

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

**MOTION RECORD OF THE PLAINTIFF
(Seeking Discontinuance of Action)**

November 4, 2019

SCARFONE HAWKINS LLP

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Hamilton, Ontario
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**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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INDEX

<u>TAB</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
1.	Notice of Motion.....	1
2.	Affidavit of Charles Mossman.....	8
	(a) Exhibit “A” – Berkshire Gift Program documents	16
	(b) Exhibit “B” – Statement of Claim dated September 12, 2014	41
3.	Affidavit of Michael Stanton	91
	(a) Exhibit “A” – SH LLP Class Action Website Excerpt – Berkshire	98
	(b) Exhibit “B” – Consent to Discontinuance	102
	(c) Exhibit “C” – Notice of Class Members.....	107
4.	Draft Order	110

Court File No. 14-CV-512061

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

NOTICE OF MOTION

The plaintiff, Charles Mossman, will make a motion to The Honourable Justice Benjamin T. Glustein on Monday, November 18, 2014 at 10:00 a.m., or as soon after that time as the motion can be heard at the courthouse, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5. **PROPOSED METHOD OF HEARING:** The Motion is to be heard

in writing under subrule 37.12.1(1) because it;

in writing as an opposed motion under subrule 37.12.1(4);

orally.

THE MOTION IS FOR:

1. an order approving the discontinuance of this action, on consent, without costs;

- 2 -

2. an order discontinuing this action, on consent, without costs;
3. an order approving the form of notice and posting and sending notice to putative class members; and,
4. such further and other relief as this Honourable Court may deem just and appropriate in the circumstances.

THE GROUNDS FOR THE MOTION ARE:

1. this proposed class proceeding was commenced by Statement of Claim issued September 12, 2014;
2. the lawyers for the plaintiff were Landy Marr Kats LLP (“LMK”), Scarfone Hawkins LLP (“SH”) and Lemer & Company (“LC”), collectively “Class Counsel”;
3. in August 2014, Class Counsel entered into a Consortium Agreement that included provisions to apply for funding and indemnification for adverse costs from the Class Proceedings Fund. In the event that funding and indemnification for adverse costs were not obtained, any one of or all three of the law firms could withdraw from the agreement and the action;
4. in September 2014, Class Counsel and Charles Mossman entered into a Class Proceeding Contingency Fee Retainer Agreement which also included provisions to apply for funding and indemnification for adverse costs from the Class Proceedings Fund. In the event that funding and indemnification for adverse costs were not obtained, any one of or all three of the law firms could withdraw from the agreement and the action;

- 3 -

5. following commencement of the action, Class Counsel and Charles Mossman applied to the Class Proceedings Fund to seek funding and indemnification for adverse costs. In February 2015, the Class Proceedings Fund denied their request;
6. the Statement of Claim was served upon most of the defendants in 2015;
7. lawyers for the defendants, Thorsteinssons LLP, Gowling Lafleur Henderson LLP, James Penturn and Richard E. Glatt were appointed and communicated with Class Counsel;
8. in 2015, 2016 and 2017, Class Counsel sought funding from others but funding was not obtained;
9. in 2016, LMK withdrew from the Consortium Agreement and the Class Proceeding Contingency Fee Retainer Agreement;
10. there was very little interest in the action and proposed class proceeding from putative class members, particularly in Ontario;
11. the action languished and no steps have been taken to advance this proposed class proceeding;
12. in 2019, the plaintiff, Charles Mossman, and the defendants, Thorsteinssons LLP, Gowling Lafleur Henderson LLP, James Penturn and Richard E. Glatt, by their lawyers, agreed to consent to the discontinuance of this action on a without costs basis;
13. the *Class Proceedings Act, 1992*, SO 1992, s 29;
14. the *Rules of Civil Procedure*, RRO 1990, Reg 194 as amended; and,

15. such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the Affidavit of Charles Mossman and exhibits attached thereto, all sworn November , 2019;
2. the Affidavit of Michael Stanton and exhibits attached thereto, all sworn November 4, 2019; and,
3. such further and other evidence as the lawyers may advise and this Honourable Court may permit.

November 4, 2019

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- 6 -

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CHARLES MOSSMAN
Plaintiff

-and-
Defendants

BERKSHIRE FUNDING INITIATIVES LIMITED et al.

Court File No. 14-CV-512061

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

SCARFONE HAWKINS LLP

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Lawyers for the plaintiff,
CHARLES MOSSMAN

RCP-E 4C (July 1, 2007)

Court File No. 14-CV-512061

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

CHARLES MOSSMAN

Plaintiff

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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

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

AFFIDAVIT OF CHARLES MOSSMAN

I, CHARLES MOSSMAN, of Ottawa, Ontario, MAKE OATH AND SAY:

1. I am the plaintiff in this action and have direct knowledge of the information in this affidavit. Where my knowledge information and belief is based upon other sources, I state the source of the information. I believe all that is set out in this affidavit to be true and accurate.
2. By this affidavit, I do not intend to nor do I waive lawyer-client privilege over any of my discussions, correspondence or communications with my lawyers in this action.
3. I was a professor of finance at the I.H. Asper School of Business (“Asper School”) at the University of Manitoba from 1990 until I retired in 2013. Since then I have continued as a Senior Scholar with the Asper School. I live in Ottawa Ontario.

THE BERKSHIRE GIFT PROGRAM

4. In 2001 I received documents my then financial advisor, Robert Eger, which originated from Berkshire Funding Initiatives Limited (“Berkshire”), Talisker Funding Limited (“Talisker”) and Ideas Canada Foundation (“Ideas”) describing the Berkshire gift program (the “Berkshire Gift Program”). I refer to Berkshire, Talisker and Ideas as the “Berkshire Gift Program Defendants”. Attached as Exhibit “A” are copies of some of the Berkshire, Talisker and Ideas documents which describe the Berkshire Gift Program.
5. The Berkshire Gift Program is the subject matter of this action. I participated in the Berkshire Gift Program in 2001 and 2002.
6. In 2001, I signed a Loan Application and Power of Attorney agreeing to pledge a donation of \$20,000.00 to Ideas. I paid Talisker \$4,000.00 to Talisker 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. I borrowed \$16,000.00 from Talisker and signed a promissory note in that regard. I received a charitable donation tax receipt in the amount of \$20,000.00 for the 2001 tax year.
7. In 2002, I signed a Loan Application and Power of Attorney agreeing to pledge a donation of \$20,000.00 to Ideas. I paid Talisker \$4,000.00 to Talisker 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. I borrowed \$16,000.00 from Talisker and signed a promissory note in that regard. I received a charitable donation tax receipt in the amount of \$20,000.00 for the 2002 tax year.

8. I filed my personal income tax returns for the 2001 and 2002 tax years, claiming charitable donation tax credits based upon the charitable donation tax receipts received under the Berkshire Gift Program.

THE CRA'S DISALLOWANCE OF BERKSHIRE GIFT PROGRAM DONATIONS

9. The Canada Revenue Agency ("CRA") reassessed my income tax returns for the 2001 and 2002 taxation years, disallowing 80% of the charitable donation tax credits I claimed pursuant to the charitable donation tax receipts received under the Gift Program. The CRA allowed only the \$4,000.00 cash portion of the charitable donations.
10. As a result of CRA's reassessment of my 2001 income tax return, I was required to make payment of taxes of \$7,425.79, together with interest on tax arrears of \$1,629.56.
11. As a result of CRA's reassessment of my 2002 income tax return, I was required to make payment of taxes of \$7,425.79, together with interest on tax arrears of \$915.54.
12. I sought and obtained professional legal and accounting advice in respect of CRA's determination and reassessment of my 2001 and 2002 income tax returns. I incurred professional legal and accounting fees.

NOTICES OF OBJECTIONS AND APPEALS

13. On the advice and recommendations received from the Berkshire Gift Program Defendants, I filed Notices of Objection with the CRA for the 2001 and 2002 tax years. I completed CRA questionnaires and provided the CRA with documents and information concerning my participation in the Berkshire Gift Program in 2001 and 2002.

