit do not apply if the qualified donee is the policyholder.

47 *Ibid*, ss 118.1(15.2)(b), (4.1)(b).

48 *Ibid*, s 118.1(5); this rule is subject to the rules regarding non-qualifying securities at s 118.1(13), discussed below.

49 *Ibid*, s 248(1) definition of graduated rate estate, s 118.1 "total charitable gifts" and "total gifts", and ss 118.1(4)-(5.2).

50 *Ibid*, s 39(1)(a)(i.1): cultural property has no capital gains inclusion despite ss 69(1), 70(5).

51 *Ibid*, s 38(a.1).

52 *Ibid*, s 40(1.01).

53 Or received by a beneficiary of an estate: *ibid,* ss 118.1(7)(b), 70(3).

54 However, if the donated work is not certified as "cultural property", the artist may designate an amount between the cost of the work and its fair market value for the purpose of a donation credit and income inclusion for the sale of inventory of the artist.

B) Gifts by corporations

Corporations do not receive a credit for gifts to qualified donees. The *Act* instead provides for a deduction for the "eligible amounts" of charitable gifts made to qualified donees against up to 75% of income earned by the corporation in the year. However, the limit is increased by 25% of the taxable capital gains arising on donations of appreciated capital property and capital cost allowance recapture from donations of depreciable capital property.[55] Similar to gifts for individuals, gifts of cultural or ecological property are not subject to these income restrictions and can be applied against up to 100% of income. The same carry forward rules and capital gains exemptions apply as well.

4. The safeguards of the donation credit

The credit, summarized above, is calculated based on the eligible amount of all gifts made to a qualified donee in a taxation year. This sounds simple enough, but many terms are undefined and there is a complex web of measures in place to minimize avoidance transactions, some of which are difficult to comprehend. These component elements are reviewed in turn.

A) "Qualified donee"

The first safeguard of the credit is the regulation of which entities may receive a donation. Unlike other terms related to the charitable gift credit, a "qualified donee" of a gift is comparably easy to define and determine from the facts. The term is defined at subsection 149.1(1) as including registered charities[56] and other entities. Registered charities can be categorized as either a charitable organization or a charitable foundation, the latter of which can be public or private. A charitable organization is an organization which may or may not be incorporated, and which is constituted and operated exclusively for charitable purposes; its resources are devoted to charitable activities carried on by the organization; no income of the charitable organization may be used for the personal benefit of any proprietor, member, shareholder, trustee, or settlor;[57] and

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The same designation is made in the terminal return for a deceased artist who has similarly donated the work via will; the estate is deemed to have received the work at the same value. *Ibid*, s 118.1(7.1)(b) and the detailed overview of the tax treatment of an artist's inventory of work at Canada Revenue Agency, "Income Tax Folio S4-F14-C1, Artists and Writers" (11 January 2021), online: *Government of Canada* <www.canada.ca/en/revenue-agency>.

[55] The *Act*, *supra* note 3, ss 110.1(1), 248(31).

[56] *Ibid, d*efined at s 248(1), although the definitions of "charitable organization", "public foundation" and "private foundation" are found at s 149.1(1).

[57] Although this restriction does not refer to salaries or reimbursements of employees.

the organization must be arm's length and not be controlled by any major donors. This last criterion requires at least half of the directors, trustees and other officials to be at arm's length with each other and donors who have contributed at least 50% of the capital. A list of all registered charities can be found online.[58]

Charitable foundations are defined at subsection 149.1(1). Unlike registered charities, a foundation may not be an unincorporated association. A foundation's constituting documents may permit charitable activities but typically a foundation is used to make gifts to other qualified donees. A foundation will be considered a "public foundation" if it meets the same arm's length and control tests as for registered charities. A "private foundation" is a foundation that does not meet the arm's length or control tests of a public foundation. Categorization of an entity as a "private foundation" will have implications for certain gifts of non-qualifying securities, as discussed below.

Other entities that may be "qualified donees" include a municipality or a public body performing government functions, a university outside Canada which normally includes Canadian students, certain housing corporations,[59] certain foreign charities[60] and a journalism organization or Canadian amateur athletic association, all of which must be registered with CRA. Qualified donees which do not require registration include Her Majesty in right of Canada or a province, the United Nations, or an agency of the United Nations.

The rules governing charities are mainly in section 149.1 but are also found elsewhere in the *Act* and the Regulations. The registration process[61] is critical to protect both taxpayers, so they donate gifts to institutions that serve the public and which can properly issue them a charitable receipt for donations, but also to protect the overall integrity of the charitable donation scheme in the *Act*. However, a full review of charitable activities and registration requirements of charities is beyond the scope of this paper.[62]

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58 Canada Revenue Agency, "List of charities and certain other qualified donees—basic search" (10 July 2020), online: *Government of Canada* <www.canada.ca/en/revenue-agency>.

59 That is resident in Canada and exempt from tax because of the *Act*, *supra* note 3, s 149(1)(i), and that has applied for registration.

60 Foreign charities that have applied for registration under *ibid,* s 149.1(26).

61 The Minister may register charities under *ibid*, s 149.1(6.3). Their status as a qualified donee begins once their notice of registration has been sent.

62 A detailed overview can be found in William Innes & Patrick Boyle, *Charities, Non-Profits and Philanthropy Under the Income Tax Act,* 1st ed (Toronto: CCH Canadian Limited, 2006).

Gifts of cultural property must be made to an institution or public authority in Canada that is designated under subsection 32(2) of the *CPEIA* and is also a registered charity.[63] These terms are defined at section 2 of the *CPEIA*.[64] A list of all designated institutions and public authorities can be found online.[65] However, the donee of a cultural property gift must be designated by the Minister under subsection 32(2) of the *CPEIA* prior to a donation being made in order for the gift to qualify as a gift of "cultural property" under the *Act*. In *Williamson v Canada (AG)*[66] a taxpayer had donated historically significant personal property items to the Fort Saskatchewan Historical Society, but at the time of donation, the Society was not a designated institution. The Society subsequently sought to be designated, but the property which was the subject of the donation in question was denied certification. The Federal Court interpreted the provisions dealing with "designated institutions" by considering the ordinary meaning of the word "designated" along with the intention of Parliament and the scheme and object of the *Act*.[67] The verb tense chosen in subsection 32(1) of the *CPEIA* is consistent with the overall scheme in subsections 32(2) and (3), as well as the relevant provisions in the *Act*, that require the designation of the institution before a gift is made.[68]

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63 Institutions that wish to be designated can determine in advance if they might fit the criteria with reference to the CCPERB, "Designation: Self-Assessment Tool—Movable Cultural Property" (24 November 2017), online: *Government of Canada* <www.canada.ca>.

64 An "institution" is "an institution that is publicly owned and is operated solely for the benefit of the public, that is established for educational or cultural purposes and that conserves objects and exhibits them or otherwise makes them available to the public". A "public authority", meanwhile, refers to "Her Majesty in right of Canada or a province, an agent of Her Majesty in either such right, a municipality in Canada, a municipal or public body performing a function of government in Canada or a corporation performing a function or duty on behalf of Her Majesty in right of Canada or a province": *CPEIA*, *supra* note 13, s 2.

65 CCPERB, "Designation organizations—Movable Cultural Property" (5 December 2019), online: *Government of Canada* <www.canada.ca>.

66 2005 FC 954 [*Williamson*].

67 *Ibid* at para 17, citing *Rizzo & Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27, 154 DLR (4th) 193 [*Rizzo*].

