

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

CHARLES MOSSMAN

PLAINTIFF

and



BERKSHIRE FUNDING INITIATIVES LIMITED, TALISKER FUNDING LIMITED,  
JAMES PENTURN, RICHARD E. GLATT,  
JACK KESLASSY, IDEAS CANADA FOUNDATION,  
THORSTEINSSONS LLP and GOWLING LAFLEUR HENDERSON LLP

DEFENDANTS

**PROCEEDINGS COMMENCED UNDER THE CLASS PROCEEDINGS ACT**

**STATEMENT OF CLAIM**

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff(s). The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff(s) lawyer or, where the plaintiff(s) do(es) not have a lawyer, serve it on the plaintiff(s), and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: September 12, 2014

Issued by

  
Local registrar

Address of court office:  
393 University Avenue  
10th Floor  
Toronto, Ontario M5G 1E8

TO **Berkshire Funding Initiatives Limited**  
1959 Upper Water Street  
Suite 800  
Halifax, Nova Scotia  
B3J 2X2

AND **Talisker Funding Limited**  
TO 1959 Upper Water Street  
Suite 800  
Halifax, Nova Scotia  
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AND **James Penturn**  
TO 1 Yonge Street  
#1801  
Toronto, Ontario  
M5E 1W7

AND **Richard E. Glatt**  
TO 45 St. Clair Avenue West  
Suite 200  
Toronto, Ontario  
M4V 1K6

AND **Jack Keslassy**  
TO 443 Danforth Avenue  
#1  
Toronto, Ontario  
M4K 1P1

AND **Ideas Canada Foundation**  
TO 611-157 Adelaide Street West  
Toronto, Ontario  
M5H 3M7

AND **Thorsteinssons LLP**  
TO Thirty-Third Floor, Brookfield Place  
Bay Wellington Tower, 181 Bay Street  
Toronto, Ontario  
M5J 2T3

AND **Gowling Lafleur Henderson LLP**  
TO 100 King Street West  
Suite 1600  
Toronto, Ontario  
M5X 1G5

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## DEFINITIONS

The following definitions apply for the purpose of this Statement of Claim:

- (a) **“Berkshire”** means Berkshire Funding Initiatives Limited, a Nova Scotia corporation;
- (b) **“Charles”** means Charles Mossman;
- (c) **“Class or Class Members”** means all individuals who participated in the **Gift Program** for the taxation years 2001, 2002 and 2003 (“the Class period”);
- (d) **“CPA”** means the *Consumer Protection Act*, S.O. 2002, c.30;
- (e) **“CRA”** means Canada Revenue Agency;
- (f) **“Gift Program”** means the Berkshire Gift Program more particularly described below;
- (g) **“Gift Program Defendants”** means all defendants other than Thorsteinssons and Gowlings;
- (h) **“Gift Program Documents”** means the “Loan Application” and “Power of Attorney”, “Promissory Note” and “Pledge” “, as those terms are used in the **Gift Program Documents, Promotional Materials and Opinion Letters**;
- (i) **“Gowlings”** means Gowling Lafleur Henderson LLP, a limited liability partnership of lawyers with offices in Toronto and elsewhere;

- (j) **"Ideas"** means the Ideas Canada Foundation registered November 1, 2000;
- (k) **"Jack"** means Jack Keslassy, a resident of Ontario;
- (l) **"James"** means James Penturn, a resident of Ontario;
- (m) **"Opinion Letters"** means the **Thorsteinssons'** and **Gowlings'** opinion letters on the income tax consequences of participation in the **Gift Program**;
- (n) **"Promotional Materials"** includes the "Berkshire Funding Initiatives Limited Brochure", the "Berkshire Giving Program Overview", various undated letters from Berkshire Funding Initiatives Limited and the "Talisker Funding Limited Transaction Summary", and other documents used by the **Gift Program Defendants** to market the **Gift Program**;
- (o) **"Richard"** means Richard E. Glatt, a resident of Ontario;
- (p) **"Talisker"** means Talisker Funding Limited a Nova Scotia corporation;
- (q) **"Personal Defendants"** means **James, Richard and Jack**;
- (r) **"Thorsteinssons"** means Thorsteinssons LLP, a limited liability partnership of lawyers with offices in Toronto and elsewhere;

## CLAIM FOR RELIEF

1. The plaintiff claims on behalf of himself and on behalf of all Class Members:
  - (a) an order certifying this action as a class proceeding and appointing him as representative plaintiff;
  - (b) \$100,000,000.00 for general and special damages with respect to the causes of action described below:
    - (i) against all defendants for negligence and negligent misrepresentations;
    - (ii) against the Gift Program Defendants for unjust enrichment, restitution, and constructive trust, fraud, and fraudulent misrepresentations;
    - (iii) against the Gift Program Defendants, a declaration that they engaged in unfair and unconscionable practices and are in breach of s. 17 of the *CPA*, and that it is in the interests of justice to waive the requirement for giving notice under s. 18(15) of the *CPA*, and for declarations under similar legislation in other provinces and territories as set out in Schedule A; and ordering rescission of the Gift Program contracts and granting damages, including exemplary and punitive damages pursuant to s. 18 of the *CPA* and the similar legislation in other provinces and territories as set out in Schedule A; and
    - (iv) against Ideas, Berkshire and Talisker for breach of contract, or in the alternative, for rescission of the

contract and the return of all monies paid under the Gift Program.

- (c) an interim order or injunction, until trial or other final disposition of these proceedings restraining any of the Gift Program Defendants and their servants and agents from dissipating any monies, wherever situate in the world, in their possession which directly or indirectly came from the Class Members, and an interim order or injunction freezing any bank accounts wherever situate in the world where Class Members' monies are held;
- (d) punitive and exemplary damages in the sum of \$50,000,000.00;
- (e) a tracing order and a constructive trust against all of the Gift Program Defendants to trace all monies paid by the Class in respect of the Gift Program;
- (f) a declaration against Berkshire and Talisker that all promissory notes executed by Class Members in connection with participation in the Gift Program, are void and unenforceable;
- (g) compounded pre-judgment and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, or alternatively, pre-judgment and post-judgment interest calculated on a simple interest basis;

- (h) any tax which may be payable on any amounts pursuant to Bill C-62, the *Excise Tax Act*, R.S.C. 1985, as amended or any other legislation enacted by the Government of Canada;
- (i) an order directing a reference or such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (j) costs of this action on a full indemnity basis, as well as the costs of notice and administering the plan of distribution of recovery in this action, plus disbursements and applicable taxes; and
- (k) such further and other relief as counsel may advise and this Court may permit and deem just and appropriate in the circumstances.