14. In 2004, I received a standard form letter from Berkshire to donors advising that the CRA's disallowances under the Berkshire Gift Program would be proceeding to the Tax Court by way of a "test case". Donors were asked to contribute to the legal fees to be incurred by the lawyers who would be prosecuting the "test case" appeal to the Tax Court.
15. I was subsequently advised that the test case was: *Kossow v. The Queen* (the "Kossow Case"), and that the Kossow Case proceeded through the Tax Court of Canada between 2005 and 2012, the Federal Court of Appeal in 2013 and the application for leave to appeal to the Supreme Court of Canada which was dismissed on May 15, 2014.

RETAINER AGREEMENT AND COMMENCEMENT OF THIS ACTION

16. After May 2014, I communicated with lawyers, Sam Marr and David Fogel of Landy, Marr Kats LLP ("LMK") in Toronto, Ontario and David Thompson and Matt Moloci of Scarfone Hawkins LLP ("SH") in Hamilton, Ontario.
17. By the end of August 2014, I understood that LMK LLP and SH LLP were working with Bruce Lemer of Lemer & Company ("LC") of Vancouver, British Columbia and had entered into a Consortium Agreement for the three law firms to work together as Class Counsel in the proposed class proceeding.
18. On September 11, 2014, I signed a Class Proceeding Contingency Fee Retainer Agreement with SH, LMK and LC ("Class Counsel"). From my communications with Class Counsel and the provisions of the Class Proceeding Contingency Fee Retainer Agreement, I understood, among other things, that:

- 5 -

- (a) there was a possibility and risk of an adverse costs award that may be made against me if a motion seeking certification of the class proceeding was unsuccessful or the action was unsuccessful;
 - (b) I authorized Class Counsel to issue the Statement of Claim to commence this proposed class proceeding;
 - (c) I authorized and directed Class Counsel to make application to the Class Proceedings Fund to seek funding and indemnification for adverse costs; and,
 - (d) if the application to the Class Proceedings Fund for funding and indemnification for adverse costs was denied, that any or all of LMK, SH and LC had the right to withdraw from this proposed class proceeding and that the class proceeding may not proceed if funding was not approved.
19. This action was then commenced by Statement of Claim issued September 12, 2014, a copy of which is attached as Exhibit "B".

FUNDING AND INDEMNIFICATION FOR ADVERSE COSTS

20. In early October 2014, Class Counsel prepared and submitted an application to the Class Proceedings Fund for funding, which included my affidavit and verification of authorization.

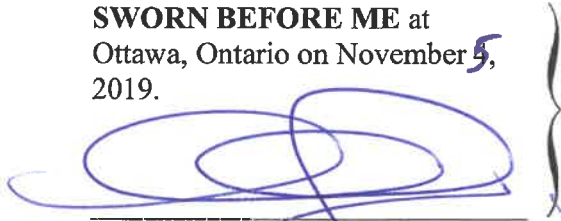
21. Class Counsel retained Vern Krishna of TaxChambers LLP (“Krishna”) to provide a preliminary overview opinion regarding the Berkshire Gift Program, which he did. Krishna’s preliminary overview opinion was provided to the Class Proceedings Fund as part of the application seeking funding and adverse costs indemnity.
22. The Class Proceedings Fund hearing proceeded on October 15, 2014. I attended the Class Proceedings Fund hearing together with Class Counsel.
23. Later in 2014, the Class Proceedings Fund requested supplementary information and submissions from Class Counsel, which Class Counsel provided to the Class Proceedings Fund in December 2014.
24. By letter dated February 2015, the Class Proceedings Fund denied our application for funding and adverse costs indemnity.
25. In 2015 and 2016, Class Counsel sought funding from Claims Funding Europe (“CFE”) and Claims Funding International (“CFI”). In March 2016, CFE/CFI advised that they were not prepared to provide funding for this proposed class proceeding.
26. In May 2016, LMK withdrew from the Consortium Agreement and Class Proceeding Contingency Fee Retainer Agreement given funding and indemnification for adverse costs had not been obtained.
27. In September 2016, SH advised me that they were discussing the possibility of proceeding under an amended consortium agreement between SH and LC.

- 7 -

28. In 2017, Class Counsel applied for funding from BridgePoint Financial Services Inc. (“BridgePoint”). However, BridgePoint advised that they had a conflict and could not consider funding for this case.
29. Throughout 2017 and 2018, my communications with Class Counsel were less frequent. I knew from prior discussions that the interest from possible Berkshire Gift Program participants was very low, that Class Counsel were unable to obtain funding or indemnification for adverse costs for this proposed class proceeding and that class counsel had not taken any steps to prosecute the action.
30. In 2019, Class Counsel advised that they would be seeking to discontinue this action on consent of the defendants and without costs. I have no objection to the action being discontinued on a without costs basis.
31. I have not been promised nor do I expect to receive any benefit or payment from Class Counsel or any of the defendants with respect to my individual claim or my agreement to discontinue this action on a without costs basis.
32. I have read the Affidavit of Michael Stanton sworn November 4, 2019. Michael Stanton’s information is true to the best of my knowledge.
33. Given all of the above, and specifically that Class Counsel were unable to obtain funding or indemnification for adverse costs, and the risks of an adverse costs award against me, I consent to the discontinuance of this action on a without costs basis.

34. I make this affidavit in support of the motion seeking discontinuance of this action and for no other or improper purpose.

SWORN BEFORE ME at
Ottawa, Ontario on November 5,
2019.



Commissioner for Taking Affidavits
M-Jackson (or as may be)

Marion Elizabeth Jackson
Barrister, Solicitor & Notary Public
1450 Stittsville Main St., PO Box 603
Stittsville ON K2S 1A7



CHARLES MOSSMAN

This is Exhibit "A" referred to in the Affidavit of Charles Mossman, sworn November 4, 2019.



*Commissioner for Taking Affidavits
(or as may be)*

BERKSHIRE
FUNDING
INITIATIVES
LIMITED

Helping You Give More

BERKSHIRE FUNDING INITIATIVES LIMITED

Dear Sir/Madam,

RE: "Helping you give more" CASH DONATION CAMPAIGN 2001

Last year's Campaign 2000 was an unqualified success. Building on that success we are delighted to present our new 2001 program to you. We are so excited about what will surely be this year's hottest giving opportunity that allows you to:

- Support a worthy Charity
- Do good
- Actually save money – Cash flow positive

The cash donation program is designed to give you peace of mind:

- It is a pure gift without conditions
- There is no valuation issue, whatsoever
- It does not rely on the personal use property exemption

Berkshire's goal is to bring together philanthropists who have the same desire as the IDEAS Canada Foundation in funding and advancing education and culture. Berkshire's innovative financing structure allows you to "give more" to this worthy cause. Please take the time to review the enclosed and see how you can make a difference.

We thank you in advance for your generous support of the IDEAS Canada Foundation.

Yours truly,

BERKSHIRE FUNDING INITIATIVES LTD.

Per:



Jack Keslassy
Administrative Director

HELPING YOU GIVE MORE

BERKSHIRE FUNDING INITIATIVES LIMITED

To raise funding for charitable and community interests worldwide, through developing innovative financial opportunities that maximize our donors' philanthropic goals.

"We make a living by what we get, but we make a life by what we give"

- Winston Churchill

"If at the beginning and end of our lives we depend upon others' kindness, why then in the middle, should we not act kindly to others?"

- The Dalai Lama

A Unique Opportunity To Make A Difference

The opportunity to have dollars make a difference should be made available to all who wish to give and not reserved only for the privileged. **Berkshire Funding Initiatives Ltd.** in conjunction with **Talisker Funding Limited** has established a manner in which philanthropists can help worthy charitable organizations and maximize one's return in terms of social impact. **Berkshire** and **Talisker** encourages and facilitates donors to reach their personal goals of having the satisfaction of maximizing their charitable giving while also receiving the tax benefits deserving of such generosity. We are looking for donors that understand that money does not make an institution great, but you cannot have a great institution without money.

