Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

-and-

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

MOTION RECORD
(SETTLEMENT & FEE APPROVAL)
VOLUME 1 OF 2

November 30, 2022

ROY O'CONNOR LLP
1920 Yonge Street, Suite 300
Toronto, ON M4S 3E2

David O'Connor (LSO# 33411E)
Tel: 416-362-1989
Email: dfo@royoconnor.ca

J. Adam Dewar (LSO# 46591J)
Tel: 416-362-1989
Email: jad@royoconnor.ca

Lawyers for the Plaintiff

TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
Barristers
130 Adelaide Street West, Suite 2600
Toronto, ON M5H 3P5

Peter Griffin (LSO# 19527Q)
Email: pgriffin@litigate.com

Rebecca Jones (LSO# 47826M)
Email: rjones@litigate.com

Jessica Kras (LSO# 77700K)
Email: jkras@litigate.com

Tel: (416) 865-9500
Fax: (416) 865-9010

Lawyers for the Defendant, Cassels Brock & Blackwell LLP

AND TO: **DEWART GLEASON LLP**
366 Adelaide Street West, Suite 102
Toronto, ON M5V 1R9

Sean Dewart (LSO# 26708B)
Email: sdewart@dgllp.ca

Adrienne Lei (LSO# 58975R)
Email: alei@dgllp.ca

Tel: (416) 971-8000
Fax: (416) 971-8001

Lawyer for the Third Parties, Gardner Roberts LLP and
The Estate of Ronald Farano, Deceased

AND TO: **DENTONS CANADA LLP**
Barristers & Solicitors
Toronto-Dominion Centre
77 King Street West, Suite 400
Toronto, ON M5K 0A1

Frank E.P. Bowman (LSO# 16649W)
Email: frank.bowman@dentons.com

Deepshikha Dutt (LSO# 62846F)
Email: deepshikha.dutt@dentons.com

Tel: (416) 863-4511

Fax: (416) 863-4592

Lawyers for the Third Party, Mintz & Partners LLP

AND TO: **BENNETT JONES LLP**
Barristers & Solicitors
One First Canadian Place, Suite 3400
P.O. Box 130
Toronto, ON M5X 1A4

Jeffrey Leon (LSO# 18855L)
Email: leonj@bennettjones.com

Ethan Schiff (LSO# 70448W)
Email: SchiffE@bennettjones.com

Tel: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the Third Party, Prenick Langer, LLP

INDEX

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

-and-

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

INDEX

TAB 1

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

-and-

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

NOTICE OF MOTION
(Settlement & Fee Approval Motion)

The Plaintiff will make a motion to the Honourable Justice Perell on January 20, 2023, at 10:00 a.m. or as soon after that time as the motion can be heard by Zoom videoconference.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. a Declaration and Order that the Settlement Agreement between the Plaintiff and the Defendant dated November 14, 2022 ("Settlement Agreement") is fair, reasonable and in the best interests of the Class Members;

2. an Order that the Settlement Agreement be approved pursuant to s. 29 of *the Class Proceedings Act, 1992* and that it shall be implemented in accordance with its terms;
3. an Order approving the distribution of a Notice of Certification and Settlement Approval to the Class;
4. an Order appointing RicePoint Administration Inc. ("RicePoint") as Claims Administrator;
5. an Order approving the Plaintiff's Retainer Agreement with Class Counsel and approving and directing the payment of Class Counsel's fees (including disbursements and taxes) in accordance with the Settlement Agreement from the Settlement Fund;
6. an Order approving the levy payable to the Class Proceedings Fund pursuant to Regulation 771/92 to the *Law Society Act*; and,
7. such further declarations, directions and other orders as counsel may advise and this Honourable Court deems just and appropriate.

THE GROUNDS FOR THE MOTION ARE:

1. The Settlement Agreement, which establishes a Settlement Fund of $8,250,000, is fair and reasonable and in the best interests of the Class Members. The parties engaged in extensive arm's length negotiations and a mediation before a retired judge before entering into the Settlement Agreement.
2. The Settlement provides Class Members with a remedy that is likely as good or better than what they could reasonably hope to achieve after a successful judgment on the common issues. This Settlement avoids the risks associated with proceeding to a contested common issues trial;
3. Class Counsel and the Plaintiff recommend that the Court Approve the Settlement;

4. Notice of this hearing to approve the Settlement will be distributed pursuant to the Order of the Honourable Justice Perell dated November 15, 2022.
5. RicePoint is an experienced claims administrator. Its staff have worked on many settlements approved by Canadian courts;
6. Class Counsel's proposed fee is fair and reasonable. The requested 25% contingency fee is set out in the Retainer Agreement. The Representative Plaintiff fully understood the proposed fee before signing the Retainer Agreement;
7. Class Counsel's proposed fee reflects the work done and the risks undertaken by Class Counsel in litigating this case on behalf of the Class;
8. Class Counsel's disbursement request is reasonable;
9. The proposed fee accords with the case law and principles applied by Ontario courts with respect to Class Counsel contingency fees;
10. Such 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 Peter L. Roy, sworn November 29, 2022;
2. the affidavit of Jeffrey Lipson, sworn November 29, 2022; and,
3. such further and other material as counsel may advise and this Honourable Court may permit.