68 As noted above, the words in *CPEIA*, *supra* note 13, s 32(1) were also chosen carefully: the property for which certification is sought is described in the subsection as property which "a person disposes or proposes to dispose", but the recipient of such property is described as "an institution, or a public authority designated" [emphasis added]. This verb tense makes it clear that the institution must be designated at the time the property is donated. See discussion *Williamson*, *supra* note 66 at paras 18-21 as well as the description of the institutions as "designated under s 32(2)" [emphasis added] in each of ss 39(1)(a), 110.1(1)(c) and 118.1(1) definition of "cultural gift" (b): the *Act*, *supra* note 3. To find otherwise would have gone against the overall scheme in the *Act* that is clearly noted with the use of the past tense.

Institutions which receive gifts of cultural property are incentivized to hold onto the objects which have been donated. Ordinarily, designated institutions, much like other charities, are exempt from income tax. However, an institution or public authority which disposes of cultural property within 10 years after the object was transferred to it[69] shall pay a tax liable to 30% of the object's fair market value at the time of disposition unless the object is sold to another designated institution or public authority.[70]

B) "Gift"

A "gift" is not defined in the *Act*. The caselaw remains somewhat divided on how the elements of what makes a "gift" are interpreted,[71] but in every situation, the facts surrounding the "gift" must be reviewed and the provisions must be read in context and with a meaning that is harmonious with the scheme of the *Act*, its object, and the intention of Parliament.[72] Many commentators have suggested that a defined term for "gift" in the *Act* would prevent much litigation.[73]

Nevertheless, a gift for tax purposes is determined with reference to its ordinary, private law meaning, which is generally accepted as a voluntary transfer of property for which there is no consideration to the donor.[74] The common law requirements for a "gift" to be found are delivery of the item, acceptance by the donee and intention to make a gift by the donor.[75] However, the term "gift" is not used in isolation in the *Act*. It is found for our purposes in the context of charitable donations, and

69 And thus received nil capital gain on gifts of cultural property: the *Act*, *supra* note 3, s 39(1)(a)(i.1).

70 *CPEIA*, *supra* note 13, s 32(3); the *Act*, *supra* note 3, s 207.3.

71 However, a full review of the tensions in the caselaw over what constitutes a "gift" is beyond the scope of this paper. A comprehensive overview of the concept of gift in the common law, civil law, and how it has been interpreted for the purpose of the *Act* can be found at Kathryn Chan, "The Perils of Federalizing the Common Law: A Case Study of the ITA Gift Concept" (2017) 50:3 UBC L Rev 579 and Adam Parachin, "Reforming the Meaning of "Charitable Gift": The Case for an Alternative to Split Receipting" (2009) 57:4 Can Tax J 787.

72 *Rizzo*, *supra* note 67.

73 For example, see Adam Parachin, "Funding Charities Through Tax Law: When Should a Donation Qualify for Donation Incentives?" (2012) 3:1 Can J Nonprofit & Soc Economy Research 57.

74 *Canada v Zandstra*, [1974] 2 FC 254 at 262, 74 DTC 6416. See also *The Queen v Friedberg* (1991), [1992] 1 CTC 1, 92 DTC 6031 (FC (AD)) [*Friedberg* cited to DTC], referenced in Government of Canada, "Income Tax Folio S7-F1-C1, Split-receipting and Deemed Fair Market Value" (9 October 2020) at 1.2, online: *Government of Canada* <www.canada.ca/en/revenue-agency> [Split Receipt Folio].

75 *McNamee v McNamee*, 2011 ONCA 533 at paras 23–24.

so other elements that must be found in defining a gift in this context include donor intention, voluntariness and motive. The CRA guidelines reflect these elements, as they indicate that a gift is made if the donor had donative intent,[76] there is a voluntary transfer of property to a qualified donee, the property transferred was owned by the donor [77] and no benefit or consideration flows to the donor.[78] Even with the addition of the split receipting rules,[79] it is generally accepted that donative intent requires the donor be impoverished by the gift that is made.[80] It is also generally accepted that the receipt of a tax benefit does not invalidate donative intent.[81]

C) Special inclusionary and exclusionary rules

1) A gift of "cultural property"

A taxpayer's "total cultural gifts" may be included in calculating their "total gifts" for a taxation year; this term is defined with reference to the *CPEIA* and has recently been expanded, an expansion which is unwarranted, but which will likely ease the door open for more claims of cultural property donations, for better or for worse.

The "total cultural gifts" of a taxpayer are defined in subsection 118.1(1) as the sum of all eligible amounts of gifts of cultural property made to a designated institution in the taxation year. While "cultural property" is not defined in the *Act*, paragraph 118.1(1)(a) requires the

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[76] The recent decision of *Van der Steen v Canada*, 2019 TCC 23 [*Van der Steen*] is illustrative of the analysis the court takes in looking for donative intent. The taxpayer in this case was not found to have donative intent as there was evidence that he expected a kickback in exchange for the gift in question and the subject gift was out of character vis-à-vis the rest of his giving history.

[77] *Friedberg, supra* note 74. In this case, the taxpayer had purchased two sets of textiles, and agreed to donate them directly to the Royal Ontario Museum in Toronto. He sought a cultural gift credit for both gifts. However, the full credit was denied for one set as all documents pertaining to the sale, including customs declarations and transfer documents, were between the vendor and the ROM (see description of documents at 6033-6034). The court found the taxpayer had never owned the property and so was denied the cultural property credit. He did, however, receive a charitable credit for the amount he had spent in acquiring the collection for the ROM. The court noted "… the taxpayer made a gift of the money to the ROM, with which it acquired the collection. He did not hold the title to the textiles, nor did he ever acquire the title, and one cannot give what one does not have". The documentation for the second collection evidenced the correct transfer of title.

[78] Split Receipt Folio, *supra* note 74. Also see *Kossow* supra note 22 at para 29 and *Maréchaux v The Queen*, 2009 TCC 587 at para 49 [*Maréchaux*].

[79] *Infra* under the heading "Eligible amount of the gift".

[80] For example, see *Berg*, *supra* note 22.

[81] *Friedberg, supra* note 74 at 6032.

object to have met the criteria set out in paragraph 29(3)(b) of the *CPEIA*, which requires the CCPERB [82] to find the item to be of "outstanding significance". This term is defined at paragraph 11(1)(a) of the *CPEIA* and is found in the object's close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences.[83] Until 2019, the *Act* required the object meet the requirements in both paragraphs 29(3)(b) ("outstanding significance") and (c) ("national importance") of the *CPEIA*. The removal of the reference to "national importance" was an uncharacteristically swift Parliamentary reaction to a decision of the Federal Court in *Heffel Gallery Limited v the Attorney General of Canada.*[84]

The facts of the case were simple. The Heffel Gallery is a well-known Canadian art dealer. In 2016, it sold a painting by French Impressionist Gustave Caillebotte to a purchaser outside Canada and applied for an export permit with CCPERB. However, the CCPERB rejected the application, given the item was of such "national importance" that its export should not be permitted. The CCPERB's decision was appealed by the Gallery. In submissions to the Federal Court, CCPERB explained that the national importance criterion "is a quantitative assessment that is focused on degrees of quality, significance or rarity" of the works in question. The court, however, did not agree, and found the "national importance" criterion required the object have a direct connection to Canada.

The art community quickly lobbied Parliament to "rectify" the effect of this decision, as donations of international cultural works to institutions halted across the country.[85] Parliament acted promptly, amending the

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[82] *CPEIA*, *supra* note 13, may certify a wider range of works for income tax purposes than those to which export controls are sought. A control list for export purposes is set out at s 4(2) that sets out valuation thresholds for the items to be included on the list, and includes objects of historical, scientific, archaeological interest recovered from Canada, objects relating to aboriginal people, objects of decorative arts, books and other recordings, and other artworks or items of significant monetary value. An object is excluded from the control list if it is less than 50 years old or if it has been made by a living artist, pursuant to s 4(3). This list and exclusion does not, however, extend to certification for income tax purposes.