## **THE PARTIES**

2. Charles resides in Ontario. He is a consumer under the *CPA*. Charles is the proposed representative of the Class.

3. Ideas was settled as a charitable trust on September 22, 2000, and became a registered charity effective November 1, 2000. Ideas' Registration number is 89431 0416 RR0001. Ideas was created by the Personal Defendants. Ideas' charitable status was voluntarily revoked by CRA effective February 9, 2008.

4. Berkshire and Talisker are Nova Scotia corporations which created, promoted, marketed, administered, operated, participated in and sold the Gift Program to the Class as



more particularly described below. Both operated in Ontario under an extra-provincial registration.

5. James and Richard are officers and directors of Berkshire. James is President. Richard is Treasurer. Both are shareholders of Berkshire. Jack is an employee of Berkshire and the responsible Ontario resident for Berkshire's operation.

6. Jack is President, director and sole shareholder of Talisker.

7. James, Richard and Jack created, promoted, marketed, administered, operated and sold the Gift Program.

8. Ideas retained Berkshire as a fundraising agent.

9. Thorsteinssons and Gowlings are law firms carrying on business throughout Canada. All of the partners of Thorsteinssons and Gowlings are vicariously liable for the negligent acts or omissions and the negligent misrepresentations of Thorsteinssons and Gowlings made during the Class Period and for the damages suffered as a consequence by the Class.

## **THE GIFT PROGRAM**

10. The Gift Program is a leveraged charitable donation arrangement. The Gift Program allowed participants to borrow money to make a charitable donation in order to receive a charitable donation receipt and concomitant tax credit. The Gift Program allowed participants to borrow 80% of the total charitable donation amount. Participants received a

pre-arranged loan, without any credit checks being performed, and made a donation of the loan proceeds, as well as an additional cash portion.

11. Class Members signed a promissory note to repay an interest-free loan in 25 years.

Class members were told in the Promotional Materials:

- "Donor provides Security deposit equal to 10% of donation amount..."
- "No interest",
- "No payment of any kind before maturity"
- "Invested by Lender and guaranteed to meet or exceed benchmarked rate of return for the entire terms of the loans (Benchmark-Simple average return of Technology Funds as reported by Morningstar, previous 3 year average 30.82%)."
- "9.6%-11.1% return would retire the entire loan."
- "Actually save money-Cash Flow positive."

12. The money has not been invested. It has been diverted out of Canada in a scheme to enrich the Gift Program Defendants.

13. The flow of money was circular. Lenders provided money to Talisker by way of daylight loans (repaid on the same day or within a very short time period). Talisker then advanced monies to the donor, then to Ideas, then to the MacLaren Art Centre, then to an

agent in the UK, then to an offshore art dealer, then to an offshore lender, back to Talisker, and finally back to the providers of the daylight loans.

14. The circular flow of funds was pre-arranged and occurred on the same day or within a very short time period. There was no purpose for the arrangement other than to attempt to obtain a favourable tax benefit.

15. 88% of the funds were deposited into a Canadian law firm's trust account for donation to a charity, the MacLaren Art Center ("MacLaren"). Only .5% was actually paid to MacLaren. The remaining 87.5% was left in the law firm's trust account. By agreement with one or more of the Gift Program Defendants or their agents, MacLaren agreed that the funds in the trust account would be used to purchase art from art dealers at a price which the dealers dictated and which was not based on a valid valuation. The dealers acted as agents for the Gift Program Defendants. The dealers purchased the art for re-sale to MacLaren at a fraction of the cost of the valuation. The difference between the dealers' purchase price and the inflated valuation was available to repay the Canadian lender referred to above. The Canadian law firm's trust account was controlled by the Gift Program Defendants or their agents and on their direction the law firm made payments resulting in elimination of Talisker's indebtedness within 24 to 48 hours of when it was incurred. The money supposedly borrowed by participants in the Gift Program to fund their charitable donation was actually repaid to the lender as a result of the wrongfully inflated value of the art.

16. The Gift Program was developed, promoted and administered by the Gift Program Defendants.

17. The Gift Program Defendants acted in concert in all dealings in relation to the Gift Program.

18. The Gift Program is a consumer transaction, governed and regulated by the provisions of the *CPA* (for Ontario residents) and by the equivalent and/or similar legislation in Schedule A for Class Members who at the time of the advance of money to the Gift Program resided in other provinces and territories of Canada.

### **PROMOTIONAL MATERIALS**

19. Members of the Class were each provided with the Promotional Materials that were identical or substantially similar.

20. All the defendants took part and played a role in the review, preparation and dissemination of the Promotional Materials to the Class, and intended that the Class would rely upon the representations contained in them, which they did.

21. With the knowledge and consent of Thorsteinssons and Gowlings, the Promotional Materials made reference to their role in evaluating and opining on the validity and lawfulness of the Gift Program. The Promotional Materials provided to the Class stated that:

### **TAX OPINION**

A tax opinion has been obtained from the law firm of **Thorsteinssons** with respect to the tax implications of an individual donating cash to registered charities a portion of which is funded by an interest free loan to the donor. **Thorsteinssons** is Canada's largest law firm dealing exclusively in the area of taxation. A second confirming tax opinion has been given by **Gowlings** on Quebec provincial tax implications for residents of Quebec. The tax opinions may be reviewed upon request and after signing the confidentiality

agreement. Individuals are urged to consult their own advisors about the tax implications of making a donation.

22. Further, the Promotional Materials included express and/or implied representations that:

- (a) Berkshire and Talisker had received a favourable tax opinion from Thorsteinssons and Gowlings with respect to the Gift Program;
- (b) the Gift Program complied with the *Income Tax Act*; and,
- (c) the full amount of the donations would qualify for a charitable donation tax credit.

23. None of the Promotional Materials explained to the plaintiff or to Class Members that the cash donations to the charities were granted to the charities conditionally and on express terms limiting their use. The omission of these facts from the Promotional Materials was intentional, material, misleading, deceptive and unconscionable.

24. The defendants intended the plaintiff and the Class Members to receive and rely upon the Promotional Materials, including the reference to the existence of the Opinion Letters, and the representations contained therein to the effect that there was a charitable purpose or intent for the Gift Program, to induce the plaintiff and the Class Members to participate in the Gift Program.

25. The defendants intended the Class to rely upon the prominence, reputation and credentials of Thorsteinssons and Gowlings in making the decision whether to participate in the Gift Program.