The decision to donate to a charity is made in response to an organization asking for a donation. Giving is not generally spontaneous or premeditated. Our goal is to introduce potential benefactors to a unique opportunity to make a difference. **Berkshire** and **Talisker** together have developed funding assistance that facilitates financial support for many leading Institutions.

The Measure Of Humanity Is What One Will Do For Another

Benevolence is a measure of one's character in which the opportunity to give to another for the sole purpose of giving is the most fulfilling act one can do. Many of the world's intellectual infrastructures were donated by philanthropists as well as created by public spending thereby, filling the gap where the private sector is not addressing the crises.

HELPING YOU GIVE MORE

GIFTS AND INCOME TAX

Canada Customs and Revenue Agency RC4142 Tax Advantages of Donating to Charity

"Charities play a vital role, both in Canadian society and around the world. Generous tax incentives have been created to encourage gifts by individuals and corporations to registered charities."

"A gift is a voluntary transfer of money or property for which the donor expects and receives nothing of value in return...The more you give, the greater the tax credit...You apply the credit directly against the tax you owe, instead of deducting it from your taxable income."

"You will receive a federal tax credit equal to 17% of the first \$200 you give to registered charities in a taxation year. You will receive a tax credit equal to 29% for any donation amounts you make of more than \$200...The charitable tax credit also reduces surtaxes and provincial or territorial taxes. In Quebec, a charitable gift provides a separate provincial tax credit." [This means the taxpayer will be entitled to a tax credit equal to the **highest marginal tax rate** of the province in which the taxpayer resides for example, in British Columbia it is approximately 48.7% and in Ontario, it is approximately 46.4%.]

"Registered charities are qualified donees. The Income Tax Act permits qualified donees to issue official tax receipts for gifts they receive from individuals or corporations..."

Canada Customs and Revenue Agency Gifts and Income Tax P113(E) Rev. 99

"The amount eligible for tax credits for these gifts is 75% of your net income for the year... You can claim less than the maximum amount of tax credit available to you. If you do not claim an eligible amount, you can carry that amount forward and claim it for up to five years."

Charitable donations do not create minimum tax obligations. It may be possible to procure a source waiver to reduce taxes withheld at source.

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.

TALISKER FUNDING LIMITED

TRANSACTION SUMMARY

A Pledge is made and signed by the donor to IDEAS Canada Foundation for the total donation amount.

Pledge is forwarded to IDEAS Canada Foundation.



PAYMENT

- OPTION 1:** Cheque written for full amount of donation to Talisker Funding Limited "As Agent"
- OPTION 2:** Fill out Loan Application and Promissory Note at \$800 per \$1,000 of donation amount; choose mutual fund from Security – INVESTMENTS "Units" in loan application

- (a) Cheque to Talisker Funding Limited "as Agent" for \$200 per \$1,000 of donation amount
- (b) Cheque to Talisker Funding Limited for \$100 per \$1,000 of donation amount for loan security
- (c) Cheque to Talisker Funding Limited for \$10 - \$50 of donation amount for loan processing fee as follows:

LOAN PROCESSING FEE:

- \$50 per \$1,000 of donation amount up to \$49,999
- \$40 per \$1,000 of donation amount from \$50,000 to \$74,999
- \$30 per \$1,000 of donation amount from \$75,000 to \$249,999
- \$20 per \$1,000 of donation amount from \$250,000 to \$499,999
- \$10 per \$1,000 of donation amount from \$500,000 and up



Talisker Funding Limited forwards amount borrowed by the donor plus funds "As Agent" to IDEAS Canada Foundation on behalf of the donor



IDEAS Canada Foundation issues to the donor official donation receipt on approved form 6 to 8 weeks from date of donation by the donor.

SECURITY – INVESTMENTS

Following are five Funds that the Lender has pre-approved as acceptable security. Lender reserves the right to add or delete Funds from this pre-approved list. Borrowers may with prior approval provide alternative security acceptable to the Lender.

<u>FUND</u>	<u>RETURN</u>		
	<u>1 YR</u>	<u>3 YR</u>	<u>5 YR</u>
Acuity Pooled Canadian Equity Fund	10.19%	17.77%	25.39%
Acuity Pooled Global Equity Fund	4.10%	15.03%	18.41%
AGF Amer Tactical Asset Allocation	7.66%	11.12%	13.74%
AGF International Value	40.52%	21.45%	21.53%
Altamira Science & Technology Fund	-3.87%	64.43%	44.66%

As of March 7, 2001

Acuity Mutual Funds has created a family of ten pooled funds to provide clients with a wide variety of choices and combinations through professional investment management. The investment approach for the Pooled funds emphasizes consistency; patient and prudent investments in well established companies that are strategically positioned for significant growth. Acuity remains steadfast to its investment philosophy, which has placed Acuity in the upper echelon of private money managers.

AGF (Investment Strategy) believes experienced and committed professional advice is the key to long-term financial success. For more than 40 years, AGF has been helping investors achieve their financial goals by providing investment funds that are managed and advised by some of the world's top money managers. All of these managers have been chosen based on their broad experience and in-depth knowledge of financial markets. They apply their experiences and knowledge to their distinct investment styles, allowing you to choose from a variety of different investment strategies.

Altamira Offers Over a Quarter Century of Experience. With approximately \$7.6 billion in mutual fund assets under management, Altamira ranks as one of Canada's largest independent providers of mutual funds. They have steadily built their track record by providing superior investment performance and quality service to investors. They manage money for mutual funds, pension funds, corporations and other major institutions.

The foregoing information does not constitute investment advice or recommendation. Borrowers may with prior approval provide alternative security of their choice. Talisker is not qualified to provide investment advice and Borrowers are urged to seek their own investment advice. The returns and the descriptions of the fund companies appearing above were obtained from public sources believed to be reliable, but Talisker does not warrant the accuracy of this information.

TALISKER FUNDING LIMITED**LOAN FEATURES**

- Donor provides Security deposit equal to 10% of donation amount which is invested in INVESTMENTS
- Private Lender
- Personal Loan – no reporting
- 25-year term
- No interest
- No payments of any kind before maturity
- Cash neutral position – distribution of tax payable, if any, on increase of value of INVESTMENTS – distributed annually
- Status of Investments reported annually
- Invested by Lender and guaranteed to meet or exceed benchmarked rate of return for the entire term of the loan (Benchmark – Simple average return of Technology Funds as reported by Morningstar, previous 3 year average 30.82%)
- 9.6%-11.1% return would retire loan amount.

PLEDGE

TO: IDEAS CANADA FOUNDATION

AMOUNT: \$ _____

WHEREAS the undersigned wishes to make a gift in the above amount (the "Donation") to the above-named charity (the "Charity");

AND WHEREAS the undersigned wishes to be allowed a period of time in which to fulfill his pledge herein to make the Donation;

NOW THEREFORE this Pledge witnesses as follows:

1. The undersigned hereby pledges, covenants and agrees to and with the Charity that the undersigned will deliver to the Charity on or before December 31, 2001 the full amount of the Donation by way of bank draft, wire transfer or other immediately available funds.
2. The undersigned acknowledges and agrees that
 - (a) this Pledge is made by the undersigned voluntarily and without expectation of any return, right, privilege, recognition, benefit or advantage of any nature from the Charity, other than an income tax receipt in prescribed form,
 - (b) the undersigned has not imposed any limitation or other restriction of any nature on the use to which the Charity may make of the Donation, and the Charity may apply the Donation in such manner or manners as it may in its sole and unfettered discretion consider advisable, and
 - (c) this pledge is executed under seal and accordingly it represents an enforceable obligation of the undersigned notwithstanding any lack of consideration.

DATED this day of , 2001.