[83] *Supra* note 13, s 11(1)(a). The CCPERB's website explains the component elements of this criterion: see CCPERB, "Outstanding Significant for Certification" (24 June 2021), online: *Government of Canada* <www.ccperb-cceebc.gc.ca>. Their website also provides guidance for applicants to the certification process in their structuring their application CCPERB, "Principles, Policies and Forms" (23 September 2021), online: *Government of Canada* <www.ccperb-cceebc.gc.ca>.

[84] 2018 FC 605 [*Heffel* FC].

[85] See Leah Sandals, "Budget 2019 Changes Canada's Art Laws, and More" (20 March 2019), online: *Canadian Art Magazine* <canadianart.ca> [perma.cc/B5E7-WMZV].

Act and *CPEIA* so that donations of cultural property would no longer be subject to the "national importance" criterion.[86] Any reference to certification by CCPERB in the *Act* was amended to remove references to paragraph 29(3)(c). A corresponding amendment was made to the *CPEIA* at subsections 32(1) and 33(1) so that the "national importance" criterion is no longer considered in determining whether an object is "cultural property" for the purposes of the tax incentives in the *Act*.[87] The "national importance" criterion remains, however, for determinations of CCPERB for its export control functions.

These resulting legislative changes because of *Heffel* FC were unnecessary. For one, the Federal Court's decision was overturned at the Federal Court of Appeal,[88] where the Federal Court's narrow interpretation of "national importance" was rejected and CCPERB's interpretation reinstated. Second, the expansive interpretation of "national importance" should never have been in doubt. As noted by the Federal Court of Appeal, the "national importance" criterion "measures the extent of the effect of the removal of the object from Canada—i.e., the importance of the object to Canada", and not just its connection to Canadian culture and history.[89] At the time the *CPEIA* was enacted, the associated commentary specifically noted that it would not be just items of Canadian heritage subject to this regime, but also property from other cultures:

> "The argument is that Canadians are entitled, not only to the preservation of their indigenous heritage, but also to access through their public institutions to the heritage of mankind as represented by examples from other cultures, civilizations and historic periods."[90]

It inevitably would capture objects with no direct connection to Canada and had in fact done so since the enactment of the regime in 1977. Further, the tax incentives were enacted alongside the enactment of the *CPEIA* to codify Canada's commitment to the principles of the UNESCO Convention, which deals with all transfers of cultural property, not just Canadian objects. It appears that the Parliamentary purpose behind the *CPEIA* was forgotten when the *Act* was amended.

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86 Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures*, 1st Sess, 42nd Parl, 2019 (as passed by the House of Commons 21 June 2019) at page iv, Summary (b); Library of Parliament, *Bill C-97: An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 19, 2019 and Other Measures* (Legislative Summary), No 42-1-C97-E (Ottawa: Library of Parliament, 2020) at 3, online (pdf): <lop.parl.ca> [perma.cc/8LYF-YQ4W].

87 Library of Parliament, *supra* note 86 at 4.

88 *Canada (AG) v Heffel Gallery Limited*, 2019 FCA 82 [*Heffel*, FCA].

89 *Ibid* at para 37.

90 Cameron, *supra* note 12 at 10.

Finally, the interpretation of "national importance" in *Heffel* related to an export permit, but the amendments to the *CPEIA* only altered the income tax certification regime. No changes were made to the provisions regarding export of works from Canada.[91] If the "national importance" criterion was seen as too stifling by Parliament, should it not have been removed from the export control regime as well?

While advocacy groups have applauded the changes to the *Act* and *CPEIA* as it potentially will open the door to more donations,[92] the easing of the requirements to qualify as "cultural property" may also open the door to certification of objects which may not have been intended to fall within the scope of this rule when the regime was first enacted. It also appears to be a departure from the objective of protecting the integrity of the credit with strict safeguards in the *Act*, and the quick response to the Federal Court's decision is also departure from a textual, contextual, and purposive interpretation of legislation. It is particularly concerning given the proliferation of tax shelters involving cultural property, as discussed below.

2) Non-qualifying securities, "excepted gifts" and conversion of non-qualifying securities

Parliament does not appear to be as willing to open the doors to donations of private shares and other securities as they are with cultural property. These assets fall into a defined class of assets in the *Act* which, as noted above, are denied a credit until certain technical conditions are met. These rules regarding "non-qualifying securities" are not limited to shares in private companies. The property captured in the definition, which is set out at subsection 118.1(18),[93] includes private company shares, other obligations, and forms of security between non-arm's length taxpayers including promissory notes.

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91 *CPEIA, supra* note 13, s 11 sets out the criteria for an export permit to be issued. The form of an application for an export permit is set out at *Cultural Property Export Regulations*, CRC, c 449. The criteria for an export permit are described in detail for the public at CCPERB, "Outstanding Significance and National Importance for the Review of an Application of ran Export Permit" (27 September 2022), online: *Government of Canada* <ccperb-cceebc.gc.ca>.

92 Sandals, *supra* note 85.

93 The rules regarding non-qualifying securities at the *Act*, *supra* note 3, ss 118.1(13)–(14) and (16)–(20) apply to a corporation as though the references in those subsections to an individual were read as referring to a corporation instead, and the references to a non-qualifying security were read as reference to "capital stock" of a corporation; see the *Act*, *supra* note 3, s 110.1(6). Note also that the time at which the relationships are determined in this subsection is the time at which the gift is made.

The same restriction does not apply to an "excepted gift", which is a share that is given to a donee that is not a private foundation, and the taxpayer or the taxpayer's estate is at arm's length with the donee and all directors, trustees, officers, and officials of the donee if the donee is a public foundation. The credit may also be granted when a non-qualifying security's status changes; this can occur in two situations. The first is set out at paragraph 118.1(13)(b), if the donor and the donee become arm's length within 60 months of the date the gift is made. The second condition is set out at paragraph 118.1(13)(c), when the donee disposes of the non-qualifying security within 60 months of the date of the gift for consideration that is not a non-qualifying security.

The form and timing of the acceptable consideration that a qualified donee may receive under paragraph 118.1(13)(c) has received particular attention in the caselaw, being the subject of amendments to the *Act* arising out of *Remai*,[94] and then further reviewed in the recent decision of the Federal Court of Appeal in *Odette*.[95] The review of both courts shows how the rules are highly technical with precise drafting in place to prevent specific transactions from occurring.

The donor in *Remai* was the sole shareholder of an administrative company, FRM, that was part of a larger corporate group. FRM issued the donor promissory notes as payment for management fees, which he would routinely donate to a private foundation with which he was not at arm's length. The terms of the notes required the foundation to delay their redemption for 10 years from the date of receipt, and interest was paid by FRM to the foundation at a prescribed rate. Despite the terms of delayed redemption, the foundation met its disbursement quota annually.

The donations of the promissory notes the donor received in 1998 and 1999 (totalling $10.5 million) were challenged by the Minister due to the recent enactment of subsection 118.1(13). The taxpayer's accountant suggested the notes be sold to a third party so the notes would fit the exception set out in then paragraph 118.1(13)(c), which stated that the deemed fair market value of the property is deemed to be the lesser of the fair market value of "any consideration (other than a non-qualifying security of *the individual* …)" (emphasis added). The taxpayer and his accountant considered various options and ultimately sold the notes to another company owned by the taxpayer's nephew. The nephew's company was in a partnership with one of the other companies in the taxpayer's corporate group, purchased the 1998 and 1999 notes from

94 *Supra* note 27.

95 *Supra* note 27.

the foundation, and provided payment to the foundation by way of a promissory note for the total amount.