26. The plaintiff and the Class Members did, in fact, rely upon the representations contained in Promotional Materials, including the reference to the existence of the Opinion Letters, and upon the reputations, prominence and credentials of these law firms, in deciding to participate in the Gift Program.

## **THE OPINION LETTERS**

27. Thorsteinssons and Gowlings issued the Opinion Letters as to the income tax consequences for an individual participating in the Gift Program. The Opinion Letters concluded that the donations made by Class Members would qualify and be accepted by CRA as charitable tax donations.

28. Thorsteinssons and Gowlings knew that reference to the Opinion Letters would be included in the Promotional Materials.

29. Class Members were aware of the existence of Opinion Letters. The defendants knew that Class Members would reasonably rely upon the representations (express and implied) in the Promotional Materials, particularly the reference to the Opinion Letters, in making the decision to participate in the Gift Program.

30. The plaintiff and Class members relied upon the existence of the Opinion Letters, and relied upon the express or implied representations that:

- (a) the Gift Program was a legitimate charitable donation program;
- (b) the Gift Program complied with the *Income Tax Act*; and,
- (c) donors would receive charitable tax credits equal to the value of the

total donation being the cash and the loaned amounts.

31. The Opinion Letters were a necessary inducement and a necessary pre-requisite to the promotion and sale of the Gift Program. But for the Opinion Letters, the Gift Program would not have been launched and the Class would not have participated in the Gift Program. The Opinion Letters were designed to induce Class Members to participate in the Gift Program without disclosing to the Class all of the material risks of participating in the Gift Program, and without disclosing to the Class the fact that virtually none of their donations would be received by any legitimate charitable organization.

32. The existence of the Opinion Letters, and their conclusion that the donations made by the Class Members under the Gift Program would qualify and be accepted by CRA as charitable tax donations, was an express term of the contract entered into by Class Members with respect to the Gift Program.

### **CIRCUMSTANCES OF THE REPRESENTATIVE PLAINTIFF**

33. Charles participated in the Gift Program for the 2001 and 2002 tax years.

34. For the 2001 tax year, Charles executed a loan application and power of attorney agreeing to pledge a donation of \$20,000.00 to Ideas. Charles paid to Talisker the sum of \$4,000.00 as the cash portion of the donation, \$2,000.00 in satisfaction of the required security deposit (being 12.5% of the loan amount), and a loan processing fee of \$1,000.00. Charles borrowed \$16,000.00 from Talisker and executed a promissory note in that regard. Charles received a purported charitable donation tax receipt in the amount of \$20,000.00 for the 2001 tax year.

35. For the 2002 tax year, Charles executed a loan application and power of attorney agreeing to pledge a donation of \$20,000.00 to Ideas. Charles paid to Talisker the sum of \$4,000.00 as the cash portion of the donation, \$2,000.00 in satisfaction of the required security deposit (being 12.5% of the loan amount), and a loan processing fee of \$800.00. Charles borrowed \$16,000.00 from Talisker and executed a promissory note in that regard. Charles received a purported charitable donation tax receipt in the amount of \$20,000.00 for the 2002 tax year.

36. Charles' participation in the Gift Program for the 2001 and 2002 tax years is summarized as follows:

CHARLES MOSSMAN					
TAX YEAR	PROMISSORY NOTE	SECURITY DEPOSIT	ADDITIONAL CASH DONATION	LOAN PROCESSING FEE	CHARITABLE DONATION TAX RECEIPT
2001	\$16,000.00	\$2,000.00	\$4,000.00	\$1,000.00	\$20,000.00
2002	\$16,000.00	\$2,000.00	\$4,000.00	\$800.00	\$20,000.00

37. Charles filed his personal income tax return for the 2001 and 2002 tax years, claiming charitable donation tax credits based upon the charitable donation tax receipts received under the Gift Program.

38. CRA reassessed Charles' income tax returns for 2001 and 2002 taxation years. By its reassessment, CRA determined that Charles was not entitled to a tax credit for the purported charitable donations made to Ideas.



39. On the advice and the recommendation of the Gift Program Defendants, Charles filed a Notice of Objection with CRA in respect of the CRA reassessments.

40. As a result of CRA's reassessment of Charles' 2001 income tax return, Charles was required to make payment of taxes of \$7,425.79. CRA charged Charles interest on tax arrears arising from the reassessment in the amount of \$1,629.56.

41. As a result of CRA's reassessment of Charles' 2002 income tax return, Charles was required to make payment of taxes of \$7,424.00. CRA charged Charles interest on tax arrears arising from the reassessment in the amount of \$915.54.

42. Charles sought professional legal and accounting advice in respect of CRA's determination and reassessment of his 2001 and 2002 income tax returns. Charles incurred professional legal and accounting fees in that regard.

## **CRA REASSESSMENTS**

43. As a result of the transactions mandated by the Gift Program, including the fact that Class Members received charitable receipts for more than the value of their cash donation, and that Class Members received interest-free loans, CRA concluded that Class Members received consideration and a benefit from the Gift Program. Therefore, CRA concluded that donations of Class Members under the Gift Program were not gifts as defined in the *Income Tax Act*. CRA also concluded that other provisions in the *Income Tax Act* invalidated the charitable receipts received by the Class. CRA has reassessed all tax returns of Class Members. All Class Members lost the promised tax benefits and have also lost the money advanced to the Gift Program.

44. A reasonably competent lawyer practicing in the field of tax ought to have known that CRA would conclude that the donations of Class Members under the Gift Program would not qualify as charitable gifts under the *Income Tax Act*. Thorsteinssons and Gowlings were negligent in delivering the Opinion Letters with the opposite conclusion, and in delivering the opinion letters that stated that the Gift Program would qualify as charitable gifts under the *Income Tax Act*.

45. The total amount of the plaintiff's loss is the total of his cash donations to the Gift Program, plus the interest and/or penalties he was obliged to pay to CRA.

46. The total amount of each Class Member's loss is calculated on the same basis, the full particulars of which will be provided prior to trial.

47. CRA audited all Class Members' claimed tax credits with respect to participation in the Gift Program and disallowed 100% of the tax credits claimed by Class Members. Each Class Member has been assessed interest and/or penalties as a result of the reassessments.

48. CRA determined that even the cash portion of the donation amount actually paid by Class Members does not qualify as a gift under the *Income Tax Act*.

49. CRA correctly determined that the Gift Program was not a *bona fide* charitable gift program and that the charitable receipts issued are not valid. CRA's position was confirmed by the Tax Court of Canada in the decision of Justice V.A. Miller, released September, 14, 2012. The decision was affirmed by the Federal Court of Appeal on December 6, 2013. Leave to Appeal to the Supreme Court of Canada was denied May 15, 2014.

