**Gift of post-freeze common shares upheld**
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Estate and tax planners in Ontario were relieved when the Ontario Court of Appeal released its decision in *McNamee v. McNamee* 2011 ONCA 533 in July 2011.

*McNamee* involved a corporate estate freeze in which a father transferred his shares of an operating company to a holding company in exchange for redeemable retractable voting preferred shares valued at $2 million. Then the father subscribed for 1000 common shares for $1 and transferred 500 common shares to each of his two adult sons.

Father executed a declaration of gift at the time that the common shares were transferred to the sons and the declaration contained a "standard" clause pursuant to s.4(2), *Family Law Act* (Ontario) to the effect that: the property gifted, any income arising from it, any appreciation and any property acquired in substitution should not form part of the net family property of the donee son.

At trial, the Court had held that there was no gift with the result that the value of the common shares was subject to equalization for family law purposes.

The trial decision caused much angst as the post-freeze gift was a fairly standard means of enabling the next generation to become the holders of growth (common) shares while achieving protection from equalization under the *Family Law Act* (Ontario).

The trial court noted certain aspects of the estate freeze which it considered unusual. In particular, the trial court noted that the father retained voting control of the corporation because the redeemable retractable preferred shares issued to him were voting. With respect, such a feature of an estate freeze is far from unusual, but rather to be expected. The trial court also noted that the father's preferred shares had a discretionary dividend entitlement as the quantum and frequency of dividends was simply determined at the discretion of the directors and the father 's voting rights enabled him to elect a majority of the board of directors. Such a discretionary dividend feature in respect of the "freeze' preferred shares is indeed unusual and might be considered to undermine the freeze, given that substantial value could be stripped to the holder of such shares (i.e., the father-freezor) as a dividend declared on the preferred shares to the detriment of the common shareholder. These control elements figured largely in the trial judge's finding that there was no gift.

The trial judge based his conclusion that the transfer of shares to the son was not a gift on four factors:

(a) The transfer was not gratuitous but rather was a transfer for consideration.
(b) The father did not intend to gift the shares.
(c) The father did not divest himself of power or control over the shares.
(d) The son did not accept the gift.

The Court of Appeal held that "consideration" is a contractual concept which flows as a result of a bargain between two parties.

In this case, the share transfer was unilateral on the part of the father; there was no bargaining between father and sons. Accordingly, the Court of Appeal held that the fact that the father might consider that he was rewarding sons for their efforts in building the business or have the expectation that the sons would continue to work for the company, was not relevant and was not consideration.

It was acknowledged that the sons may receive some benefit by virtue of the estate freeze, but this was not consideration flowing from sons to father.

With respect to intention to gift, the trial court held that father did not implement the estate freeze for the purpose of making a gift to his sons but rather to creditor proof the business and to achieve tax planning. The Court of Appeal held that this may have been father's motivation or purpose, but did not derogate from the making of a gift.

Finally with respect to delivery/acceptance and the divesting of power and control, the Court of Appeal held that the son merely had to understand the essential nature of the transaction i.e., that he had received shares of the corporation and paid nothing for them.

It was not necessary that he understand all of the documentation. Further the fact that father could effectively diminish the value of the common shares at any time because of the discretionary dividend entitlement of his preferred shares, had no bearing on the transfer of the common shares as a gift.

The trial court decision had raised concerns about the ability to implement an estate freeze and also to take steps to cause the post-freeze common shares to be "excluded property" for *Family Law Act* (Ontario) purposes. The judgement in the Court of Appeal should permit corporate estate freezes to continue as before.