The Minister denied the credits on the basis that the taxpayer and the nephew's company were not at arm's length for the purpose of paragraph 118.1(13)(c).[96] This argument was rejected by the court. Their analysis considered whether the nephew's company and the taxpayer were related pursuant to paragraph 251(1)(c)[97] by reviewing the accepted test for non-arm's length parties, being whether there was a common mind directing the bargaining for the parties, whether the parties had separate interests or if they were acting in concert and whether one party exercised de facto control over the other.[98] The court also noted that there is no separate requirement to determine if the terms of the transaction reflect "ordinary commercial dealings between parties acting in their own interests".[99] The parties were at arm's length and the promissory note was acceptable consideration for the security. The credit was allowed.

In response to *Remai*, paragraph 118.1(13)(c) was amended so that the consideration received by a donee under paragraph 118.1(13)(c) cannot be "a non-qualifying security of any person", not just of the individual taxpayer.

This paragraph was again considered in the Federal Court of Appeal in *Odette*[100] where it was confirmed that "any consideration" in paragraph 118.1(13)(c) cannot be another non-qualifying security of any person, and the consideration must be received at the time the donee disposes of the non-qualifying security. The donor in this case was the deceased taxpayer. He donated $17 million in shares from his private company to his private foundation. Shortly after the donation was made, his company purchased

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96 The Minister's other position, that the transaction was a misuse and abuse of the *Act*, *supra* note 3, pursuant to s 245(2) of GAAR, is reviewed below. The court also noted that the trial judge had misinterpreted s 251(1) of the *Act* as it read at the time but that it had no bearing on the rest of the analysis.

97 An amendment made after *Remai, supra* note 27 changed paragraph (c)'s application to "where paragraph (b) does not apply" to "in any other case" which, as the court noted, was how the provision was interpreted. The revision thus added clarity to avoid misinterpretation of the *Act*, *supra* note 3, 251(1)(c).

98 The criteria is set out in *Peter Cundill & Associates Ltd v The Queen*, [1991] 1 CTC 197, 91 DTC 5085 (FC (TD)) and referenced in Canada Revenue Agency, "Income Tax Folio S1-F5-C1, Related Persons and Dealing at Arm's Length" (8 June 2004), online: *Government of Canada* <www.canada.ca/en/revenue-agency>.

99 *Remai*, *supra* note 27 at para 33, referring to *Petro-Canada v The Queen*, 2004 FCA 158 at para 55.

100 *Supra* note 27.

the shares back from the foundation by way of a promissory note, and then repaid the note within a few months of purchase.

The parties agreed that the promissory note is a non-qualifying security and the gift of the shares to the foundation was not an excepted gift, given the donee is a private foundation. The position of the estate was that a contextual, textual and purposive approach to reviewing paragraph 118.1(13)(c), and the term "any consideration", would include promissory notes between non-arm's length parties. The court disagreed as a strict review in a dictionary sense of the definition of "consideration" is unacceptable.[101] While "consideration" might refer to a promissory note in the ordinary course, the term "any consideration" must be reviewed in its immediate context in the provision which specifically states

> "the individual is deemed to have made a gift to the donee of property at the time of the disposition and the FMV of that property is deemed to be the lesser of the FMV of *any consideration (other than a non-qualifying security of any person) received by the donee for the disposition* …" (emphasis added)

The estate also pointed to the fact that the notes were repaid a few months after the redemption by the foundation, but paragraph 118.1(13)(c) requires the consideration to be received by the donee at the time the security is disposed of, in addition to the requirement that the consideration cannot be another non-qualifying security of any person. If both requirements are not met, the deemed value of the shares is nil and there is no credit afforded to the donor. It is not enough to show that the note was repaid later: the consideration must be received at the time the non-qualifying security is disposed of by the charity. These limits are placed to ensure the credit is only granted when the charity is enriched by the gift. As stated by the court:

> "Put simply, Parliament does not want to grant a tax credit where the donor is not impoverished and the charity is not enriched. A non-arm's length promissory note creates no real obligation to pay. Non-arm's length parties can artificially enter into similar transactions, claim a donation tax credit and never actually make payments. For this reason, it is important to show that the charity is actually enriched and the donor is in fact impoverished. A promissory note between non-arm's length parties is not convincing enough."[102]

In the case at hand, neither of these requirements were met. The consideration at the time the security was disposed of by the foundation was the non-qualifying security. The fact that the company later repaid

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101 *Ibid* at paras 33-37.

102 *Ibid* at para 59.

the note in question was insufficient, as the disposition by the donee occurred at the time the non-qualifying security was exchanged for the new promissory note. The credit was thus denied. Specific rules like these regarding non-qualifying securities may lead taxpayers to enter more complex transactions to obtain the benefit of the credit by skirting the precise requirements that are set out. The anti-avoidance provisions, discussed under the heading "Tax avoidance", have considered certain steps that might be taken in this regard.

D) "Eligible amount" of a gift

In calculating the credit, subsection 118.1(1) refers to the "eligible amount" of a gift, and not its "fair market value". While the latter is still relevant, the "eligible amount" of the gift requires definition, as it is not an ordinary term, nor can it be defined with reference to the private law. The *Act* specifically permits a gift to be made and the taxpayer receives a benefit in return if the amount of the benefit (defined at subsection 248(32) as an "advantage") does not exceed more than 80% of the fair market value of the gift,[103] or the taxpayer can show an intention to make a gift.[104] The "advantage" received by the donee can be any partial consideration, token of gratitude, or related to the gift in any way, that the donee received in exchange for the gift, including property, service, compensation, use or other benefit. Common examples include tickets purchased at charitable raffles or dinners received at charitable golf tournaments. The advantage can be received contemporaneously with the making of the gift or be receivable in the future, by either the donee or another individual taxpayer not at arm's length with the donee.[105]

The drafters of these provisions attempted to add some certainty by defining the value which may be claimed in respect of a gift for the donation credit, known as the "eligible amount",[106] as the difference between the fair market value of the gift and the amount of the advantage. So, for example, if a donor makes a gift of $1,000 and receives a $200 dinner in return, the eligible amount could be $800. To claim the eligible amount in the calculation of "total gifts" at subsection 118.1(1), the taxpayer must also show that the gift complies with the requirements of a gift in the common law.[107] However, the value of the advantage, and more

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[103] *Supra* note 3, s 248(30)(a).

[104] *Ibid*, s 248(30)(b).

[105] CRA has an administrative policy to disregard an advantage that does not exceed the lesser of 10% of the fair market value of the gift or $75. See Split Receipt Folio, *supra* note 74.

[106] The *Act, supra* note 3, s 248(31).

[107] A trio of cases reviewing the requirements for a gift during the period of time when the split receipting rules had not yet been enacted but were being administratively

particularly, the fair market value, must be clearly ascertainable. There is rarely an issue with ascertaining the value of a cash gift. However, issues arise with determining the fair market value of in-kind donations.

E) "Fair market value"

Determining "fair market value" of a gift requires an understanding of both the context in which the term is used in the *Act* and the relevant facts of the case. The term is not defined in the *Act*, but even as far back as 1966, the Carter Commission considered how value should be determined (as well as other issues arising with in-kind gifts, such as how to recognize transfer of the property).[108] The report made numerous recommendations to address these concerns, including a rule that the property which is the subject of the gift be deemed to have been disposed at the time the gift is made, at its fair market value.[109]

As noted in the discussion on "eligible amount" of gift, the credit is based on the difference between the "fair market value" of the gift and the "advantage" that is received by the taxpayer. A determination of "fair market value" cannot lose sight of the plain meaning of the words; that is, it must refer to the market price for the object. The commonly accepted definition of "fair market value" is

> "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

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followed: *Kossow; Berg, supra* note 22; *Maréchaux, supra* note 78. In *French v The Queen*, 2016 FCA 64 the court found that split receipting was not rejected in these cases or that the meaning of gift before 2002 excluded the idea of split gifts.