50. The plaintiff and Class Members only had sufficient information to cause a limitation period to begin to run once the Leave to Appeal application was dismissed on May 15, 2014. Alternatively, the limitation period only began to run on December 6, 2013, the date of the decision of the Federal Court of Appeal, or further alternatively on September 14, 2012 when the Tax Court of Canada decision of Justice V.A. Miller was released.

## **BREACH OF CONTRACT**

### **The Contract**

51. Class Members had a direct and specific understanding that they would receive charitable donation receipts that would be recognized by CRA for tax credit purposes. It was an express, or in the alternative, an implied term of the contract that all participants would receive a valid and legitimate charitable donation receipt, and would realize the tax savings as stated in the Promotional Materials.

52. Berkshire fundamentally and materially breached the terms of the contracts with Class Members. The Gift Program was a fraud, and virtually none of Class Members' donations were gifted to charitable donees. Class Members did not receive valid and legitimate charitable donation receipts recognized by CRA.

53. The plaintiff and the Class have been damaged in the amount of their cash donations and the interest and other penalties assessed by CRA in respect of the disallowed charitable donation tax credits, and any special damages they have incurred.

## **FRAUD AND FRAUDULENT MISREPRESENTATIONS**

54. The plaintiff states that all the Gift Program Defendants fraudulently planned, created and operated the Gift Program, for the purpose of profiting themselves and defrauding the Class.

55. The Gift Program Defendants promoted, perpetuated, participated, marketed, administered, created, controlled, and operated Ideas and the Gift Program which they knew was fraudulent, or they were wilfully blind or reckless as to the fact. The Gift Program Defendants fraudulently misrepresented to the Class that they would receive from the Gift Program the tax benefits, including the specific tax benefits set out above, when they knew or ought to have known that Class Members would not receive the tax benefits and savings. The Gift Program Defendants fraudulently misrepresented the benefits the charities would receive from the Gift Program.

56. The Gift Program was a fraud and the Gift Program Defendants knew that they were assisting with the fraud or they were reckless with respect thereto.

57. The Gift Program Defendants knew that the Gift Program violated the *Income Tax Act* and the CPA, as they knew that the real purpose and intent of the Gift Program was not to benefit any charities, but to defraud the Class of the amounts that they contributed to the Gift Program, and which the Class intended to be charitable donations.

58. The money that was to be invested to repay the loans is gone and has improperly enriched the Gift Program Defendants.

59. The plaintiff and the Class Members advanced money to the Gift Program, and received charitable receipts many times larger than their actual cash donation. The Gift

Program Defendants knew or ought to have known, or were wilfully blind to the fact, that the charitable donation receipts would not be recognized by CRA, and that the plaintiff and Class Members would not be to the tax donation credits. The Gift Program Defendants knew or ought to have known, or were wilfully blind to the fact that CRA would conclude that the donations made by Class Members were not gifts, as defined in the *Income Tax Act*.

60. It was a fundamental express or an implied term going to the root of the contract that the donated money would be paid to charity, and Class Members were fraudulently and intentionally not told that this contractual term would be breached and was incapable of being honoured, based upon the structure of the Gift Program and the obligations imposed upon the charities by the Gift Program Defendants.

61. Class Members were never told by the Gift Program Defendants that the primary purpose of the scheme was for the benefit of the Gift Program Defendants such that they would receive the vast majority of the monies advanced by the Class.

62. The Gift Program Defendants, as the marketers and promoters of the Gift Program, had the authority and responsibility to supervise the sales persons for the Gift Program, and had an obligation to ensure that the information provided to the plaintiff and the Class Members was accurate. Further, the Gift Program Defendants had an obligation to ensure that the Class was explained the risks of participation in the program, and explained that the primary purpose of the Gift Program was the financial benefit of the Gift Program Defendants, and for charitable giving or tax savings by the Class.

63. Further and in the alternative, the Gift Program Defendants created, reviewed, drafted, supervised, approved, and authorized or had the opportunity and authority to authorize the preparation and distribution of the Promotional Materials and the Opinion Letters. The Gift Program Defendants knew, or were reckless or wilfully blind to the fact that the Class Members would be receiving misleading, inaccurate and incomplete Promotional Materials and the Opinion Letters and relying upon the accuracy and completeness of the said information in making the decision to participate in the Gift Program.

64. The Gift Program Defendants knew, or were reckless or wilfully blind to the fact that the information contained in the Promotional Materials, and Opinion Letters was inaccurate, false, deceptive, misleading, and failed to contain material information. The Gift Program Defendants allowed those documents to be distributed to the Class, thus committing the tort of fraudulent misrepresentation either by way of express fraudulent representation or by omissions of material facts which ought to have been disclosed to the plaintiff and the Class Members.

65. Further, once the Gift Program Defendants became aware of CRA's position, and became aware that the information in the Promotional Materials and Opinion Letters was inaccurate, false, deceptive, or misleading they failed to take any steps to contact the Class Members to advise them that these documents were inaccurate, false, deceptive, and misleading. Further, the Gift Program Defendants failed to deliver revised Promotional Materials or Opinion Letters, and continued to fraudulently sell and operate the Gift Program even after becoming aware of CRA's position.

66. The fraud and fraudulent misrepresentations of the Gift Program Defendants caused losses to Class Members.

## **SEPARATE TORTIOUS CONDUCT**

67. With respect to the acts and omissions of the Personal Defendants, the plaintiff states the following:

- (i) the Personal Defendants owed a duty of care to the Class;
- (ii) the acts and omissions of the Personal Defendants constitute separate tortious conduct, which conduct caused or contributed to the losses of the Class;
- (iii) the tortious conduct of the Personal Defendants exhibited a separate identity or interest from the corporations or trusts or entities with which the Personal Defendants were employed, affiliated, or associated, or for whom they were employees, trustees, officers, or directors; and
- (iv) the tortious conduct of the Personal Defendants was not in the best interests of the corporations, trusts, or entities, with which these defendants were employed, affiliated or associated, but was for the intended purpose of furthering the fraud, and for their own personal enrichment.

The corporate veil should be pierced to expose the Personal Defendants to personal liability because of their grievous, negligent, fraudulent and tortious conduct.