November 29, 2022

ROY O'CONNOR LLP
1920 Yonge Street, Suite 300
Toronto, Ontario
M4S 3E2

David F. O'Connor (LSO No. 33411E)

J. Adam Dewar (LSO No. 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204
Email: dfo@royoconnor.ca
Email: jad@royoconnor.ca

Lawyers for the Plaintiff/Moving Party

TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
Barristers
130 Adelaide Street West, Suite 2600
Toronto, ON M5H 3P5

Peter Griffin (LSO# 19527Q)
Email: pgriffin@litigate.com

Rebecca Jones (LSO# 47826M)
Email: rjones@litigate.com

Jessica Kras (LSO# 77700K)
Email: jkras@litigate.com

Tel: (416) 865-9500
Fax: (416) 865-9010

Lawyers for the Defendant, Cassels Brock & Blackwell LLP

AND TO: **DEWART GLEASON LLP**
366 Adelaide Street West, Suite 102
Toronto, ON M5V 1R9

Sean Dewart (LSO# 26708B)
Email: sdewart@dgllp.ca

Adrienne Lei (LSO# 58975R)
Email: alei@dgllp.ca

Tel: (416) 971-8000
Fax: (416) 971-8001

Lawyer for the Third Parties, Gardner Roberts LLP and
The Estate of Ronald Farano, Deceased

AND TO: **DENTONS CANADA LLP**
Barristers & Solicitors
Toronto-Dominion Centre
77 King Street West, Suite 400
Toronto, ON M5K 0A1

Frank E.P. Bowman (LSO# 16649W)
Email: frank.bowman@dentons.com

Deepshikha Dutt (LSO# 62846F)
Email: deepshikha.dutt@dentons.com

Tel: (416) 863-4511
Fax: (416) 863-4592

Lawyers for the Third Party, Mintz & Partners LLP

AND TO: **BENNETT JONES LLP**
Barristers & Solicitors
One First Canadian Place, Suite 3400
P.O. Box 130
Toronto, ON M5X 1A4

Jeffrey Leon (LSO# 18855L)
Email: leonj@bennettjones.com

Ethan Schiff (LSO# 70448W)
Email: SchiffE@bennettjones.com

Tel: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the Third Party, Prenick Langer, LLP

JEFFREY LIPSON - and -	CASSELS BROCK & BLACKWELL LLP et al. -and-	MINTZ & PARTNERS LLP et al.
Plaintiff	Defendant	Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

NOTICE OF MOTION
(Settlement & Fee Approval Motion)

ROY O'CONNOR LLP
Barristers
1920 Yonge Street
Suite 300
Toronto, Ontario
M4S 3E2

David F. O'Connor (LSO# 33411E)
J. Adam Dewar (LSO# 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204
Email: dfo@royoconnor.ca
Email: jad@royoconnor.ca

Lawyers for the Plaintiff

TAB 2

Court File No.: CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEFFREY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

- and -

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

Proceeding under the *Class Proceedings Act, 1992*

Affidavit of Peter L. Roy – Settlement & Fee Approval

I, **Peter L. Roy**, of the City of Toronto, Ontario, hereby make oath and say:

1. I am a senior partner with Class Counsel, Roy O'Connor LLP ("RO"), and have been involved with this matter since our firm assumed carriage of this action in 2009. As such, I have knowledge of the matters deposed to in this affidavit. Where the information in this affidavit is not based on my direct knowledge, but is based on information and belief from other sources, I have stated the source of that information and confirm that I believe that information to be true. This affidavit adopts the defined terms from the Settlement Agreement, a copy of which is attached to this affidavit as **Exhibit "A"**.