(address)

(signature) I/s 
(SEAL)

(city, province, postal code)

(name - please print)

4 King Street West, 17th Floor
 Toronto, Ontario
 M5H 1B6

Telephone: 416.214.6060
 Facsimile: 416.214.1025

**TALISKER
 FUNDING
 LIMITED**

**LOAN APPLICATION
 AND POWER OF ATTORNEY**

SUBMITTED AND AGREED TO BY:

 (the "Borrower")

TO AND IN FAVOUR OF:

TALISKER FUNDING LIMITED
 (the "Lender")

DESIGNATED CHARITY:

IDEAS CANADA FOUNDATION
 (the "Charity")

DESIGNATED SECURITY:

 (the "Units")

RECITALS:

- (1) The Borrower has by instrument of pledge of even date pledged a donation of the sum of \$_____ (the "Pledge") to the Charity, has delivered to the Lender as its agent in immediately available funds the sum of \$_____ (the "Deposit") and wishes to borrow the balance of \$_____ (the "Loan Amount") from the Lender in order to help facilitate the fulfillment of the Pledge;
- (2) The Borrower has with this application also delivered to the Lender in immediately available funds the sum of \$_____ (the "Initial Security") as security for the repayment of its indebtedness hereunder to be applied to the subscription on behalf of the Borrower for the securities above designated (the "Units");
- (3) The Borrower acknowledges that the Lender will rely on the representations and warranties and other information made herein by the Borrower in processing this Loan Application (the "Application");

- 2 -

NOW THEREFORE THE BORROWER HEREBY REQUESTS THAT the Lender make a loan (the "Loan") to the Borrower of an amount equal to the Loan Amount and the Borrower hereby covenants and agrees as follows:

1.0 Preamble

1.1 The foregoing recitals form part of this Application.

1.2 The loan contemplated hereunder shall be evidenced by a promissory note.

2.0 The Loan

2.1 If this Application is not accepted before the earlier of December 31, 2001 and the 60th day following the date hereof the Deposit shall be immediately returned to the Borrower, without interest or deduction. If this Application is accepted within that period then the Lender agrees to advance the Loan Amount to the Borrower and the Borrower hereby irrevocably authorizes and directs the Lender to immediately deliver the Deposit and the Loan Amount to or to the order of the Charity on behalf of the Borrower, and upon such delivery the Lender will be deemed to have advanced to the Borrower the Loan Amount and to have fully discharged its obligations regarding the Deposit.

2.2 Subject to section 2.3, the Loan Amount will be due and payable by the Borrower without the necessity of demand on December 31, 2026, (the "Due Date") at the Lender's address herein above referred to, or at such other address as may be from time to time indicated by the Lender to the Borrower as the address for payment of the Loan.

2.3 The Lender may at its option exercisable by notice in writing require the acceleration of the Due Date and the immediate repayment of the Loan Amount out of the proceeds of the realization of the Collateral at any time at which such proceeds, if realized, would be equal to or greater than the then outstanding Loan Amount, after accounting for any distribution to the Borrower contemplated by section 4.5 below.

2.4 The Loan Amount shall not bear interest before the Due Date, but any part thereof remaining unpaid thereafter shall bear interest at the rate of 8% per annum, calculated and payable monthly, with interest on overdue interest at the same rate.

- 3 -

2.5 The Borrower may at any time prepay all or from time to time any part of the outstanding Loan Amount without notice or bonus.

2.6 All references to dollars or \$ herein shall mean Canadian dollars unless the "Charity" above designated by the Borrower is a university outside of Canada listed on Schedule VIII to the Regulations to the *Income Tax Act* (Canada), in which event such references shall mean US dollars.

3.0 Security

3.1 The Borrower hereby directs the Lender to subscribe for and acquire in the name of the Lender but for the beneficial account of the Borrower immediately upon the acceptance of this Application that number of Units equal to the amount of Initial Security divided by the issue price per Unit thereof.

3.2 As continuing security for the repayment of the Loan Amount, any and all interest accrued thereon after the Due Date, and all other amounts, if any, payable by the Borrower to the Lender in connection with the Loan (collectively the "Indebtedness"), the Borrower hereby pledges, assigns, transfers and sets over to the Lender the Initial Security, the Units and all other securities hereafter received in addition to or in substitution therefor and all rights now or hereafter attaching thereto and all accretions thereto and income and proceeds thereof (the "Collateral"). This pledge, assignment and transfer will remain in full force and effect until such time as the Indebtedness has been fully paid. The security hereby constituted shall become enforceable forthwith upon any default by the Borrower in the due payment of any of the Indebtedness. The Lender may at any time, without prejudice to any of its other remedies or recourses realize, collect, sell, transfer and deliver the Collateral in whole or in part in such manner, for such consideration and whether by private sale or otherwise as may seem to it advisable, and, in addition, the Lender or its nominee shall be entitled to exercise and enforce all the rights and privileges (including all voting rights, if any) and all ownership rights attaching to the Collateral as fully and effectually as if the Lender were the absolute owner thereof. The Lender may charge on its own behalf and also pay to others reasonable sums for expenses incurred and for services rendered (expressly including legal advice and services on a solicitor and client basis) in connection with realizing, collecting, selling, transferring, delivering and/or obtaining payment of the Collateral or any part thereof and may deduct such amounts from the proceeds thereof. The Lender may apply such proceeds on account of such part of the Indebtedness hereby secured as the Lender may see fit. The Lender may grant extensions of time and other indulgences, take and

- 4 -

give up other securities, accept settlements, grant releases and discharges and otherwise deal with the Borrower and other parties and with the Collateral as the Lender may see fit without prejudice to the Lender's rights in the security hereby constituted. Any amounts from time to time received by the Lender for the account of the Borrower whether in respect of the Collateral pledged, assigned and transferred to the Lender hereunder or pursuant hereto or otherwise, shall be retained by the Lender and shall be added to and form a part of the Collateral.

3.3 For so long as the Indebtedness remains unpaid, the Borrower hereby nominates, constitutes and appoints the Lender, to the greatest extent permitted under applicable law, with full power of substitution, as the true and lawful agent of the Borrower and attorney-in-fact for the taking of all proceedings with respect to the Collateral contemplated in this agreement including, without limitation, the sale, transfer and assignment of the Collateral and all right, title and interest of the Borrower as party to the agreement resulting from the acceptance of this Application or as owner of the Collateral, the whole for the benefit of the Lender and in such manner as the Lender from time to time, in its discretion, directs, and without prejudice to the rights of the Lender as assignee of the rights of the Borrower. The Borrower hereby unconditionally ratifies, adopts, confirms and approves, and covenants and agrees to ratify, adopt, confirm and approve, all such acts and proceedings contemplated hereunder of the Lender and undertakes to indemnify and save harmless the Lender, and any of its representatives or officers, from any and all costs, expenses, actions, suits, losses, claims, liabilities, obligations, demands or injury of any nature or kind whatsoever incurred or suffered in so doing.

3.4 The Borrower covenants and agrees that, whenever the Lender shall so require, the Borrower will execute and perform such further documents and acts as the Lender determines may be useful or necessary for the purpose of better and more perfectly granting the powers of attorney herein granted by the Borrower, and for the purposes of perfecting the Borrower's appointment of the Lender as the Borrower's agent herein or satisfying any acts undertaken by the Lender pursuant to such appointment and for better and more perfectly pledging, assigning and transferring to the Lender the Collateral, or any rights, advantages and benefits herein sought to be pledged, assigned and transferred to the Lender, the whole without prejudice to or diminishing the effect of the powers of attorney herein or hereafter granted by the Borrower.

- 5 -

3.5 Subject to the provisions of applicable law, in the event that (i) the Borrower fails upon request to perform any act or execute any document requested by the Lender pursuant hereto, or (ii) the Borrower fails upon request to ratify, adopt, confirm or approve any act or proceeding by the Lender pursuant hereto, or (iii) the Borrower is in default of any of his other obligations hereunder and has not cured such default within ten (10) days after notice from the Lender, or (iv) the Borrower commits an act of bankruptcy, or any proceeding in bankruptcy is commenced against the Borrower and not dismissed within thirty (30) days, then the Indebtedness may at the Lender's option become immediately due and payable upon demand, notwithstanding the due date provided for in section 2.2 or in any promissory note evidencing the Indebtedness.