## **NEGLIGENCE**

**Negligence of the Gift Program Defendants**

68. The Gift Program Defendants knew, or reasonably ought to have known, or were reckless or wilfully blind to the fact that there was no genuine charitable purpose or intent in the Gift Program. The transactions related to the Gift Program were transactions without a legitimate purpose, a fact that was not disclosed to the Class, and which was a material omission. The primary purpose of the Gift Program was to financially benefit the Gift Program Defendants. Most of the money paid by the Class Members was received by the Gift Program Defendants and not by any charity. This was not disclosed to the Class prior to the Class advancing money to the Gift Program. Had Class Members known that there was no legitimate charitable purpose or intent to the Gift Program, they would not have participated in the Gift Program.

69. In the alternative, if one or more of the Gift Program Defendants did not financially benefit from the Gift Program, then those defendants nevertheless knew or ought to have known or were reckless or wilfully blind to the fact that some of the defendants would improperly financially benefit from the Gift Program.

70. The Gift Program Defendants negligently created, reviewed, drafted, supervised, approved, and authorized the preparation and distribution of the Gift Program Documents, the Promotional Materials and the Opinion Letters, even though they knew, or ought to have known, that the Class Members would be receiving these documents, and relying upon the accuracy and completeness of the information in the documents in making the decision to invest in the Gift Program.



71. The Gift Program Defendants knew or ought to have known that the information contained in the Promotional Materials and Opinion Letters was inaccurate, false, deceptive, misleading, and failed to contain material information, and yet the Gift Program Defendants negligently distributed or permitted the distribution of the Promotional Materials to the Class, or negligently authorized the distribution of the Promotional Materials, and did not take steps to halt the distribution of the Promotional Materials when they had the authority, capacity and means to stop the distribution of the Promotional Materials.

72. Further, once the Gift Program Defendants became aware of CRA's position, and became aware that the information in the Promotional Materials was inaccurate, false, deceptive, or misleading, they negligently failed to take any steps to contact the Class Members to advise them that these documents were inaccurate, false, deceptive, and misleading. Further, the Gift Program Defendants negligently failed to deliver revised Promotional Materials, and negligently continued to allow the Gift Program to be sold to Class Members even after becoming aware of CRA's position.

73. But for the existence of the Opinion Letters and their reference in the Promotional Materials, the Gift Program would not have been launched and the Class would not have participated in the Gift Program. The existence of Opinion Letters and their reference in the Promotional Materials were designed to induce the Class to participate in the Gift Program without disclosing to the Class all of the material risks of participation in the Gift Program, or the true facts relating to the actual operation of the Gift Program. The Gift Program Defendants knew, or ought to have known, that the Class Members receiving the reference in the Promotional Materials (but not the Opinion Letters), would assume the Opinion Letters created by Thorsteinssons and Gowlings would opine that the income tax savings

represented in the Promotional Materials for the Gift Program would be permitted without objection from the CRA.

74. The Gift Program Defendants owed the Class a duty of care, which they breached. The Gift Program Defendants the Class Members a duty of care based on the special relationship between them and the members of the Class. The special relationship between the defendants and the Class Members arose from the defendants' knowledge of the reliance which the Class Members would place on the information provided to them in the Promotional Materials and the Opinion Letters, and arose from the facts set forth above. The defendants had a duty to ensure that the Opinion Letters and the Promotional Materials were accurate, and were neither deceptive nor misleading, and to ensure that these documents contained all material facts relevant to the decision to participate in the Gift Program.

75. The Gift Program Defendants had an obligation to ensure that the sales persons selling the Gift Program to the Class Members understood the risk to the Class participating in the Gift Program and had a duty to ensure that the sales persons were properly trained, and a duty to take steps to ensure the sales force explained the risks of participation in the program to the Class, and explained to the Class that the primary purpose of the Gift Program was the financial benefit of the Gift Program Defendants.

76. The plaintiff and Class Members state that the Gift Program Defendants were negligent, the particulars of which are as follows:

- (i) they failed to ensure that CRA would in fact recognize the charitable donation receipts issued and tax credits claimed by the Class Members;
- (ii) they provided to the Class the Promotional Materials and the Opinion Letters which were inaccurate, false, deceptive, misleading, and failed to contain material information, and which were designed to convince the Class Members of tax benefits which the Gift Program Defendants knew or ought to have known would not be ultimately realized;
- (iii) they breached their duty by not providing to the Class Members amended and accurate documents. The Gift Program Defendants were aware or ought to have been aware that the Promotional Materials and the Opinion Letters provided to the Class Members were inaccurate, false, deceptive, misleading, and failed to contain material statements or information. The Gift Program Defendants were aware of the necessity of delivering revised or amended documents but failed to provide these amended documents to the Class Members;
- (iv) they separately, and in concert, created, authorized, approved, promoted, marketed, administered, operated, participated and allowed to be sold to the public and the Class the Gift Program when they knew or ought to have known that participation in the Gift Program

would likely result in Class Members not receiving the tax savings promised in the Promotional Materials and the Opinion Letters;

- (v) they knew, or ought to have known, that the Gift Program would not qualify as a charitable gift under the *Income Tax Act*;
- (vi) they knew or ought to have known that there was no proper valuation of the art in the Gift Program;
- (vii) they knew or ought to have known that the transactions at the heart of the Gift Program were not arm's-length;
- (viii) they knew or ought to have known that the Class would be negligently misled into believing that the Gift Program had a charitable purpose or intent where no such intent or purpose existed;
- (ix) they knew or ought to have known that CRA would conclude that the donations of the Class Members were not gifts as defined in the *Income Tax Act*;
- (x) they knew, or ought to have known, that CRA would reassess the tax returns of the Class Members, rendering the Class Members liable to repay tax, interest, and penalties to CRA;
- (xi) they failed to tell the Class Members that the transactions related to the Gift Program were tax avoidance transactions without legitimate purpose;

- (xii) they participated in a scheme which they knew would deceive the Class Members into believing that the tax benefits of the Gift Program would ultimately be received by Class Members, when they knew or ought to have known it was unlikely such benefits would ultimately be received;
- (xiii) they preferred their own interests to those of the Class Members and failed to advise the Class that they were making this preference;
- (xiv) they failed to disclose to the Class that the primary purpose of the Gift Program was the financial benefit to the Gift Program Defendants and that most of the money paid by Class Members under the Gift Program was to be received by the Gift Program Defendants and not the charities;
- (xv) they negligently failed to ensure the fulfilment of duties owed to the Class Members pursuant to the provisions of the CPA and other equivalent and/or similar legislation in the provinces and territories for the Class Members who at the time of the participation resided in other provinces and territories of Canada;
- (xvi) the Gift Program Defendants provided to the lawyers factual information and assumptions about the Gift Program which they knew or ought to have known were untrue;

- (xvii) the Gift Program Defendants had an obligation to ensure that the sales persons selling the Gift Program to the Class Members understood the risk to the Class of participating in the Gift Program, and had a duty to ensure that the sales persons were properly trained, and had an obligation to take steps to ensure the sales force explained the risks of participation in the Gift Program to the Class;
- (xviii) the Gift Program Defendants knew that the tax benefits promised to the Class were unlikely to ultimately be received by the Class, and the Gift Program Defendants had a duty to explain to the Class that the primary purpose of the Gift Program was the financial benefit of the Gift Program Defendants; and
- (xix) they failed to tell the Class Members about the true facts underlying the Gift Program.