Introduction & Summary

2. In this certified class action, the Plaintiff alleged that the Defendant Cassels Brock and Blackwell LLP ("Cassels Brock") breached the standard of care of reasonably competent solicitors when it prepared legal tax opinions ("Opinions") relating to a charitable tax donation program ("Program") offered by the Athletic Trust of Canada ("Athletic Trust") for the years 2000 to 2003. The Opinions were part of a package available to the Class Members (those who participated in the Program).
3. The Plaintiff's claim advanced two causes of action: (a) negligence *simpliciter,* based on the allegation, that Cassels Brock's Opinions were a pre-requisite to the establishment of the Program and that they did not meet the relevant standard of care; and (b) negligent misrepresentation, based on the allegation, that the Opinions contained misleading statements as to the whether the Program withstand CRA challenge.
4. This action was formerly scheduled to proceed to a pre-trial in November 2022. Subject to the outcome of that pre-trial, the Parties were scheduled to commence a 30-day trial of the common issues commencing in late January 2023. The common issues trial would, if necessary, address whether Cassels Brock owed and breached any of the duties set out in the certified common issues. It is important to note that the certified common issues do not include any questions relating to the quantification of Class Members' damages. While some elements of liability may be established at the common issues trial if the Plaintiff was successful, individual damages hearings or analysis would almost certainly be necessary to resolve the individual damage claims of the Class Members.
5. After approximately 12-years of litigation, the completion of the discovery process and the exchange of expert reports discussed below, the Parties have reached a proposed Settlement

in this proceeding. The Settlement is the product of the active pursuit of this action, arm's length negotiations and a mediation before the Honourable Frank Marrocco – a retired judge of the Ontario Superior Court of Justice.

6. The Class Members made cash donations, based on the information available and our expert's assumptions and analysis, in the aggregate of approximately $43.5 million over the years 2000 to 2003. Based on a settlement from CRA arising out of test case for the Program and again the analysis and assumptions of our expert, the Class Members were able to claim a tax credits totaling approximately $21 million (in aggregate for all Class Members) on the $43.5 million total donated funds, resulting in the Class Members being net out of pocket approximately $23.3 million. If approved, this Settlement will see Cassels Brock pay $8.25 million, which is approximately 35% of the $23.3 million out of pocket damages. If one takes into account the CJA interest that may have been awarded (at 1.3%) on that principal amount (for a total with interest of approximately $27.5 million), the $8.25 million represents 30% of that total.
7. In our opinion, the Settlement is fair, reasonable and in the best interests of the approximately 1,000 Class Members.
8. As discussed in greater detail below, there were real risks and challenges in this case. The first related to whether Cassels Brock even owed a duty of care to the Plaintiff and Class Members for the damages alleged, as they were not clients of Cassels Brock. The second and most significant hurdle related to the question of whether Cassels Brock would have been found to have breached the standard of care in rendering the Opinions. The Opinions did not guarantee any particular outcome for any participant in the Program. The Opinions indicated that a challenge of the Program by CRA was unlikely to succeed, which by

definition means that a challenge by CRA was possible and it was also possible that such a challenge could be successful. The Opinions also contained various caveats, assumptions, disclaimers, limitations and risks.

9. Against our tax expert (Vern Krishna) stood two tax experts who submitted reports for Cassels Brock and for the Third-Party Gardiner Roberts (namely, Edward Heakes and Brian Nichols). Each of those experts opined that Cassels Brock's Opinions met the standard of care at the time, based on what was considered to be the leading Federal Court of Appeal jurisprudence at the time. Mr. Heakes and Mr. Nichols opined that Dr. Krishna's views were not a reflection of the existing caselaw, but rather an inappropriate reflection of how the caselaw changed or turned after 2003 (the last year of the Program). In addition, there was evidence that supported Mr. Heakes' and Mr. Nichols' opinions from Thorsteinssons LLP (the largest law firm in Canada that practices exclusively in tax law), who acted for the tax payers (i.e. Class Members) in the test case. Thorsteinssons stated view (in the context of the test case and before this Class Action was commenced) was that investments in the Program should have (or should likely have) qualified for the full tax credits promoted as part of the Program at the time the taxpayers made their donations in 2000 to 2003, and that it was only a subsequent shift in the caselaw that created the real challenge for the taxpayers. Lastly, there was also an opinion from Ronald Farano (another tax expert) who essentially opined in late 2000 or early 2001 that the Cassels Brock Opinion (then for the year 2000) accurately captured the tax principles issues, and authorities.

10. The pure negligence claim (negligence simpliciter) may have presented real challenges. The negligence misrepresentation cause of action was a more natural or usual fit to the

facts. However, even if Cassels Brock was found to have breached the standard of care (i.e. found to have made negligent misstatements in its Opinions), the Class Members would then have had to prove on an individual basis that they relied on the Opinions, and in that context, likely would have had to prove that they at least read the Opinions for the years that they donated. It was apparent to us that many of the Class Members may not have read the Opinions. Mr. Lipson himself testified that he did not read the Opinions and we understand that other Class Members did not read the Opinions as well.

11. Beyond proving that Class Members actually read the Opinions, each individual may have had to explain how they specifically relied on the Cassels Brock Opinions (as opposed to relying on what their accountants or advisers, who presented the Program to them, said), including what their own accountants and advisers advised them, and whether they knew that the Program was risky, knew of the risk that CRA would challenge the tax credits claimed, and knew that such a challenge may be successful and accepted that risk.