4.0 Investment of Collateral

4.1 The parties acknowledge and agree that it is their mutual and reasonable expectation that the fair market value of the Collateral will be more than sufficient to repay the Loan Amount on the Due Date, in which event any excess will be paid on that date to the Borrower. However, in the event that the Collateral is not sufficient to repay the Loan Amount in full on that date, the Borrower shall remain liable for and shall immediately pay to the Lender the amount of any such deficiency.

4.2 The Borrower hereby acknowledges and agrees that the Lender shall be entitled at any time or from time to time at which it may, in its sole discretion, consider itself insecure, or determine the investment return on the Collateral to be unsatisfactory, to engage at the Borrower's expense upon notice to the Borrower one or more duly qualified investment advisers, including discretionary portfolio managers, to assist in the investment of the Collateral with a view to meeting the expectations of the parties as set forth above and in furtherance thereof to maximizing the capital appreciation of the Collateral prior to the Due Date while at the same time minimizing the income thereon taxable in respect of any period prior to the Due Date. Subject to section 4.3 below, the Borrower hereby grants to the Lender, to the greatest extent permitted under applicable law, the discretionary right and authority to sell, redeem, convert, exchange, invest and reinvest the Collateral on behalf of the Borrower in such manner as any such adviser may from time to time consider appropriate, or to deposit the Collateral in a fully managed account, subject always to compliance with applicable securities and other laws, which compliance shall be at all times the responsibility of the Lender.

- 6 -

4.3 The Lender hereby represents and warrants to the Borrower as follows:

- (a) any and all advisers engaged for the purposes of section 4.2 shall at all times exercise in the performance of that engagement that degree of care and skill that a reasonably prudent adviser would exercise in comparable circumstances, and
- (b) during any period in which any part of the Collateral is invested pursuant to the exercise of the authority granted by section 4.2 above the average annualized pre-tax rate of return on such amount shall be no less than the corresponding simple average annual rate of return achieved by all "Technology" category funds, as ranked by Morningstar (or similar agency, if Morningstar is not then in existence) over the same that period. The corresponding simple average annual rate of return over the five year period ended September 12, 2000 for the Technology category as reported by Morningstar was 30.75%.

4.4 The Borrower hereby represents and warrants to the Lender as follows:

- (a) he or she has a net worth substantially in excess of the Initial Security,
- (b) his or her primary investment objective is the maximization of the long term capital appreciation of the Collateral, so that its value will grow to exceed the Loan Amount in less than twenty five years,
- (c) he or she has no particular desire or preference that the Collateral remain invested in either technology related or publicly traded investments and agrees that, subject to the provisions hereof, the Lender shall have the full and unfettered discretion to invest the Collateral in such manner as it may consider appropriate, whether or not such investments are technology related or publicly traded,

- 7 -

- (d) he or she has a high risk tolerance in relation to the investment and reinvestment of the Collateral for the purposes hereof, and
- (e) he or she has made his or her own investment decision in connection with the investment of the Initial Security in the Units and has neither asked for nor received any advice from the Lender in connection therewith.

4.5 The Lender agrees that to the extent that in any calendar year the investment or reinvestment or realization of the Collateral results in taxable income in that year to a Borrower resident in Canada then the Lender shall distribute from the Collateral to the Borrower on or before April 15 of the following year an amount sufficient in the Lender's opinion to pay the amount of tax payable in respect of such income assuming the Borrower pays income tax at the top marginal rate applicable to individuals resident in the Borrower's Province of residence.

4.6 Notwithstanding any other provision herein contained, the Borrower hereby expressly reserves the right to require by notice in writing to the Lender that the Collateral be invested in Units or other publicly traded securities acceptable to the Lender, acting reasonably, provided that in the event that (i) the Borrower exercises such right, or (ii) the Borrower purports to withdraw any of the powers of attorney herein granted, or (iii) any of the powers of attorney granted herein lapse by the application of law, then the Borrower shall not be entitled to the benefit of paragraph 4.3(b) above in respect of any period commencing on or after the date of this agreement.

5.0 Acknowledgements and Confirmation

5.1 The Borrower acknowledges and confirms that: (a) the Lender does not, by reviewing this Application, make any commitment to the Borrower to make the Loan; (b) except as expressly set forth herein the Lender does not make any representation or warranty to the Borrower whatsoever with respect to the Pledge or the tax effect thereof, or otherwise; (c) the Lender has no responsibility for, is not and has not been associated with, and does not express any opinion with respect to any representations, warranties, declarations or undertakings made by any other party in connection with the Loan or any other transaction; (d) the making of the Loan by the Lender to the Borrower is a transaction completely separate from and independent of the Pledge and any other transaction relating thereto and

- 8 -

the Borrower will be irrevocably obligated to the Lender for payment of the Indebtedness without regard to any issues which may arise between the Borrower and any other person or persons; (e) the Lender will be obliged to exhaust its recourses in respect of its security before looking to the Borrower for payment; (f) nothing contained herein or in any other instrument will be interpreted so as to oblige the Lender to extend any time for payment of the Indebtedness under any circumstances; and (g) the Lender is not a charitable foundation, but a for profit business, and is entitled to and will receive compensation in connection with the Loan.

6.0 General

6.1 Upon acceptance hereof by the Lender this Application will constitute a loan agreement between the Borrower and the Lender, which agreement, together with any promissory note issued in evidence of the Indebtedness hereunder, shall constitute the entire agreement between the parties hereto in respect of the subject matter hereof.

6.2 The Borrower elects domicile at the City of Toronto and the agreement arising from the acceptance of this Application will be governed by and interpreted in accordance with the law of the Province of Ontario and the law of Canada applicable therein.

6.3 The Borrower covenants and agrees to pay all legal fees on a solicitor/client basis and other reasonable costs incurred by in connection with the realization of the security of the Lender created hereby.

6.4 Upon acceptance by the Lender, this Application shall become binding upon the Borrower and his heirs, executors, administrators and assigns. The Lender may assign all or any of its rights hereunder without the consent of the Borrower. The Borrower shall not be entitled to assign its rights hereunder without the prior written consent of the Lender, which consent may be arbitrarily withheld.

6.5 The Borrower agrees that the Lender may give, receive from, and share and exchange with others, including credit bureaus and persons with whom the Borrower has or may have financial dealings, credit and other information about the Borrower.

DATED this _____ day of _____, 2001.

- 9 -

 Signature of Witness

 Signature of Borrower

 Name of Witness (please print)

 Legal Name of Borrower
 (including initials) (please print)

 Address of Witness (please print)

 Address of Borrower (please print)

 City, Province and Postal Code
 (please print)

 City, Province and Postal Code
 (please print)

 Telephone Number of Witness

 Telephone Number of Borrower

 Date of Birth of Borrower

 Social Insurance Number of
 Borrower

 Name of Financial Advisor

 Address of Financial Advisor

 Phone Number of Financial Advisor

 Address (cont'd)

The Lender hereby accepts the above Application.

DATED this _____ day of _____, 2001.

TALISKER FUNDING LIMITED

by: _____

PROMISSORY NOTE

FOR VALUE RECEIVED the undersigned hereby promises to pay to or to the order of the holder on the first business day following the twenty-fifth anniversary of the date referenced below at the then registered office of the holder the principal sum of \$ _____ (please Initial), together with interest thereon at the rate of 8% per annum, calculated and payable monthly on the last business day of each month, provided that interest shall only accrue after the date of maturity, with interest on overdue interest at the same rate and calculated as aforesaid.

This note is issued in furtherance of and subject to the terms and conditions of the agreement resulting from the acceptance by The Berkshire Foundation Ltd. of the undersigned's loan application of even date herewith and is not a negotiable instrument. This note may not be assigned or endorsed in whole or in part by the holder unless assigned or endorsed in conjunction with an assignment of that agreement and all security relating thereto in accordance with the provisions thereof.