108 Canada, *Report of the Royal Commission on Taxation*, vol 3 (Ottawa: Queen's Printer, 1966) at 225-226 (Chair: Kenneth Le M Carter), online (pdf): <publications.gc.ca> [perma.cc/AHM9-MUHA].

109 *Ibid* at 336, recommendation 18. The recommendations from the report included recognizing transfers of property only once the ownership and possession of the asset was unconditionally and irrevocably transferred; a threshold value of $500 to acknowledge the administrative impossibility of tracking small donations of items to, for example, church bazaars; and the credit would be based on the fair market value of the asset at the time the gift is made with a corresponding deemed disposition for tax purposes.

Currently, CRA does not require a formal appraisal if the fair market value of the item being donated is less than $1,000, but the object which should be appraised by someone qualified to do so. However, it is recommended that a more formal appraisal is submitted for items with a fair market value of $1,000 or more. If rejected by the Minister, the taxpayer may appeal to the Tax Court, who may review the appraisals provided by the taxpayer and assess their veracity.

> of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell."[110]

Many of the cases considering the determination of "fair market value" of an in-kind donation involve gifts of artwork and other cultural property.[111] This is not surprising, given the generous tax treatment given to cultural property. At the time the cultural property provisions were enacted in 1977, the Senate Committee noted that taxpayers might financially benefit from the cultural property tax incentives that were proposed but nevertheless did not propose any amendments.[112] Indeed, in early cases, "profitable" donations were not seen as being problematic.[113] This sentiment has evidently changed with the rise of schemes developed precisely to take advantage of situations where an inflated appraisal might be obtained, such as in the art market.

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110 *Henderson Estate v Canada (Minister of National Revenue)*, [1973] CTC 636, 73 DTC 5471 at 5475 (TD) [*Henderson*].

111 Of course, there are cases looking at the fair market value of other in-kind donations. For example, in *Robichaud v The Queen*, 2004 TCC 661 the court considered the valuation of a donation of stamps and rejected the taxpayer's reliance of the Scott catalogue of stamps, noting that such a guide is a useful starting point in assessing value but ultimately the fair market value analysis depends on all the facts of the case, which in this case included the fact that the taxpayer's collection had no theme and was a haphazard amateur collection of little marketable value.

112 Cameron, *supra* note 12 at 10.

113 The classic case where "profitable" donations were tacitly accepted is *Friedberg*, *supra* note 74 at 6033, the court stated "it is possible to make a 'profitable' gift in the case of certain cultural property. Where the actual cost of acquiring the gift is low, and the fair market value is high, it is possible that the tax benefits of the git will be greater than the cost of acquisition. A substantial incentive for giving property of cultural and national importance is thus created through these benefits."

See also for example, the comments by House of Commons, Canada Index Subcommittee on The Taxation of Visual and Performing Artists and Writers of Standing Committee on Communications and Culture, 32-2, vol 1, No 1 (1984) at 13:11-13:12 (Arthur Drache), Mr. Drache during the House of Commons, Canada Index Subcommittee on The Taxation of Visual and Performing Artists and Writers of Standing Committee on Communications and Culture (1984), Issues 1-17 at 13:11-13:12. He disagreed with a proposal for the fair market value of art to be the price paid.

"This policy—and it is a policy—is, on the face of it, wrong. The Income Tax Act talks about fair market value and it does not talk about purchase price or anything else. It is an example of Revenue Canada holding the gun against the head of potential donors. In effect, whereas the Cultural Property Export Review Board talks about the spirit of the Act, the spirit of the Act was to encourage donations. Now we have a situation in which I come along and find something at a bargain which I may not particularly want but would like to donate to, say, the National Gallery or whoever will have it but by their policy I cannot get the full benefit."

It was in response to "art flip" cases[114] that the CCPERB was given the authority to determine the fair market value of an object for which cultural property certification is sought under subsection 118.1(10). Their determination of fair market will apply to any income tax purposes regarding the object for two years after the valuation.[115] If a taxpayer is unsatisfied with CCPERB's valuation, the taxpayer may appeal the determination of value by the CCPERB to the Tax Court of Canada. It may have been assumed that CCPERB would be able to objectively determine fair market value of property up for certification and minimize disputes over valuation; however, as fair market value remains undefined in both the *Act* and the *CPEIA*, uncertainty with valuations of cultural property persists.

In line with the definition in *Henderson*,[116] the "fair market value" must be determined in reference to the actual market for the item. However, defining the market can prove to be challenging in cases where the art was not purchased on an open market. In *Nash*,[117] the taxpayers had purchased groups of prints from the promoter of a donation scheme, and then donated the prints to various charities immediately after purchase. The donation receipts valued the prints significantly higher than the cost had been to the taxpayers, as the appraiser had appraised each individual print and then summed the total of the appraisals, instead of using the group price paid by the taxpayers. The court disagreed with the appraiser and found a block discount was appropriate. If the individual pieces did in fact have a fair market value at the individual prices assessed by the appraiser, they would have been sold at this amount by the vendor. The use of a block discount in valuing art is inconsistent across the caselaw.[118]

While expertise is critical in all valuations, cultural property, such as art, requires exceptional subjective as well as objective determinations.

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114 *Klotz; Nash, supra* note 21.

115 The *Act*, *supra* note 3, s 118.1(10.1); see also *CPEIA*, *supra* note 13, ss 33(1), (1.2). See also *CPEIA, supra* note 13, s 33(1), (1.2). If more than one certificate is issued for an object, the most recent certificate is deemed to be the only certificate related to the object: s 33(1.2). The CCPERB will also value an item at its cost if the item was purchased less than two years prior to the date at which valuation has been sought. The website for CCPERB contains detailed instructions about the appraisals which must accompany the applications for certification: CCPERB, "Apply for Certification" (2 February 2011), online: *Government of Canada* <ccperb-cceebc.gc.ca>.

116 *Supra* note 110.

117 *Supra* note 21.

118 See *Malette v The Queen*, 2003 TCC 542. *Klotz; Nash, supra* note 21 have been relied upon in other cases dealing with block discounts, such as *Lockie*, *supra* note 21.

The issue was put succinctly in *Maréchal v Canada*[119] where the difficulty in valuing a sculpture submitted for CCPERB certification was noted:

> "Valuing a work of art is difficult. It is not like valuing a piece of commercial property, or a house, or shares in a corporation. Well-defined criteria for such valuations are more readily available. In valuing a work of art there are many variables and subjective elements that can result in differences in estimates of value that may vary within a range of indeterminate magnitude."[120]

Factors that are relevant in valuing art include the artistic merit of the work, the period in which the work was done, the quality of the work, among others.[121]

A thorough review of fair market value for an artist's works was undertaken in *Whent v Canada.*[122] The taxpayers were three lawyers who, over the course of two years, purchased 216 paintings by the celebrated Canadian Indigenous artist, Norval Morrisseau. The paintings were purchased at a bargain for an aggregate price of $130,000. They obtained an appraisal of the fair market value for the works at $992,900. Among other arguments, the Minister contended that the appraisal obtained by the taxpayers was too high and the fair market value should have been equal to the cost they had incurred to purchase the pieces. As part of their overall analysis, the court considered the appraisals, the state of the art market at the relevant time, the personal circumstances of the artist during the time the art had been purchased, and the fact that there were no records of private sales of his work during the relevant time.[123] The court determined the appraised value was too high based on these factors, particularly given there was no traditional "market" at the time the works were donated. The court reduced the fair market value for the subject pieces to $660,000.[124]

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119 2004 TCC 464. In this case, the appellant had purchased a sculpture for $1700 and sought certification by CCPERB for a value at $8000 a year later. The CCPERB relied on another valuation of $5,000, which was ultimately accepted by the court.