12. There were also potentially real limitation period issues for the Class as this Court noted in its initial certification decision. While the case was re-instated on appeal, those limitation arguments on the merits did not disappear.

13. There were also challenges with the damages claimed. The first challenge was that the Defendant intended to argue that, in order to be entitled to the charitable tax credit as part of the settlement with CRA, the Class Members (tax payers) essentially confirmed that they intended to donate their full cash donations to a charity, in exchange for a charitable tax credit. In other words, the net out of pocket amount was not "damages" but rather the result of a conscious choice to donate in exchange for a tax credit (and without such donative intent, no tax credit would have been available). The mediator also expressed

concern with the calculation of our damages and the overall quantum that may be awarded by a judge.

14. With these issues in mind (and more, as discussed further below), we have no hesitation in recommending this $8.25 million Settlement to the Class Members and to the Court. The Settlement avoids the real risk of losing on the common issues and provides the Class Members with compensation now. The Settlement also avoids the delays and complications that would have been encountered if the case went to trial, appeal, and then (if successful) on to an individual issues phase and any appeals therefrom.

15. This affidavit addresses, among other things, the claim, the background facts and events, factors to be considered on a settlement approval motion, and the factors and facts relevant to RO's proposed fee. For the sake of brevity and clarity, this affidavit does not list every dispute, case conference, amendment, or other event that took place in this proceeding. Rather, the focus of this affidavit is on the significant events that may inform or affect the Court's consideration of this proposed settlement.

My Background & the Experience of Class Counsel

16. I was called to the bar in 1976 and, for the first 28 years of practice (while I was at Faskens), my practice focused primarily on complex corporate/commercial litigation and defending various class proceedings including the defence of BMO in proceedings in Canada and the U.S.

17. From 1982 to 2004 I was a partner in Faskens. On February 1, 2004, I left Faskens to co-found our predecessor firm Roy Elliott Kim O'Connor LLP. Roy Elliott Kim O'Connor LLP eventually became Roy Elliott, O'Connor LLP and then Roy O'Connor LLP ("RO"). For the sake of simplicity this affidavit refers to our predecessor firms and current firm as

RO or "Class Counsel". While at RO or its predecessor firms, more of my practice has focused on plaintiff side class actions.

18. RO's general or overall practice is restricted to civil litigation with a focus on class proceedings and corporate/commercial litigation. Counsel at RO have significant experience in appearing as class counsel for both plaintiffs and defendants in class proceedings, at all levels of Court in Ontario. In 2013, 2015 and 2017 RO was named the "Plaintiffs Firm of the Year" by Benchmark Litigation Canada. Some of our notable class actions include:

    a. *McCarthy et al. v. The Red Cross Society et al.* (Hepatitis C tainted blood – settled and the administration of that settlement will be completed within months)[1]; and
    b. *Hislop v. Canada* (same sex pension benefits – successfully concluded following trial and appeals to Supreme Court of Canada)[2]
    c. *Quenneville v. VW et al.* ("dieselgate" emissions scandal – member of counsel team that led to multi-billion-dollar settlement arising from VW's emissions manipulations)[3];
    d. *Fresco v. CIBC* (ongoing unpaid overtime in banking industry action was commenced in 2007, has been pursued for the last 15 years and, in 2020, the plaintiff won summary judgment against the defendant bank. In 2022 that judgment was upheld by the Court of Appeal for Ontario)[4];
    e. *Fulawka v. Bank of Nova Scotia* (unpaid overtime in the banking industry settled in 2014 and, following issues with the claims administration process, re-settled in 2016)[5];
    f. *Bozsik v. Livingston International Inc.* (unpaid overtime in the customs brokerage

1 *McCarthy v. Canadian Red Cross Society*, 2007 CanLII 21606 (ON SC).
2 *Canada (Attorney General) v. Hislop*, 2007 SCC 10 (CanLII).
3 *Quenneville v. Volkswagen*, 2017 ONSC 2448 (CanLII).
4 *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75 (CanLII) and *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115 (CanLII)
5 *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 (CanLII) and *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576 (CanLII).

industry – settled in 2018)[6];

g. *Fantl v. Transamerica Life Canada* (management fee overcharge settlement – with investment return aspects ongoing)[7];

.

19. David O'Connor, Adam Dewar and myself are the lawyers at RO primarily responsible for advancing the plaintiff side class actions, including this action against Cassels Brock. Copies of our biographies are attached to this affidavit respectively as **Exhibits "B," "C"** and **"D"**.