DATED this day of , 2001.

(legal seal)
Signature of Borrower



*Make a difference
to worthy
educational and cultural
charities
with limited resources*

*S*uccess often brings the desire – even an obligation – to share our good fortune and to give back something meaningful to our community. We want to extend our help where it can really make a difference... where the impact of our generosity will be seen and felt.

There are tens of thousands of charities in Canada with few resources to solicit financial support. All of us face the dilemma of how to decide which charity or not-for-profit group will benefit most from our contributions.



IDEAS CANADA FOUNDATION

THE FOUNDATIONS' FOUNDATION.

Ideas Canada Foundation's mission is to find and to choose those unique, lesser known educational and cultural institutions and organizations that both deserve and need our financial assistance.

Our purpose is to enrich our lives and our communities by supporting worthy universities, art galleries, museums, foundations and charitable societies in the important work they do enriching Canadians.

Ideas Canada Foundation is a non-denominational, apolitical foundation which will not knowingly support any organization which openly advocates intolerance of any race or religion, or promotes any religious, political or social doctrine of a contentious or controversial nature.

Faced with increasing government restraint and pressures on cultural and social programs, many charities are in crisis. Most of them have limited means to find the donations they need to keep their programs alive.

Ideas Canada Foundation is the "foundations' foundation". We aim to be the expert source

charities turn to for support. The trustees of Ideas Canada Foundation will carefully examine applications for assistance, with a view to ensuring every donation goes directly to the advancement of the arts, education in schools and inspiration throughout our communities.

We want to help make a difference every day.

CHOOSING THE RIGHT CHARITY.

Ideas Canada Foundation exists to allow philanthropists like yourself to give to worthy charities and know that your donation will result in real social impact. Our trustees are responsible for choosing those charities that meet the Foundation's objectives.

Within these guidelines, the trustees may consider donor's suggestions for charities worthy of support, but understandably, these suggestions cannot be binding.

Ideas Canada Foundation's foremost aim is helping donors support lesser known but qualified charities with limited fundraising abilities. The Foundation has in the past also contributed to, in a much smaller way, a wide range of better known educational and cultural institutions.

A significant majority of all funds disbursed by Ideas Canada Foundation will be disbursed to educational and cultural institutions located within Canada.

A UNIQUE WAY TO MAKE A DIFFERENCE.

The decision to make a significant gift or donation is intensely personal, but often it is made spontaneously or without all the information needed to properly assess the benefits to both the charity and the donor. That is where Ideas Canada Foundation can make a difference for you and for those organizations in need of your support.

Ideas Canada Foundation guides successful individuals in targeting their giving and, at the same time, receiving the maximum tax benefits available to those who support these charities.

We invite you to take a closer look... talk with us about your philanthropic goals, your beliefs, and your interest in community and charitable support.

We'll share our knowledge of the many deserving charities that need your financial assistance. And, we're confident we can show you how your support can become a long-lasting legacy.



*Make a difference to
worthy educational and cultural charities
with limited resources*



115 Front St., Suite 146
Toronto, Ontario
M5A 4S6

Phone: (416) 957-6360
Fax: (416) 957-6360

www.ideascanada.org



Ideas Canada Foundation
is Registered as a
Public Charitable Foundation
by Canada Customs and
Revenue Agency
number
89431 0416 RR0001



IDEAS CANADA FOUNDATION

REGISTERED AS A PUBLIC CHARITABLE
FOUNDATION

Registration # 89431 0416 RR0001

ANNOUNCEMENT

February 1st, 2001

The Trustees of Ideas Canada Foundation are pleased to announce that **Ronald C. Knechtel, CA**, has joined the Foundation as **Special Adviser**.

Mr. Knechtel is one of Canada's foremost experts on charitable and not-for-profit organizations. He is a retired tax partner of Ernst & Young (formerly Clarkson Gordon).

Ron was appointed a Special Adviser to the Minister of Finance in 1990 with respect to the treatment of charities and not-for-profit organizations under the GST Legislation.

His extensive published material with respect to charitable organizations include *The Charities Handbook*, *Tax Treatment of Charitable & Not-for-Profit Organizations*, and *Compliance Issues in Operating Charities*.

He is currently a consultant to Ernst & Young on charitable matters and a Senior Adviser to the Canadian Council of Christian Charities.

Ideas Canada Foundation seeks to support those unique, lesser known educational and cultural institutions and organizations that both deserve and need assistance.



IDEAS CANADA FOUNDATION

REGISTERED AS A PUBLIC CHARITABLE FOUNDATION
Registration # 89431 0416 RR0001

**LIST OF APPROVED CHARITIES TO RECEIVE GIFTS FROM
IDEAS CANADA FOUNDATION FROM ITS YEAR 2000 CAMPAIGN. DONATION OF
THE YEAR 2000 FUNDS HAVE BEEN AND WILL CONTINUE TO BE MADE
SUBSTANTIALLY TO REGISTERED CANADIAN CHARITIES.**

Art Gallery of Nova Scotia
Art Gallery of Ontario
Black Creek Pioneer Village
Calgary Performing Arts Centre
Canadian Opera Company
Dalhousie University
Hebrew University of Jerusalem
MacLaren Art Centre
McGill University
McMaster University
McMichael Canadian Art Collection
Medicine Hat College
Mount Allison University
National Arts Centre
Northwestern University
Ontario Track 3 Association
Opera Atelier
ORT Canada
Pier 21 Society
Royal Ontario Museum
Sheridan College
Simon Fraser University
Stratford Festival
Theatre Francais de Toronto
Universite de Montreal
Universite Laval
University of Alberta
University of British Columbia
University of Manitoba
University of Ottawa
University of Toronto
Vancouver Art Gallery
York University

115 Front Street East, Suite 146, Toronto, Ontario, Canada M5A 4S6

Telephone: (416) 957-6360

Facsimile: (416) 957-6360

www.ideascanada.org

This is Exhibit "B" referred to in the Affidavit of Charles Mossman, sworn November 4, 2019.



*Commissioner for Taking Affidavits
(or as may be)*

Court File No. **14FCV-512061**

**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
B3J 2X2

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

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

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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Bruce LemerEmail: blemer@lemerlaw.ca**Lawyers for the plaintiff
Class Counsel**

Schedule A

Consumer Protection Statutes

	Jurisdiction	Legislation	Provisions
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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**Lawyers for the plaintiff
Class Counsel**

CHARLES MOSSMAN
Plaintiff

-and-
Defendants

BERKSHIRE FUNDING INITIATIVES LIMITED et al.

Court File No. 14-CV-512061

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF CHARLES MOSSMAN

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Lawyers for the plaintiff,
CHARLES MOSSMAN

RCP-E 4C (July 1, 2007)

Court File No. 14-CV-512061

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6

AFFIDAVIT OF MICHAEL STANTON

I, MICHAEL STANTON, of Hamilton, Ontario, MAKE OATH AND SAY:

1. I am a Partner with the law firm of Scarfone Hawkins ^{LLP} (“SH”) the lawyers for the plaintiff, and have knowledge of the matters contained in this affidavit.
2. My partners, David Thompson (“Thompson”) and Matt Moloci (“Moloci”) have primary carriage of this matter on behalf of SH. My source of the information in this affidavit is from discussions with Thompson and Moloci and review of the documents in this matter. Where my knowledge information and belief is based upon other sources, I state the source of the information. I believe all that is set out in this affidavit to be true and accurate.
3. I have read a draft of the Affidavit of Charles Mossman to be sworn November 4, 2019 (the “Mossman Affidavit”). I adopt as true the contents of the Mossman Affidavit. The

source of my knowledge, information and belief of the information in the Mossman Affidavit are our file documents, correspondences, communications and my discussions with Thompson and Moloci.

4. I note that Charles Mossman (“Charles”) does not waive lawyer-client privilege in this matter. Accordingly, I do not provide any information regarding our assessment of the factual or legal issues in this proposed class proceeding or our correspondence and communications with Charles that are lawyer-client privileged.