120 *Ibid* at para 15.

121 *Canada v Côté*, [2001] 4 CTC 54, 2000 DTC 6615 (FCA) [*Côté*].

122 96 DTC 1594, [1996] 3 CTC 2542 (TCC) [*Whent* cited to DTC].

123 During the relevant time, he had lost his patron, and succumbed to alcohol abuse, allegedly selling his artwork on the streets of Thunder Bay for bargain prices or trading them for alcohol or supplies. *Ibid* at 1603.

124 As an aside, this case is interesting to consider in the current political climate where the rights of Indigenous peoples have been top of mind, and given the current cultural sensitivity to alcoholism. Would Morrisseau have been found to have capacity to make decisions regarding his property (i.e., the work he sold on the streets) if the transactions happened today, and so, would there be an argument to return these works to his estate?

In other cases, the Minister has made numerous creative arguments regarding the valuation of art that were rejected by the courts. First, in *Klotz*, the taxpayer had participated in a "buy low, donate high" donation scheme involving art prints (not cultural property) which were valued for the purpose of donation at around $1,000 per piece, which was the threshold for personal use property[125] so that gains would not be included in the taxpayers' income. The court disagreed with the Minister's position that the prints were not personal use property because the taxpayer had never "used" them, as the list of personal use property at section 46 of the *Act* is inclusive (and includes the item at issue in the case in any event). Also, the restrictive test of enjoyment by the taxpayer as suggested by the Minister[126] would be practically impossible to police. The court also noted that "One way of using an object is to give it away, whether the motive be altruistic, charitable or fiscal."[127]

There have also been cases where a donation was made of cultural property shortly after purchase, and the Minister took the position that the disposition of the property on donation should be treated as though it was "an adventure in the nature of trade". This argument was swiftly rejected in both *Francoeur v Canada (1992)*,[128] where the cultural property in question was scientific material that had been purchased with an intention to donate, and *Whent*,[129] as the donation crystallized the character of the property as capital and there was no opportunity for profit from the purchase of the property.[130]

If there is no market that is directly comparable for the object in question, other similar markets should be compared to determine its "fair market value".[131] However, sometimes there is no market for an item, which has occurred in cases involving some "cultural property", given the term encompasses items beyond art, including scientific and historical objects that are not commonly sold. In *Aikman v Canada*, a case involving a prototype aircraft donated to an aircraft museum, the court found there was no market for the object and refused to assign the costs of producing the craft as its fair market value because the cost of production is not equivalent to the cost of an item sold in the market. Instead, the court looked at evidence of the price the object would attract in a related market that CCPERB had elicited from a funder of the project which built

125 The *Act, supra* note 3, s 46.

126 *Klotz, supra* note 21 at para 65.

127 *Ibid* at para 67.

128 [1992] 2 FC 333, [1993] 2 CTC 2440.

129 *Supra* note 122.

130 *Ibid.*

131 *Nash, supra* note 21 at para 24; See also *Côté*, *supra* note 121.

the prototype.[132] In another case without an easily identifiable market, *Conn v Minister of National Revenue*,[133] the Tax Court split the difference and determined the fair market value was the halfway point between the two sets of appraisals provided for a collection of historic Canadian bank notes.[134]

There are even greater concerns with ascertaining the fair market value of a non-qualifying security, which is why the credit is simply denied until an objective measure of value is obtained. When a donee either disposes of the non-qualifying security or becomes non-arm's length with the donor, the Minister can then assume the face value of the consideration received is the value of the non-qualifying security and issue a credit based on that amount.[135] When the terms of paragraph 118.1(13)(c) are met and the donee disposes of the security within 60 months of receipt, the deemed fair market value at the time of disposition by the charity is the lesser of the fair market value of the security at that time or the value of the consideration received for it.[136] The value at the time the gift was made may be relevant for a receipt issued under paragraph 118.1(13)(b), as the deemed fair market value will be the lesser of the value at the time the gift was made or the time at which it ceased to be a non-qualifying security.[137]

Given that the meaning of "fair market value" is relevant to so many calculations in the *Act*, it is at first surprising that it is not defined. However, the ability to refer to the private law interpretations of the term permits a broad and expansive approach to defining it in the context of each case.

F) Tax avoidance: Parliamentary responses

When the charitable credit is used in a way to benefit the donor outside the scope of what is intended by the *Act,* this use is akin to other forms of aggressive tax planning which result in a "gaming" of the system.[138] The credit has always been intended to encourage gifts to charity; however, it cannot be used to avoid tax that a taxpayer would otherwise have to pay, or to enter into a transaction where the sole purpose is to avoid tax.[139]

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132 *Aikman v Canada*, 2000 DTC 1874 at para 10, [2000] 2 CTC 2211.

133 [1986] 2 CTC 2250, 86 DTC 1669 [*Conn*].

134 Relying on *Conn*, the court in *Morisset v Canada*, 2007 TCC 114 noted that the likely cost of obtaining polar bear skins was not indicative of the fair market value of polar bear skins that the taxpayer allegedly donated. The taxpayer was denied a credit on the basis that he did not make a gift.

135 *Remai, supra* note 27 at para 45.

136 The *Act, supra* note 3, s 118.1(13)(c).

137 *Ibid*, s 118.1(18)(b).

138 Li, Magee & Wilkie, s*upra* note 9 at 528.

139 *Ibid* at 530-531.

The courts have long denied a donation credit to taxpayers if the facts show the gift was made in the context of a fraudulent scheme[140] or one whose purpose was solely to avoid tax. The *Act* has also been amended to codify the consequences of entering these formalized gifting schemes, as a credit may be denied if donative intent is found to be lacking in the making of the gift, or the credit may be permitted but the fair market value on which the credit is based is reduced. For one, in response to gifting schemes where participants would try to claim "personal use property" designations on the individual items being donated,[141] section 46 was amended to exclude items purchased as part of a promoted arrangement, plan or scheme, for the taxpayer to obtain a charitable credit. The new subsection 46(5) creates a capital gain on the disposition of such property.

Other anti-avoidance rules have been implemented to counter the potential for abuse from tax shelter and other gifting arrangements, as well as non-arm's length transactions of private securities. Like most specific anti-avoidance rules, the rules summarized in the next two sections are complex, technical, and very specific. They define the specific instances in which the benefit sought by the taxpayer is denied, but the question remains whether these specific rules will simply guide taxpayers to plan transactions around their strict and specific terms.[142]

1) Specific anti-avoidance rules: tax shelters

Most recently, the *Act* has moved to regulate tax shelters offering donation incentives. A tax shelter, defined at subsection 237.1(1), is a gifting arrangement that is promoted to taxpayers whereby it can be reasonably considered that the tax savings to the taxpayer will exceed the taxpayer's cost in donating within 4 years from the date on which the arrangement is entered. In 2003, the definition of "tax shelters" was amended to include certain gifting arrangements. A "gifting arrangement" is an arrangement that is promoted to a taxpayer whereby the taxpayer makes a specified gift to a particular qualified donee, typically of property acquired through the arrangement or the incurring of a limited recourse debt which

[140] For example, in an early series of cases from the Tax Court of Canada in 1993 involved the Donelian Museum of Oriental Art ("Donelian"), taxpayers entered into a scheme whereby they purchased rugs from a dealer and donated them to the Donelian in exchange for an inflated receipt. There was, however, no museum: the owner of the purported museum stored all donations in his modest suburban home's "damp" and "musty" basement. The credit was denied in these cases. For example: *Ball v Canada*, [1993] 2 CTC 2475, [1993] TCJ No 162 (TCC), and *Gardner v Canada*, [1993] 2 CTC 2480, [1993] TCJ No 160 (TCC).