Background & Procedural History

The Plaintiff & the Class

20. The Representative Plaintiff is Jeffrey Lipson. Mr. Lipson is a successful retired businessman who made significant cash donations in the context of the Program in each of the 2000-2003 tax years. Mr. Lipson received and donated 276 Timeshare Weeks through his participation in the Program. He resides in Toronto, Ontario.

21. The certified class of approximately 1,000 individuals is defined as:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "**Class Members**" or the "**Class**").

The Defendant & Third Parties

22. Cassels Brock is the single defendant to this class action.

23. The Opinions were prepared by Lorne H. Saltman, who, at the time they were prepared, was a partner in the Tax and Trusts Practice Group of Cassels Brock. Mr. Saltman, now a tax partner at Gardiner Roberts LLP, has several decades of experience as a tax lawyer.

---

6 *Bozsik v. Livingston*, 2019 ONSC 5340 (CanLII).

7 *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (CanLII).

While no longer with Cassels Brock, Mr. Saltman was Cassels Brock's representative at the examinations for discovery.

24. Cassels Brock issued a Third-Party Claim against a number of individuals and entities, alleging that they provided tax, financial or legal advice to Class Members with respect to the Program and claiming contribution and indemnity for any amounts awarded against Cassels in the main action. The Third Parties are not parties to the certification order. As of the date of this affidavit, the Third Parties are:

    a. **Mintz & Partners LLP**: Mintz & Partners is an accounting firm alleged to have been involved in the development and promotion of the Program. Mintz & Partners LLP have defended the main action;

    b. **Prenick Langer LLP (now TCH Partners LLP):** Prenick Langer LLP is an accounting firm alleged to have been involved in the promotion of the Program to certain Class Members. Prenick Langer have not defended the main action; and,

    c. **Gardiner Roberts LLP and the Estate of Ronald J. Farano**: Mr. Farano was a senior tax partner at Gardiner Roberts and an investor in the Program (his estate opted out of this Class Action) who provided a second opinion on Cassels Brock's Opinion to Prenick Langer regarding the viability of the Program. Gardiner Roberts and the Farano Estate have defended the main action.

Any contributions made to the Settlement Fund by any Third Parties was a matter negotiated between Cassels Brock and those Third-Parties.

The Athletic Trust Tax Reduction Program

25. The Program was conceived by its promoters Steven Mintz and Stephen Elliott – often referred to in this litigation as "the Stevens" – neither of whom are parties to this proceeding.

26. The Program was marketed by a number or network of accountants and financial advisors (some of whom are or were formally Third Parties to this Action as noted above) apparently recruited by the Promoters to distribute the Program to their clients.

27. The nature of the transaction underlying the Program was relatively complex. The Program is described in Justice Perell's Court's certification *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724 (CanLII) at paragraph 18. The Program involved the acquisition and gifting of timeshare units from a resort developer by a Bahamian Trust to participants/investors in the Program (i.e., Class Members). The timeshare units were subject to a charge or lien in favour of the timeshare developer. Class Members donated their timeshares to a number of Canadian non-profit athletic organizations (known as "RCAAAs") along with a pre-set amount of cash to discharge the lien. Participants would receive a tax receipt for the value of their cash as well as the purported value of the donated timeshare units. It is the value of the Class Members' cash donations that is the focus of this Settlement. The value of the promoted tax credit exceeded the cash value of the donation by greater than 30%, which (if the Program was not successfully challenged by CRA) would have resulted in an immediate 30% return or profit for the Class Members. The RCAAAs could then exercise a put option and put (resell) the timeshare weeks in bulk back to the timeshare developer at a pre-determined price (namely, $1,000). This is what has been described as the Put Option.

28. Following the certification of this action and shortly into the discovery process, it became apparent that Cassels Brock also had provided advice with respect to the operation, development or design of the Program and with respect to various materials relating to the Program. This information supported an argument that Cassels Brock's Opinions (i.e. its views on whether the tax credits promoted could be successfully challenged) were not entirely independent. There was at least an argument, in essence, that Cassels Brock Opinions were expressions of its views on its own prior legal advice or work in the context of the development of the Program or the documents relating thereto. The Plaintiff's initial Statement of Claim was amended to refer to Cassels Brock's role in the development of the Program and this potential lack of independence or conflict. A copy of the Plaintiff's Amended Fresh as Amended Statement of Claim reflecting those amendments is attached to this affidavit as **Exhibit "E"**. Cassels Brock's Amended Statement of Defence and Third-Party Claims are attached to this affidavit as **Exhibit "F"**.