CLASS COUNSEL

5. Between 2008 and 2011, Thompson and Moloci prosecuted the class proceeding *Robinson v. Rochester et al* from commencement of the action through certification, settlement approval and claims administration (the “*Rochester*” action). The *Rochester* action arose from a charitable donation tax program that had some similar features to the charitable donation tax program in this action, which I refer to as the “Berkshire Gift Program”.
6. In 2014 and prior, Thompson and Moloci had communications with Sam Marr (“Marr”) and David Fogel (“Fogel”) of Landy Marr Kats LLP (“LMK”) as they had also prosecuted a charitable donation tax program type action, namely *Cannon v. Funds for Canada Foundation*.
7. In 2014 and prior, Thompson, Moloci and I were aware of the Berkshire Gift Program and the “test case” of *Kossow v. The Queen* that had proceeded on appeal through the Tax Court of Canada, the Federal Court of Appeal and to the Supreme Court of Canada, the application for leave to appeal being dismissed on May 15, 2014.

8. From May to August 2014, Marr and Fogel communicated with Thompson and Moloci with a view to bringing a proposed class proceeding in respect to the Berkshire Gift Program. Marr introduced Thompson and Moloci to Bruce Lemer (“Lemer”) of Lemer & Company (“LC”) in British Columbia on behalf of the BC class of putative class members.

CONSORTIUM AGREEMENT

9. In August 2014, LMK, SH and LC entered into a Consortium Agreement setting-out the terms of their agreement to act together as class counsel (“Class Counsel”) to bring a proposed class proceeding in respect to the Berkshire Gift Program (the “Consortium Agreement”).
10. The Consortium Agreement included a provision that one or all of the three law firms could withdraw if funding and costs indemnification was not obtained from the Class Proceedings Fund.

RETAINER AGREEMENT AND COMMENCEMENT OF THIS ACTION

11. In September 2014, Class Counsel entered into a Class Proceeding Contingency Fee Retainer Agreement with Charles.
12. The provisions of the Class Proceeding Contingency Fee Retainer Agreement addressed, among other things:
 - (a) the possibility and risk of an adverse costs award in the event that the motion seeking certification of the action as a class proceeding or the action itself was unsuccessful;

- 4 -

- (b) Charles' authorization and direction to Class Counsel to have the Statement of Claim issued to commence this proposed class proceeding;
 - (c) Charles' authorization and direction to Class Counsel to make application to the Class Proceedings Fund to seek funding and adverse costs indemnification; and,
 - (d) that in the event that funding and adverse costs indemnification from the Class Proceedings Fund was not obtained, one or all of the Class Counsel law firms may withdraw and if all three firms withdraw, the action will be discontinued.
13. The action was then commenced by Statement of Claim issued September 12, 2014.
14. The Statement of Claim was subsequently served upon most of the defendants in 2015.

APPLICATION TO THE CLASS PROCEEDINGS FUND

15. Class Counsel prepared and submitted an application to the Class Proceedings Fund in early October 2014.
16. Class Counsel retained Vern Krishna of TaxChambers LLP ("Krishna") to provide a preliminary overview opinion regarding the Berkshire Gift Program, which he did. Krishna's preliminary overview opinion was provided to the Class Proceedings Fund as part of the application seeking funding and adverse costs indemnity.
17. Class Counsel and Charles attended a hearing with the Class Proceedings Fund on October 15, 2014. The Class Proceedings Fund requested supplementary information which Class Counsel provided in December 2014.

18. By letter dated February 2015, the Class Proceedings Fund denied the application for funding and adverse costs indemnity.
19. In 2015 and 2016, Class Counsel sought funding from Claims Funding Europe (“CFE”) and Claims Funding International (“CFI”). In March 2016, CFE/CFI advised that they were not prepared to provide funding for this proposed class proceeding.
20. In May 2016, LMK withdrew from the Consortium Agreement and Class Proceeding Contingency Fee Retainer Agreement given funding and indemnification for adverse costs had not been obtained.
21. In September 2016, Thompson and Moloci discussed with Lemer the possibility of proceeding under an amended consortium agreement between SH and LC. However, no formal agreement was reached then or subsequently.
22. In 2017, Class Counsel applied for funding from BridgePoint Financial Services Inc. (“BridgePoint”). However, BridgePoint advised that they had a conflict and could not consider funding for this case.

PUTATIVE CLASS MEMBERS

23. From information we received during the course of our investigation and research before commencement and throughout the course of this action, we believed that there were more than 1,000 individuals who participated in the Berkshire Gift Program.
24. Since the Fall 2014, we published on our SH Class Action Law website: www.classaction.ca, an overview of the “Berkshire Funding Initiatives Limited – Class

Action Claim” including a link to the Statement of Claim. Attached as Exhibit “A” is a copy of our class action website overview.

25. Our legal support staff have experience maintaining putative class member inquiries and databases and conducting class action claims administration. Inquiries from putative class members are maintained in a database for this action.
26. As of July 2019, we had received inquiries from only twelve putative class members from Ontario. We had received inquiries from three financial advisors who had knowledge of the Berkshire Gift Program and advised of their clients’ participation in the program. We asked the financial advisors to have their clients who were participants in the Berkshire Gift Program to contact us. Very few did.
27. In respect to the BC action, we received from Lemer a list of thirty-two putative class members who had contacted the LC firm in respect to the Berkshire Gift Program.
28. We have received very few inquiries regarding this proposed class proceeding since 2017.
29. Based upon the above, we concluded that there is very little interest in or support of this proposed class proceeding.
30. We are not aware of any prejudice that will occur if this action is discontinued. In the event that any putative class member wishes to commence and prosecute an individual or other action in respect to the Berkshire Gift Program, they may do so.

- 7 -

31. Given all of the above, and specifically the absence of funding and indemnification for adverse costs, Class Counsel seek an order discontinuing this action on a without costs basis.

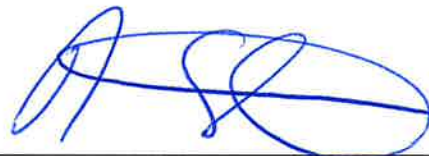
NOTICE TO PUTATIVE CLASS MEMBERS

32. Upon discontinuance of this proposed class proceeding we propose that we publish a copy of the notice attached as Exhibit "B" on our website at www.classactionlaw.ca in connection with discontinuance of this action.
33. In addition, we propose that we forward by email to the putative class members in our database, at their last known email addresses, a copy of the notice attached as Exhibit "B".
34. I make this affidavit in support of the motion seeking discontinuance of this action and for no other or improper purpose.

SWORN BEFORE ME at
Hamilton, Ontario on November
4, 2019.

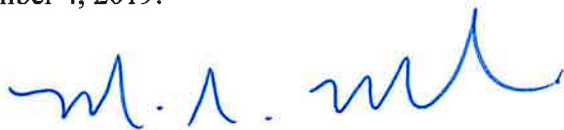


MATTHEW G. MOLOCI
Lawyer



MICHAEL STANTON

This is Exhibit "A" referred to in the Affidavit of Michael Stanton,
sworn November 4, 2019.



Matthew G. Moloci
Lawyer



BERKSHIRE FUNDING INITIATIVES LIMITED

CLASS ACTION CLAIM

OVERVIEW OF CLAIM

A Statement of Claim was issued in the Ontario Superior Court of Justice in Toronto on September 12, 2014, claiming negligence, negligent misrepresentation; unjust enrichment, restitution; constructive trust, fraud and fraudulent misrepresentation relating to the Berkshire Funding Initiatives Limited Gift Program (“Gift Program”).

The action was brought under the *Class Proceedings Act*, 1992 on behalf of all individuals who participated in the Gift Program for the taxation years 2001, 2002, and 2003 (the “Class Period”).