[141] Such as *Klotz*, *supra* note 21.

[142] See discussion on the effectiveness of specific anti-avoidance rules in Li, Magee & Wilkie, *supra* note 9 at 541.

was promoted, and statements were made to the taxpayer about their participation in the scheme.

These schemes are not illegal, though, so rules have been implemented to regulate them. The purpose behind these rules is to protect the integrity of the tax system by preventing the mass marketing of donation schemes, increasing efficiency of the identification and auditing of tax shelters and their participants, and protecting taxpayers who may innocently enter the arrangements.[143] Otherwise, the lost revenue from aggressive tax avoidance in donation tax shelters is a burden that will then be shared by other taxpayers, an inequitable result.[144] To avoid uncertainty about what arrangements are affected by the tax shelter rules, any programs which fit the definition must be regulated and obtain a tax shelter identification number[145] so CRA can maintain a registry of such arrangements and taxpayers who participate in them.[146]

Complex and cumbersome rules were implemented in 2013 (but pertain to transactions after 2002) deeming the fair market value of property in avoidance transactions, including tax shelters. The cornerstone subsection is 248(35) which limits the fair market value to be used in calculating the "eligible amount" of in-kind donations when the taxpayer acquired the property under a tax shelter,[147] or if the property was purchased less than three years prior to the day before the gift was made, or less than 10 years prior to the making of the gift and it is reasonable to conclude that one of the main reasons for purchasing the property at the time was to make a gift to a qualified donee.[148] In these cases, the "fair

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143 Canada, Department of Finance, *The Budget Plan 2003* (Ottawa: Her Majesty the Queen in Right of Canada, 2003) at 339-340, online (pdf): <www.budget.gc.ca> [perma.cc/CZ8K-BLBC].

144 Li, Magee & Wilkie, *supra* note 9 at 539.

145 The *Act*, *supra* note 3, s 237.1(2) requires the promoter of a tax shelter to apply for a tax shelter identification number from the Minister, and paragraph (5)(a) requires promoters to make reasonable efforts to disclose the tax shelter identification number issued under subsection (3) to all persons investing in the tax shelter. Subsection (4) prohibits sales from a tax shelter without a valid identification number.

146 Most recently, the courts considered a tax shelter known as the Global Learning Gifting Initiative Charitable Donation Program (GLGI). The court denied a gift had been made in the subject transactions, found the taxpayers had not owned the property which had been transferred, and found the scheme to be a sham. Over 17,000 taxpayers who participated in the scheme were denied a donation credit and continue to await reassessments including, among others, *Sweetman v Canada*, 2021 TCC 32; *Mariano v Canada*, 2015 TCC 244.

147 The *Act*, *supra* note 3, s 248(35)(a).

148 *Ibid*, s 248(35)(b).

market value" is deemed to be the lesser of the fair market value of the property and the adjusted cost base to the taxpayer.

This deeming rule also applies to determine the fair market value for gifts of capital property,[149] certain dispositions of non-qualifying securities,[150] and to transactions where property is deemed to be disposed of by way of gift, non-arm's length transaction, or to a trust,[151] or when the taxpayer sells the property and then donates the proceeds of sale to the charity to avoid the application of the rule.[152] Despite being historically exempt from the rule against tax shelters, cultural property is now subject to these rules as well.[153] However, the deeming rules do not apply if the gift is a consequence of the death of the taxpayer,[154] or to certain other specific exceptions.[155]

Further penalties are set out for non-arm's length or abusive transactions. If the property at issue was purchased in a non-arm's length transaction, the cost base is reduced further to the cost base of the vendor, unless the taxpayer's cost base was lower.[156] The fair market value of the property is deemed to be nil if the general anti-avoidance rule applies[157] or if one of the purposes of the transaction is to avoid the 3 or 10 year deeming provisions in subsection 248(35). The value of the eligible amount is also deemed to be nil if the taxpayer does not inform the donee of any information that would cause the ineligible amount of the gift to be

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149 *Ibid*, by an individual at ss 118.1(5.4) and (6) or by a corporation at ss 110.1(2.1) and (3).

150 *Ibid,* s 118.1(13.2).

151 *Ibid,* s 69(1)(b).

152 *Ibid*, s 248(39).

153 Perhaps the oversight of the CCPERB in certifying the fair market value of cultural property was not sufficient to stop abuse of the credit, leading to this exemption being removed. It would be interesting to see a study determine the effectiveness of these rules in preventing tax shelters of cultural property donations from occurring. Government of Canada, "Budget 2014, Annex 2, Tax Measures: Supplementary Information" (11 February 2014) at Table A2.1, online: *Government of Canada* <www.budget.gc.ca> [perma.cc/U342-UA23] suggests this measure should have saved $4 million in foregone revenue from schemes misusing the cultural property incentives for the taxation years 2014-19, but a review of the data is beyond the scope of this paper.

154 The *Act, supra* note 3, s 248(35)(b).

155 *Ibid*. Gifts of inventory, Canadian real property, cultural property which was not purchased under a gifting arrangement that is a tax shelter, ecological gifts, or if the property is shares of a corporation that were issued to the donor in a non-arm's length transaction and the deeming rule would not have otherwise applied. See *ibid*, s 248(37)(e) and Brian Janzen, "Personal Tax Planning: Donation of Private Company Shares" (2019) 67:3 Can Tax J 789 at 797.

156 The *Act, supra* note 3, s 248(36).

157 *Ibid*, s 245(2).

reduced from its fair market value at the time the gift is made to any of the deeming rules noted above.[158]

2) Specific anti-avoidance rules: non-qualifying securities

After the *Remai*[159] decision, the *Act* was amended to add further anti-avoidance provisions that apply when non-qualifying securities are exchanged in a series of transactions. Specifically, the rules apply when a taxpayer makes a gift to a donee, a particular person holds a non-qualifying security of the donor, and the donee acquires a non-qualifying security of the donor or the particular person.[160] When these conditions apply, the gift by the donor is deemed to be reduced by the value of the non-qualifying security acquired by the donee.[161] Finally, a broader anti-avoidance rule was also enacted at paragraph 118.1(13.3): to deem a non-qualifying security that is acquired by a donee through a series of transactions to be a non-qualifying security of the taxpayer when the purpose of the donee's acquisition was to facilitate, directly or indirectly, the making of the charitable gift. Like other specific anti-avoidance rules, these rules deal with a very specific set of circumstances and should give pause to donees who are the recipients of non-qualifying securities.[162]

3) General anti-avoidance rule

While a specific anti-avoidance rule has been added for transactions involving non-qualifying securities at subsection 118.1(13.3), and the tax shelter rule in subsection 237.1(1), the general anti-avoidance rule (GAAR) could apply to situations caught by these rules, as well as other transactions, that are a misuse or abuse of the donation credit provisions in the *Act*.[163] Subsection 248(38) specifically references the general anti-avoidance rule in deeming the value of a gift to be nil if the GAAR in subsection 245(2) applies to the transaction. If GAAR is applicable, under subsection 248(38) or otherwise, as with all other measures in the *Act* to safeguard the donation credit, a reasonable balance must be found

158 *Ibid*, s 248(31).

159 *Supra* note 27.

160 The *Act, supra* note 2, s 118.1(13.1).

161 *Ibid*, s 118.1(13.2).

162 See commentary in Robert B Hayhoe & Andrew Valentine, "Canada—recent developments affecting charitable giving in Canada" (2012) 18:6 Trusts & Trustees 525 at 531.