29. Cassels Brock prepared and issued various substantively identical legal opinions in connection with the Program for the years 2000 to 2003. The Opinions set out various principles and issues and, as noted above, various caveats, assumptions and risks. The ultimate conclusion expressed in each of the Opinions was that *"it is unlikely that the CRA could successfully deny the deemed adjusted cost base of Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries"*. As noted above and discussed further below, Cassels Brock did not provide an unqualified endorsement of the Program and it was possible that a trial judge would have found that their Opinions (including its conclusion regarding the likely outcome to any CRA challenge of the Program) satisfied any applicable standard of care.

30. Consistent with the content of the Opinions, the promotional materials in respect of the Program distributed to participants/investors, and/or their advisors, referred to the fact that CAA had retained "*Cassels Brock & Blackwell LLP to provide the legal opinion with respect to the tax consequences*" of the Timeshare Program.

Litigation in the Tax Court of Canada

31. The Program drew the scrutiny of the CRA and, in 2004, the CRA advised the Class Members that it intended to fully disallow their claims for any tax credits. In 2006, two participants in the Timeshare Donation Program launched proceedings in the Tax Court of Canada with the assistance of counsel at Thorsteinssons LLP as test cases to challenge the CRA's denial of the tax credits.

32. Prior to the CRA challenge, the Promoters and developers established, as part of the Program, a fund to pay for legal costs if the Program was subsequently challenged by the CRA. In or around April 2004, Thorsteinssons began to deal with the CRA on behalf of most of the participants/investors in the Program. Thorsteinssons was paid from the litigation fund established by the Promoters and developers. As discussed further below, the damage estimates in this Settlement are based on information collected by Thorsteinssons during that tax court proceeding. Thorsteinssons provided that information to us in advance of the mediation discussed below. Thorsteinssons was previously the source of contact information used to notify the Class of the Certification of this proceeding.

33. A summary of that information was used by the Plaintiff's damages expert (Errol Soriano) to produce the damages report and estimate discussed below. Where no information was available for a Class Member's donation, Mr. Soriano's damages report applied what he

calculated as the average donation across all participants in that province in the given year of the donation.

34. In January 2008, the CRA agreed to settle the test cases on the basis that participants/investors would be entitled to a tax credit for the cash portion of their donations to the RCAAAs under the Timeshare Program, but would not receive any credit for their donations of Timeshare Weeks. This resulted in Class Members receiving approximately 47.9% (assuming the highest tax bracket for the Class Members) of the value of their cash donation in the form of a tax credit.

35. Based on my experience with this action, I understand that the vast majority of the participants/investors in the Program accepted the CRA's offer and agreed to the foregoing settlement. As noted above and discussed in the damages section below, while the settlement salvaged some of the Class Members' investment, it left them out of pocket (so to speak) to the tune of approximately 52.1% of their cash donations.

Launch of this Class Action

36. The following section of my affidavit summarizes the major procedural steps that have taken place in this class action since it was issued.

37. Following the settlement with the CRA, Mr. Lipson brought this proposed class against Cassels Brock in April 2009. This action was issued by Mr. Lipson's then counsel Davies, Ward, Phillips & Vineberg LLP ("Davies").

38. Davies performed various tasks, including but not limited to investigating and researching the issues, seeking input from tax experts, attempting to negotiate with the Defendant and ultimately drafting and issuing the Claim against Cassels Brock. Davies had been retained on a fee-for-service retainer. As set out in our Retainer Agreement with him, Mr. Lipson

and nine other Class Members, referred to as "Funders" in the Retainer Agreement, paid Davies approximately $320,000 (including fees, disbursements and taxes). By the summer of 2009, Mr. Lipson and other Funders were not prepared to continue to pay out of their pockets for Davies to prosecute the case and Davies was not prepared to act on a contingency basis. Mr. Lipson contacted us through Davies in the summer of 2009 and we agreed to take carriage of this action from Davies in September 2009 on a contingency basis. A copy of our Retainer Agreement with the Plaintiff dated September 14, 2009 is attached to this affidavit as **Exhibit "G"**. The Retainer Agreement was negotiated with Mr. Lipson, who was then taking advice from Davies.

39. As set out in the Retainer Agreement, our firm agreed, subject to the cooperation of the Funders, to try and recover Davies Costs, or some percentage thereof, as costs in this proceeding if such costs were reasonably recoverable at any stage. We also agreed to seek recovery of the fees, disbursements and taxes paid to Davies by the Funders out of any settlement "*such that the Funders will not bear a greater percentage of the legal fees and disbursements (or case expenses) than the other class members should this action be successful*". That rational made reasonable sense to us.