77. The Gift Program Defendants owed a duty of care to the Class because the Gift Program Defendants knew or ought to have known that the Class would rely upon the accuracy and completeness of the documentation which the Class received with respect to the Gift Program, and knew the Class would rely upon the Gift Program Defendants to only market a product which would deliver to the Class valid charitable tax credits.

78. The Gift Program Defendants negligently failed to take proper steps to fully investigate the Gift Program to ensure that the CRA would in fact recognize the charitable donation receipts that were issued and the tax credits as claimed by the Class Members.

**Negligence of Thorsteinssons and Gowlings**

79. Thorsteinssons and Gowlings assisted the Gift Program Defendants in the creation and development of the Gift Program, and the preparation and distribution of the Gift Program Documents, Promotional Materials and the Opinion Letters, even though they knew, or ought to have known, that the Class Members would be receiving these documents, and relying upon the accuracy and completeness of the information in the documents in making the decision to participate in the Gift Program.

80. Thorsteinssons and Gowlings knew, or ought reasonably to have known, that there was no genuine charitable purpose or intent in the Gift Program such that Class Members' payments would not qualify as charitable donations under the *Income Tax Act*, but rather that the primary purpose of the Gift Program was to enrich the Gift Program Defendants.

81. If Thorsteinssons and Gowlings did not know that there was no genuine charitable purpose or intent in the Gift Program, they failed to make reasonable inquiries and investigations prior to rendering their opinions, and accordingly failed in their duty of care owed to the Class.

82. Thorsteinssons and Gowlings knew, or ought reasonably to have known, that Class Members were relying upon or the reference to the existence of Opinion Letters in the Promotional Materials.

83. Thorsteinssons and Gowlings were in a conflict of interest and preferred the interests of the Gift Program Defendants to the detriment of Class Members. Thorsteinssons and Gowlings knew or ought to have known that the Gift Program, and the Opinion Letters,

were part of a fraudulent and deceptive scheme. Thorsteinssons and Gowlings owed a duty of care to Class Members who were their beneficial clients and whose existence and exposure to damages were known to Thorsteinssons and Gowlings.

84. Thorsteinssons and Gowlings knew or ought to have known that the information contained in the Promotional Materials and Opinion Letters was inaccurate, false, deceptive, misleading, and failed to contain material information, and yet Thorsteinssons and Gowlings negligently distributed and authorized the distribution of the Promotional Materials and Opinion Letters to the Class, and did not take steps to halt the distribution of the Promotional Materials and Opinion Letters when they had the authority, capacity and means to stop the distribution of the Promotional Materials and Opinion Letters.

85. Further, once Thorsteinssons and Gowlings became aware of CRA's position, and became aware that the information in the Promotional Materials and Opinion Letters, was inaccurate, false, deceptive, or misleading, they negligently failed to take any steps to contact the Class Members to advise them that these documents were inaccurate, false, deceptive, and misleading.

86. Thorsteinssons and Gowlings prepared the Opinion Letters and allowed them to be referenced in the Promotional Materials with the intent that they would be read by the Class Members, and relied upon by the Class Members in making their decision to participate in the Gift Program. In particular, Thorsteinssons and Gowlings knew that the only reasonable inference to be drawn from the Opinion Letters and reference to the Opinion Letters in the Promotional Materials, was that the Gift Program was a legitimate charitable



giving program and that the tax receipts generated by donations under the Gift Program would be accepted as charitable tax credits by CRA.

87. But for the Opinion Letters and their reference in the Promotional Materials, the Gift Program would not have been launched and the Class would not have participated in the Gift Program. The Opinion Letters and the reference to them in the Promotional Materials were designed to induce the Class to participate in the Gift Program without disclosing to the Class all of the material risks of participation in the Gift Program, or the true facts relating to the actual operation of the Gift Program. Thorsteinssons and Gowlings knew, or ought to have known, that the Class Members receiving the reference to the Opinion Letters in the Promotional Materials, would assume the Opinion Letters created by Thorsteinssons and Gowlings would opine that the income tax savings represented in the Promotional Materials would be permitted without objection from the CRA.

88. Thorsteinssons and Gowlings placed themselves in sufficient proximity to Class Members to require Thorsteinssons and Gowlings to be mindful of the legislative interests and expectations of Class Members.

89. Thorsteinssons and Gowlings owed the Class a duty of care, which they breached. Thorsteinssons and Gowlings owed the Class Members a duty of care based on the special relationship between them and the members of the Class. The special relationship between the defendants and the Class Members arose from Thorsteinssons and Gowlings' knowledge of the reliance which the Class Members would place on the information provided to them in the Promotional Materials and the Opinion Letters, and arose from the facts set forth above. Thorsteinssons and Gowlings had a duty to ensure that the Opinion

Letters and the Promotional Materials were accurate, and were neither deceptive nor misleading, and to ensure that these documents contained all material facts relevant to the decision to participate in the Gift Program.

90. The plaintiff and Class Members state that Thorsteinssons and Gowlings were negligent, the particulars of which are as follows:

- (i) they issued the Opinion Letters without due care and consideration, with the expressed intention that the letters be relied upon by the Class Members, when they knew or ought to have known that the content of these letters was inaccurate, incomplete, untrue, and deceptive;
- (ii) they failed to examine the actual facts about the assumed facts in the Opinion Letters and about the transactions in the Gift Program, and failed to scrutinize and asks questions about the purported value of the art sold as part of the Gift Program and purported arm's-length nature of the transactions forming part of the Gift Program;
- (iii) they failed to properly investigate and consider the income tax consequences of participation in the Gift Program;
- (iv) they were negligent in the preparation of the Opinion Letters;
- (v) they knew, or ought to have known, that the Opinion Letters and reference to the Opinion Letters in Promotional Materials were an inducement for the promotion and sale of the Gift Program, and that

but for these the Gift Program could not be undertaken, and yet they still failed to fully and properly investigate and accurately opine about the likely tax consequences of the Gift Program;