The Statement of Claim, which contains allegations which have yet to be proven in Court, alleges that Berkshire Funding Initiatives Limited and Talisker Funding Limited, with the assistance of James Penturn, Richard E. Glatt, Jack Keslassy and Ideas Canada Foundation, developed, promoted, sold, and administered the Gift Program under which participants borrowed money to make charitable donations in order to receive charitable donation receipts and concomitant tax credits.

Participants borrowed substantially all of the funds donated and actually paid in cash only a small portion of the total donation amounts.

Law Firms, Thorsteinssons LLP and Gowling Lafleur Henderson LLP, are also named in the lawsuit as it is alleged that they issued favourable tax opinion letters which were a necessary pre-requisite to the promotion of the Gift Program to participants.

We are compiling a database of individuals who participated in the Gift Program, for the taxation years 2001, 2002, and 2003.

If you have not already contacted us, we would appreciate hearing from you as it may assist us in pursuing this claim.

You may contact us by e-mail, telephone, mail, courier, fax, etc.

Documents

Click [here](#) to read the Statement of Claim

CONTACT US

If you would like to know more information regarding this claim, or wish to be added to our database of claimants, you may e-mail us at: cyates@shlaw.ca

You can contact us directly by telephone at Scarfone Hawkins LLP at 905-526-4394

You can contact us by fax at 905-523-5878

Due to the volume of inquiries, please allow one week for a response.



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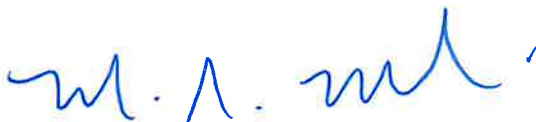
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This is Exhibit "B" referred to in the Affidavit of Michael Stanton,
sworn November 4, 2019.



Matthew G. Moloci
Lawyer

Court File No. 14-CV-512061

**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

CONSENT

By their respective lawyers, the parties, Charles Mossman, Thorsteinssons LLP, Gowling Lafleur Henderson LLP, James Penturn and Richard E. Glatt, none of whom are under disability, consent to discontinuing the action on a without costs basis.

DATED AT HAMILTON, ONTARIO this ^{6th} day of ^{October} ~~July~~, 2019

SCARFONE HAWKINS^{LLP}

Per:

 MATTHEW G. MOLOCI

Lawyers for the plaintiff,
Charles Mossman

- 2 -

DATED AT TORONTO this 8th day of July, 2019**LENCZNER SLAGHT**

Per:



PETER GRIFFINLawyers for the defendant,
Thorsteinssons LLP

DATED AT VANCOUVER this day of July, 2019

BORDEN LADNER GERVAIS

Per:

BRAD DIXONLawyers for the defendant,
Gowling Lafleur Henderson LLPDATED AT TORONTO, ONTARIO this 6th day of ^{✓ October ✓ 2019} July, 2019**DENTONS CANADA LLP**

Per:

*as authorized by*

NEIL S. RABINOVITCHLawyers for the defendants,
James Penturn and Richard E. Glatt

- 2 -

DATED AT TORONTO this day of July, 2019

LENCZNER SLAGHT

Per:

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Thorsteinssons LLPDATED AT VANCOUVER this ^{8th}..... day of July, 2019**BORDEN LADNER GERVAIS**

Per:



BRAD DIXONLawyers for the defendant,
Gowling Lafleur Henderson LLP

DATED AT TORONTO, ONTARIO this day of July, 2019

DENTONS CANADA LLP

Per:

NEIL S. RABINOVITCHLawyers for the defendants,
James Penturn and Richard E. Glatt

CHARLES MOSSMAN
Plaintiff

-and-

BERKSHIRE FUNDING INITIATIVES LIMITED et al.
Defendants

Court File No. 14-CV-512061

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

CONSENT

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Lawyers for the plaintiff,
CHARLES MOSSMAN

RCP-E 4C (July 1, 2007)

This is Exhibit "C" referred to in the Affidavit of Michael Stanton,
sworn November 4, 2019.



Matthew G. Moloci
Lawyer

NOTICE OF DISCONTINUANCE OF SUPERIOR COURT OF JUSTICE (ONTARIO)

COURT FILE NO. 14-CV-512061

**ACTION BY THE PLAINTIFF CHARLES MOSSMAN AGAINST THE DEFENDANTS
BERKSHIRE FUNDING INITIATIVES LIMITED, TALISKER FUNDING LIMITED,
IDEAS CANADA FOUNDATION, JAMES PENTURN, RICHARD E. GLATT, JACK
KESLASSY, THORSTEINSSONS LLP AND GOWLING LAFLEUR HENDERSON LLP**

This lawsuit commenced on September 12, 2014, as a proposed class proceeding under the *Class Proceedings Act*, SO 1992, c 6, against the defendants, Berkshire Funding Initiatives Limited, Talisker Funding Limited, Ideas Canada Foundation, James Penturn, Richard E. Glatt, Jack Keslassy, Thorsteinssons LLP and Gowling Lafleur Henderson LLP, in the Ontario Superior Court of Justice has been discontinued by the Order of Justice Benjamin T. Glustein dated November 18, 2019.

The discontinuance of this lawsuit means that it is not going forward or being pursued.

If you are/were relying on this action to protect your rights, you should seek your own legal advice immediately.

Discontinuance of the action will mean that applicable limitation periods in respect of these claims, which limitation periods had been suspended, will now run again as of December 18, 2019.

CHARLES MOSSMAN
Plaintiff

-and-
Defendants

BERKSHIRE FUNDING INITIATIVES LIMITED et al.

Court File No. 14-CV-512061

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF MICHAEL STANTON
SWORN NOVEMBER 4, 2019

SCARFONE HAWKINS LLP
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Lawyers for the plaintiff,
CHARLES MOSSMAN

RCP-E 4C (July 1, 2007)

Court File No. 14-CV-512061

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE
JUSTICE B. T. GLUSTEIN

)
)
)

MONDAY, THE 18TH
DAY OF NOVEMBER, 2019

B E T W E E N:

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

Proceeding under the *Class Proceedings Act, 1992*, SO 1992, c 6

ORDER

THIS MOTION, made by the plaintiff, Charles Mossman, seeking to discontinue this action on a without costs basis was heard this day at the courthouse, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Motion Record of the Plaintiff, including the consent of the parties, Charles Mossman, Thorsteinssons LLP, Gowling Lafleur Henderson LLP, James Penturn and Richard E. Glatt, filed, and on hearing the submissions of the lawyers for these parties,

- 2 -

1. THIS COURT ORDERS that approval to discontinue this action is hereby granted and this action is hereby discontinued on consent, without costs; and,
2. THIS COURT ORDERS that the notice of discontinuance of this action in the form attached as Schedule “A” to this order shall be posted on the Scarfone Hawkins LLP class action website at: www.classactionlaw.ca and sent by email to putative class members at their last known email addresses in the records of Scarfone Hawkins LLP.

(Signature of Judge)

SCHEDULE “A”**NOTICE OF DISCONTINUANCE OF SUPERIOR COURT OF JUSTICE (ONTARIO)****COURT FILE NO. 14-CV-512061****ACTION BY THE PLAINTIFF CHARLES MOSSMAN AGAINST THE DEFENDANTS
BERKSHIRE FUNDING INITIATIVES LIMITED, TALISKER FUNDING LIMITED,
IDEAS CANADA FOUNDATION, JAMES PENTURN, RICHARD E. GLATT, JACK
KESLASSY, THORSTEINSSONS LLP AND GOWLING LAFLEUR HENDERSON LLP**

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CHARLES MOSSMAN
Plaintiff

-and-
Defendants

BERKSHIRE FUNDING INITIATIVES LIMITED et al.

Court File No. 14-CV-512061

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

ORDER

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CHARLES MOSSMAN

RCP-E 4C (July 1, 2007)

CHARLES MOSSMAN
Plaintiff

-and- **BERKSHIRE FUNDING INITIATIVES LIMITED et al.**
Defendants

Court File No. 14-CV-512061

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD OF THE PLAINTIFF
(Seeking Discontinuance of Action)

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RCP-E 4C (July 1, 2007)