40. More specifically, the Retainer Agreement provided in part:

> The Client has advised that he and certain of the Other Participants (putative class members) did pay legal fees and disbursements to Davies with respect to this Proceeding (the "Paid Fees and Disbursements"). The Client has requested, on his behalf and on behalf of such Other Participants (collectively, the "Funders"), that REO seek the full reimbursement or indemnification of the Funders in respect of the Paid Fees and Disbursements, such that the Funders will not bear a greater percentage of the legal fees and disbursements (or case expenses) than the other class members should this action be successful. REO has agreed that it will take the steps set out in sections 12, 13, 14 and 15 below to recover the Paid Fees and Disbursements on behalf of and for the Funders, subject to court approval and subject to any contrary legal or professional obligations. The Funders shall in no circumstance whatsoever be entitled hereunder to claim or receive any funds or

amounts on account of the Paid Fees and Disbursements in excess of the actual amounts that they have paid to Davies towards the Paid Fees and Disbursements.

41. If the request for reimbursement of the Davies Costs out of the Settlement Fund is approved by the Court, the Funders should receive either their share, or their proportionate share of the amounts that they paid to Davies, and will thus not effectively be held responsible for a greater percentage of the legal expenses incurred with respect to this case. While several Funders have confirmed, as of the date of this affidavit, that we can make the foregoing claim on their behalf we are still in the process of contacting the balance of the Funders. We will, if necessary, file a further affidavit regarding this issue before the hearing of the settlement and fee approval motion in January 2023.

42. While we were considering assuming carriage of this file in 2009, we recognized that Davies had performed valuable work for the Plaintiff and the putative Class, work that we would have had to provide if we had been retained from the outset. With that in mind, we agreed to a 25% contingency fee as opposed to a higher percentage. The total Davies fees (excluding taxes) amount to approximately $275,000, which represents approximately 3.3% of the $8.25 million settlement amount. Thus, the total percentage of the $8.25 million going to fees would be 28.3%. Lowering our requested fee percentage recognized the work performed by Davies and should address any issue with some Class Members otherwise paying a disproportionate share of legal fees in this case.

43. The Honourable Justice Perell was appointed as the Class Action Case Management Judge with oversight of this case in 2010 and His Honour has acted in that capacity since that time.

Certification Initially Denied

44. The Plaintiff served his certification record in June 2010. Mr. Lipson's motion record included an affidavit from himself, a solicitor's affidavit attaching documents regarding the Program and an expert report from tax expert Professor Vern Krishna.

45. Prior to the hearing of the certification motion, the statement of claim was amended on consent to discontinue the action against the Defendant Lorne Saltman in his personal capacity.

46. Cassels Brock delivered its responding certification record in February 2011.

47. In April 2011, Cassels Brock issued the third-party claims against Mintz & Partners LLP, Deloitte & Touche LLP, Glenn F. Ploughman, Shelley Shifman, Prenick Langer LLP, TMK Financial Group Ltd., Gardiner Roberts LLP, the Estate of Ronald J. Farano, Deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, and John Doe LLP 1-100.[8] In light of the issuance of the third-party claim, the Plaintiff requested a direction that Cassels Brock serve a statement of defence. Justice Perell subsequently directed that Cassels Brock serve a statement of defence.

48. Cassels Brock served its Statement of Defence on September 1, 2011.

49. The Third Parties served their Statements of Defence in June, August and October of 2011.

50. The Plaintiff served a Reply to Cassels Brock's Statement of Defence in September 2011.

8 Third Party Claims against Deloitte & Touche LLP, Glenn Ploughman, Shelly Shifman and TMK Financial Group were discontinued before this action was sent down for trial.

51. Mr. Lipson and Professor Krishna were both cross-examined on their certification affidavits in October 2011. Cassels Brock cross-examined Stephen Elliot, one of the designers and promotors of the Program, as a witness on a pending motion.

52. The hearing of the Plaintiff's certification motion proceeded over two days in November 2011 before Justice Perell. In reasons for decision released on November 14, 2011, Justice Perell held that the Plaintiff's claim was statute-barred on limitations grounds and dismissed the Plaintiff's certification motion and action. Justice Perell further declined to certify the Plaintiff's proposed causation common issue. Justice Perell's certification decision stated, in part:

> [150] In the case at bar, as soon as the letters from Canada Revenue started to arrive, Mr. Lipson and the class members knew or ought to have known that Cassels Brock's opinion had caused them damage because they had actually relied on the opinions or, but for those opinions, they would not or could not have participated in the timeshare program and suffered damages. Given that Canada Revenue was challenging the validity of the trust, the validity of the gift, the donative intent of the participants and the value of the donation, the donors knew that Canada Revenue could successfully deny the tax credit.
>
> [151] The class members had all of the material facts necessary to determine that they had grounds for understanding that they had a tort claim against Cassels Brock. The class members may not have known the full extent of what it was going to cost them for having participated in the timeshare program but they did know that there had been harm caused because of Cassels Brock's opinions.
>
> [...]
>
> [157] At the time of the letters from Revenue Canada, the class members' loss was actual not potential and they knew who to blame for that actual loss. The class members had been denied the tax credits in their entirety, and they allegedly had been lured into a transaction or not properly warned about a transaction that they allege they would have avoided but for the role played by Cassels Brock. The class members incurred expenses, i.e., special damages, in an attempt to fix their problems by retaining another law firm and bringing proceedings against Canada Revenue.