- (vi) they knew, or ought to have known, that those Class Members reading the reference to the Opinion Letters in Promotional Materials (but not receiving the Opinion Letters), would assume the Opinion Letters would opine that the income tax savings represented in the Promotional Materials for the Gift Program would be permitted without objection from the CRA;
- (vii) they failed to disclose in the Opinion Letters all the material risks associated with the Gift Program, including but not limited to the disclosure of the circular flow of the funds, the lack of arm's-length transactions, the lack of proper evaluations for the art purchases;
- (viii) they failed to disclose in the Opinion Letters that the 25-year interest-free loans were a sham by reason of the 25-year term without interest, the absence of adequate security, the absence of commercial reality, and the fact that the loans were intended to facilitate a circular flow of funds;
- (ix) they failed to ensure that the Class Members were told of all the material risks associated with the Gift Program;

- (x) they prepared the Opinion Letters based upon assumptions and factual information about the Gift Program provided by the co-Defendants, or by some of the co-Defendants, which factual information and assumptions they knew or ought to have known were untrue;
- (xi) they ignored contrary legal opinions from other lawyers about the tax consequences of the Gift Program;
- (xii) they took no steps to prevent or advise against the selling and marketing of the Gift Program;
- (xiii) they negligently preferred to collect legal fees rather than objectively evaluate the tax consequences of the Gift Program;
- (xiv) they issued the Opinion Letters and allowed reference to the Opinion Letters in Promotional Materials with the express intention that these letters would be relied upon by the Gift Program Defendants, when they knew or ought to have known that the defendants would rely upon and publish the existence of the Opinion Letters in Promotional Materials in promoting the Gift Program;
- (xv) they issued Opinion Letters with the intention that these letters be relied upon by the Gift Program Defendants, without due care and consideration, when they knew or ought to have known that the other

defendants would rely upon the accuracy and reliability of these letters in promoting the Gift Program;

(xvi) they issued the Opinion Letters and allowed reference to the Opinion Letters in Promotional Materials with the intention that the Opinion Letters be relied upon by the Class Members as well as their authorized representatives, without due care and consideration, when they knew or ought to have known that the Class Members would rely upon the existence of these letters in deciding whether to participate in the Gift Program;

(xvii) they issued the Opinion Letters with the intention that these letters be relied upon by the Class Members as well as their authorized representatives, without due care and consideration, when they knew or ought to have known that the Class Members would rely upon the accuracy and reliability of these letters in deciding whether to participate in the Gift Program;

(xviii) they failed to notify the Gift Program Defendants, prospective donors to the Gift Program, and Class Members that their opinions were no longer accurate or reliable; and

(xix) they knew, or ought to have known, that the Gift Program Defendants continued to rely upon and publish the existence and content of the Opinion Letters for the promotion and sale of the Gift Program to

prospective donors and despite their knowledge that these letters were no longer accurate or reliable.

91. Thorsteinssons and Gowlings were negligent in the issuance of the Opinion Letters and in allowing reference to the Opinion Letters in Promotional Materials which were a necessary prerequisite for the promotion of the Gift Program by the Gift Program Defendants.

92. Thorsteinssons and Gowlings owed a duty of care to the Class and to those whom they intended to, or knew or ought to have known would, rely upon the existence and/or the accuracy and reliability of the content of the Opinion Letters they issued, and owed a duty of care to those they knew or ought to have known would rely upon the lawyers to advise the other defendants not to proceed with the Gift Program if a valid charitable tax credit would not be delivered to the Class.

93. Thorsteinssons and Gowlings had a duty to warn the Gift Program Defendants and the Class Members, and to make full disclosure to them as to the facts and circumstances set out above and failed to do so. Particularly, Thorsteinssons and Gowlings failed to notify the Gift Program Defendants and the Class Members that the Opinion Letters were no longer accurate or reliable.

## **DAMAGES**

94. As a result of the breach of contract, negligence, fraud, fraudulent misrepresentations, and breaches of the *CPA* and the other similar provincial legislation, the plaintiff and the Class Members have suffered the following damages and losses:

- (i) charitable donation tax credits that have been or will be disallowed by CRA resulting in reassessments as well as liability to CRA for payment of interest and penalties;
- (ii) loss of monies paid for the Gift Program;
- (iii) any interest or penalties owed by the Class Members to CRA; and
- (iv) special damages, being out-of-pocket expenses, including professional accounting, legal and consulting fees, incurred as a result of CRA's reassessments.

## **RETURN OF THE MONIES OF THE CLASS AND RESCISSION**

95. The plaintiff and the Class seek rescission and the return of the monies paid under the Gift Program on the basis that there has been a fraud, a mistake, or an unfair or unconscionable transaction, or that there were material misrepresentations by the other party (or parties) to the contracts with the Class.

96. Further, or in the alternative, the plaintiff and the Class seek rescission of the contract in respect of the Gift Program on the basis that Berkshire has engaged in unfair and/or unconscionable practices in breach of the provisions of ss. 17 and 18 of the CPA and breaches of the similar legislation in the provinces and territories for Class members who at the time of the advance of monies resided in other provinces and territories of Canada.

97. In view of the fraud that has been perpetrated upon the Class, it is in the interests of justice to waive the notice provisions under s. 17 of the CPA, and any similar notice provisions established under similar legislation in the other provinces and territories.

98. In view of the fraud that has been perpetrated upon the Class, as well as the negligent misrepresentations, it is in the interests of justice that the Class be awarded exemplary and punitive damages pursuant to s. 18 of the CPA and similar legislation in other provinces and territories.

## **RESTITUTION, UNJUST ENRICHMENT, WAIVER OF TORT, CONSTRUCTIVE TRUST**

### **Unjust Enrichment**

99. The acts, omissions, and misconduct of the Gift Program Defendants as set out herein were designed to induce the plaintiff and the Class Members to participate in the Gift Program. Directly or indirectly, the Gift Program Defendants, or some of them, have received some or all of the monies paid by the Class Members for the Gift Program.

100. The Gift Program was a fraud, and the plaintiff and Class Members' donations were not received by legitimate charities, and the plaintiff and the Class Members will not receive the tax benefits promised. Consequently, the following has occurred:

- (i) the Gift Program Defendants have been unjustly enriched;
- (ii) the plaintiff and Class Members have suffered a corresponding deprivation; and
- (iii) there is no juristic reason for this enrichment.



101. The Class relied, to their detriment, upon the inaccurate, false, deceptive, and misleading Opinion Letters and Promotional Materials, and the Class believed that they would receive the tax benefits promised. The Class' reliance on the Gift Program Defendants' representations, and their participation in the Gift Program was to the Gift Program Defendants' benefit, and to the Class' detriment.