163 A full review of GAAR is beyond the scope of this paper. However, the criteria for applying GAAR is found in *Canada Trustco Mortgage Co v R*, 2005 SCC 54 [*Canada Trustco*]. This analysis was referenced in *Remai*, *supra* note 27, in the court finding the sale of shares was not a misuse or abuse of the *Act*, supra note 3, s 118.1(13) and so the GAAR did not apply.

between protecting the integrity of the credit and ensuring only proper gifts are recognized, with the private right of taxpayers to minimize the tax they pay and arranging their affairs to maximize the benefits from this and any other tax credit for which they may be eligible.[164]

G. Timing and receipt of gifts

The last set of safeguards reviewed in this paper are the technical timing and receipt rules for gifts. A taxpayer claiming a charitable credit is required to file with the Minister an official receipt that contains prescribed information in a manner that cannot be readily altered for the gift to qualify for the tax credit.[165] The prescribed information to be contained in the receipt is set out at Regulation 3501 and includes information such as the date of the donation, the name and address of the donee, the fair market value of the gift, the amount of the advantage and where the gift is property other than cash, the date on which the gift was received, a brief description of the property and the name and address of the appraiser, if relevant.[166] If the receipt does not comply with the regulations, the credit will be denied.[167]

The receipt must reference the certificate from CCPERB for a donee to claim a "cultural gift",[168] although certification of the object as "cultural property" may occur after the donation has been made.[169] The CCPERB will only issue the certificate (Form T871) upon receiving written confirmation from the donee that legal title was transferred, and the gift

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164 See commentary on legislative context and purpose of GAAR in Li, Magee & Wilkie, *supra* note 9 at 545.

165 The *Act, supra* note 3, s 118.1(2) for individuals, s 110.1(2) for corporations.

166 *Income Tax Regulations*, CRC, c 945, ss 3500-3502.

167 For example, see C*astro v R,* 2015 FCA 225 where the court considered a series of related cases where the amount on the receipt did not match the actual amount donated by the taxpayer, the receipt was spoiled, and so the charitable tax credit was denied. Also, in *Paradis v Canada* (1996), [1996] TCJ No 1638 at paras 47-49, [1997] 2 CTC 2557 the court rejected the tax receipts for the donation of the paintings at issue: one receipt did not contain the day on which the donation was received, a description of the property donated, or the name and address of the appraiser, while the name and address of the appraisers were missing from receipts for other paintings. Without such information, the gifts may not be included in "total cultural gifts".

168 The *Act, supra* note 3, ss 118.1(2)(b) for individuals and 110.1(2)(b) for corporations; s. 33(1).

169 *Ibid*, s 118.1(11). Note the language in *CPEIA*, *supra* note 13, s 32(1), which sets out the authority of the CCPERB to certify property for tax purposes, refers to property for which certification is sought is described in the subsection as property which "a person disposes or proposes to dispose", confirming the cohesiveness of the legislative scheme. See *Williamson, supra* note 66 for further discussion.

is irrevocable.[170] However, the making of the gift and certification by CCPERB are two separate processes. The gift is deemed to have been made when the property is transferred to the donee, not when the certification has been received by the donor from CCPERB.[171]

The donation credit for a former non-qualifying security will not be issued at the time the gift is made. Instead, subsection 118.1(13) allows for the donation credit to be issued when the value of the property which is gifted can be quantified with certainty due to the disposition of the non-qualifying security. When the conditions in paragraph 118.1(13)(b) are met, if the donee has not yet disposed of the security, the taxpayer is deemed to have made a gift at the time the parties become arm's length. When the conditions in paragraph 118.1(13)(c) are met, the taxpayer is deemed to have made a gift to the donee at the time of the disposition.

5. Concluding thoughts and a look to the future

Throughout its history, the *Act* has constantly responded to loopholes and innovative interpretations by taxpayers. In particular, the donation credit has evolved from a restricted measure to encourage taxpayers to contribute funds to the war effort to a more general instrument of social policy. The credit is generous to Canadian taxpayers, and as the scope of gifts and tax benefits expanded, the need for anti-avoidance rules to preserve the integrity and fairness of the charitable donation credit and the tax system grew as well. However, the introduction of ever more detailed rules meant to prevent avoidance also increases the risk of "creative compliance", or manipulation of the rules by using the specific anti-avoidance provisions as "signposts" indicating how avoidance may be achieved.[172] While specific anti-avoidance rules are necessary to explicitly delineate certain restrictions, it is not possible for the *Act* to address every possible attempt at misusing the charitable donation credit.[173] And so, with hastily enacted revisions to the *Act* (like the amendments in response to *Heffel*), complex language in the anti-avoidance provisions, and uncertainty in the definition of basic terms such as "gift" and "fair market value", there

170 *CPEIA, supra* note 13, s 33(1).

171 In *Yellow Point Lodge v Canada*, 2020 FCA 195, the question of when the gift is made was considered in the context of ecological property. However, the court noted the similarly between the two regimes in confirming that the time of disposition is the time of the gift.

172 See discussion in Judith Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle" (2004) 4 Brit Tax Rev 332 at 346 and generally, Doreen McBarnet & Christopher Whelan, "The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control" (1991) 54:6 Mod L Rev 848.

173 The GAAR, as noted above, may be invoked in avoidance transactions; however, it is only as a "provision of last resort" (see *Canada Trustco, supra* note 163 at para 21).

continues to be room for motivated taxpayers to find new and creative loopholes to use the charitable credit for their own benefit, contrary to the intention of Parliament and the overall scheme of the *Act*.

Nonetheless, the regulation of the charitable sector remains top of mind for Parliament. Stricter rules were proposed in the 2021 Budget[174] to regulate charities and particularly to prevent organizations that are associated with terrorist organizations or other groups that act against public policy from being having registered charity status. While it would not be surprising if more restrictions are implemented in future budgets to further regulate and restrict charitable donations and the charitable system—particularly given the increased fiscal needs of the government arising out of the pandemic and the financial support programs that have been implemented—presently the focus of the government is on increasing the funds deployed by charities with a proposed increase to the "disbursement quota" of charities.[175]

But that does not mean the donation credit will not continue to grow and evolve as taxpayers continue to innovatively interpret the rules, and as other in-kind donations become more prevalent. For example, cryptocurrency and non-fungible tokens (NFTs) have become hot topics of conversation in recent years. Donations of these digital assets may be the future of charitable giving, particularly for younger generations who live in a digital world. Are the current guardrails that are in place for in-kind donations of property sufficient to deal with the issues that might arise with digital assets, such as their price volatility?[176] Will NFTs be treated like non-qualifying securities, and prohibited from being the subject of a donation unless strict requirements are met, or will they be afforded special preferential treatment like cultural property? The *Act* will no doubt be amenable to changes as needed once gaps in the current legislation appear due to the unique characteristics of these assets and the evolving inventiveness of taxpayers.

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[174] 2021 Budget, *supra* note 33.

[175] Canada, Department of Finance, *2022 Budget: A Plan to Grow Our Economy and Make Life More Affordable*, (Ottawa: Her Majesty the Queen in Right of Canada, 2022) at 196, online (pdf): <www.budget.gc.ca> [perma.cc/H57R-5V7T].

[176] For a detailed discussion on this and other concerns, see Peter Howson, "Crypto-giving and surveillance philanthropy: Exploring the trade-offs in blockchain innovation for nonprofits" (2021) 31:4 Nonprofit Management & Leadership 805. A discussion on blockchain, NFTs, and how digital art may upend the art market can be reviewed at Ross Blum et al, "Panel 1: Digital Art and Digital Collectibles" (2019) 37:3 Cardozo Arts & Ent LJ 567.