102. Even if the Class did not rely upon the Promotional Materials and Opinion Letters, the Gift Program Defendants have unjustly benefited from the monies directly or indirectly received by them from the Class as the entire Gift Program was a fraud. The Class received no benefit from the Gift Program. There is no juristic reason for Gift Program Defendants' betterment.

103. Accordingly, the Class claims damages on the basis of unjust enrichment.

#### **Waiver of Tort, Constructive Trust and Restitution**

104. The plaintiff pleads and relies upon the legal doctrines of restitution, waiver of tort and constructive trust. The Gift Program Defendants created, reviewed, drafted, supervised and approved the Gift Program, and authorized the preparation and distribution of Promotional Materials, and the Opinion Letters, which they knew, or ought to have known, were inaccurate, false, and misleading. The Gift Program Defendants failed to confirm all material facts relating to the Gift Program. Not only did the Class not realize a financial benefit from the Gift Program, the Class has or will lose money in interest payments and penalties imposed by CRA and other damages as particularized above. In these circumstances, the Gift Program Defendants should be compelled to disgorge all the funds which these defendants received, directly or indirectly, from the Gift Program and to

repay to the plaintiff and the Class Members all benefits, monies, and profits unjustly obtained by the Gift Program Defendants' tortious, unlawful, and improper conduct as described herein.

105. The Gift Program Defendants have been unjustly enriched as a result of the fraud they perpetrated. The funds paid to the Gift Program by the Class are therefore impressed with a constructive trust in favour of the Class and should be returned to the Class by the Gift Program Defendants.

106. The Class is entitled to a tracing order to determine the present location of the funds they paid into the Gift Program and they are entitled to an order for restitution of those funds to them.

### **CPA AND SIMILAR LEGISLATION FOR CLASS MEMBERS IN OTHER PROVINCES AND TERRITORIES OF CANADA**

107. The Gift Program Defendants owed duties to the Class to comply with the CPA and other similar legislation in other provinces and territories of Canada set out in Schedule A and are liable to the Class for false, misleading and deceptive representations, unfair practices, and their unconscionable conduct. The Class claims damages and rescission for the breach of these statutory duties.

### **PUNITIVE AND EXEMPLARY DAMAGES**

108. The conduct of all of the defendants is such as to justify an award of punitive and exemplary damages. The defendants' conduct has been a breach of the duty of good faith and separate actionable wrongs, including separate breaches of the provisions of the CPA

and other similar legislation in the provinces and territories for Class Members who at the time of participation in the Gift Program resided in other provinces and territories of Canada. The defendants breached their obligations to the plaintiff and Class Members because of their desire to maximize profits and financial gain, causing them to suppress the conveying of accurate information to the plaintiff and Class Members, which the defendants feared would hurt sales. The defendants have behaved with arrogance and high-handedness, have shown a callous disregard and complete lack of care for the plaintiff and Class Members and the rights of the plaintiffs and Class Members, and ought to be punished and deterred from future misconduct. The defendants' conduct was sufficiently harsh, vindictive, reprehensible, and malicious, so as to justify an award of punitive, exemplary, and aggravated damages from these defendants. The defendants were, or ought to have been, aware of the probable consequences of their conduct and the damage such conduct would cause to the plaintiff and Class Members.

109. The defendants continue to be major participants in Canadian business. These defendants have considerable assets. An award of \$50 million for punitive and exemplary damages is justified and required to punish the defendants and deter their inappropriate conduct in the future.

## **ONTARIO IS THE PROPER FORUM**

110. The plaintiff and Class Members are all residents of Canada, or were residents of Canada when investing in the Gift Program, and many of the Class Members are residents of Ontario.

111. The plaintiff and Class Members were provided with the Promotional Materials, Opinion Letters in Canada, and many in Ontario. The transactions were negotiated and documents were signed in Canada.

112. The plaintiff and Class Members participated in Canadian currency in the Gift Program, which was promoted as a tax shelter duly registered under Canadian law.

113. The Gift Program Defendants promoted the Gift Program throughout Canada, including Ontario, and accepted funds that, although directed to off-shore companies, were initially collected in Canada by Canadian entities which held themselves out as offering a tax shelter program that was in compliance with the Canadian tax regime. All of the defendants carried on business in Ontario.

114. In these circumstances, there is a real and substantial connection between this claim and Ontario, entitling the plaintiff and Class Members to bring this action in Ontario. Ontario is the most convenient forum for the trial of the action.

## **SERVICE OUTSIDE ONTARIO**

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115. With respect to service of this claim outside of Ontario, the plaintiff pleads and relies upon the following Rules:

- (a) 17.02(f)(i)(iv) - the contract was made and breached, in part in Ontario;
- (b) 17.02 (g) - the tort was committed in Ontario;
- (c) 17.02 (h) - the damages of many members of the proposed class were sustained in Ontario;

- (d) 17.02 (o) - the defendants are necessary and proper parties to this action which is properly served;
- (e) 17.02 (p) - the defendants carry on business in Ontario;

116. The plaintiff proposes that this action be tried at Toronto.

Date of issue: September 12, 2014.

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## Schedule A

### Consumer Protection Statutes

	<b>Jurisdiction</b>	<b>Legislation</b>	<b>Provisions</b>
1	Alberta	<i>Fair Trading Act</i> R.S.A. 2000 C. F-2	s.6, 7
2	British Columbia	<i>Business Practices and Consumer Protection Act</i> S.B.C. 2004 c.2	s. 4, 5, 8, 10, 171, 172
3	Manitoba	<i>Business Practices Act</i> C.C.S.M. c. B120	s. 2, 5, 23
4	Newfoundland and Labrador	<i>Consumer Protection and Business Practices Act</i> S.N.L. 2009, c. C-31.1	s. 7, 8, 9, 10
5	Ontario	<i>Consumer Protection Act</i> S.O. 2002, c.30	s.14, 15, 17, 18
6	P.E.I.	<i>Business Practices Act</i> R.S.P.E.I. 2007 c.17	s. 2, 3, 4
7	Quebec	<i>Consumer Protection Act</i> R.S.Q., c. P-40.1	Articles 219, 228, 229, 239, 272
8	Saskatchewan	<i>Consumer Protection Act</i> R.S.S. 1996, c. C-30.1	s.5, 6, 7, 14, 16

**CHARLES MOSSMAN**

Plaintiff

-and-

**BERKSHIRE FUNDING INITIATIVES LIMITED et al**

Defendants

Court File No. CV-14-512061

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT TORONTO, ONTARIO**

**STATEMENT OF CLAIM**

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