> [158] In the case at bar, no independent inquiry of the facts is necessary to determine whether or not the class members claims are statute-barred. Indeed, this is apparent from the statement of claim that sets out that the material facts for the discovery of the negligence and negligent misrepresentation claims that occurred when the letters from Canada Revenue arrived denying the tax credits to the class members.

53. A copy of Justice Perell's certification decision dated November 14, 2011 is attached to this affidavit as **Exhibit "H"**.

Appeal of Certification Decision

54. The Plaintiff appealed the foregoing dismissal to the Court of Appeal. In reasons for decision released on March 19, 2013, the Court of Appeal set aside the dismissal and certified the proposed causation issue. As set out below, the Court of Appeal found that Cassels Brock's limitation defenses would, if necessary, be addressed at the individual issues phase of his action. A copy of the Court of Appeal's reasons dated March 19, 2013 are attached to this affidavit as **Exhibit "I"**. A copy of Justice Perell's Costs Decision, dated October 16, 2013, awarding the Plaintiff costs of the certification motion ($148,582.71 payable forthwith and $150,000 payable in the cause) is attached to this affidavit as **Exhibit "J".**

55. Pursuant to the Court of Appeal's decision the common issues were defined as follows:

> **Negligence**
>
> 1. Did the Defendant owe the Class a duty of care (in among other things, negligence or negligent misrepresentation) in the preparation of the Legal Opinions?
>
> 2. If the answer to common issue 1 is "yes", what is the content of the standard(s) of care?
>
> 3. Did the Defendant breach the foregoing standard(s) of care? If so, how?

4. If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?

Damages or Other Relief

5. If after an individual issues trial, the Defendant were found liable to a Class Member for negligent misrepresentation or negligence, what types or heads of damages, if any, would the Class Members be entitled to?

6. If after an individual issues trial, the Defendant were found liable to a Class Member for negligent misrepresentation or negligence, what remedy or remedies, if any, would the Class Members be entitled to?

56. Class Members' damages was not a certified common issue and, as such, the discovery process described below did not generally address the quantification of damages.

Notification of the Class & Opt-Outs

57. Pursuant to the Notice Order of Justice Perell, dated July 22, 2014 ("Certification Notice Order"), the Class received notice of certification via regular mail, email and website postings. Pursuant to the Certification Notice Order, the opt-out period closed on September 26, 2014. Following the notification of the Class, 26 former Class Members opted-out of this class proceeding. A copy of Justice Perell's Certification Notice Order is attached to this affidavit as **Exhibit "K"**. There was a second smaller round of notice, which is discussed further below at paragraph 60.

Discovery Phase of this Class Action

58. There has been a large volume of documentary production in this proceeding. Affidavits of Documents and productions, as well as various Supplemental Affidavits of Documents and productions were exchanged by the Parties and Third Parties between 2014 and 2020.

Lawyers at RO reviewed thousands of documents produced by the Plaintiff, Defendant and Third Parties.

59. In 2014, the Parties debated whether the Plaintiff would be required to produce a series of documents and opinions produced by Thorsteinssons. In reasons for decision released on October 21, 2014, Justice Perell found, among other things, that the Thorsteinssons opinions and related documents should be produced by the Plaintiff. Copies of Justice Perell's decision and order dated October 21, 2014 are attached collectively to this affidavit as **Exhibit "L".**

60. In the course of arguing the foregoing production motion, Thorsteinssons advised us that some Class Members had not received notice of certification. Pursuant to the second Notice Order of Perell J. dated May 1, 2015, approximately 144 additional Class Members were notified of certification. Two additional Class Members subsequently opted out of this proceeding, bringing the total number of opt-outs to 28. A copy of Justice Perell's second Notice Order, dated May 1, 2015, is attached to this affidavit as **Exhibit "M"**.

61. Examinations for discovery commenced on August 18, 2015. Lorne Saltman was Cassels Brock's representative for those examinations. As alluded to above, on the first day of Mr. Saltman's examination, it came to the Plaintiff's attention that Cassels Brock was in possession of additional documents regarding its role in the development or design of the Program and the documents relating thereto. Mr. Saltman's examination was adjourned to allow the Parties to consider and further address that issue.

62. Following a case conference, the Plaintiff delivered an Amended Statement of Claim to add allegations regarding the foregoing alleged conflict issue on February 11, 2016.

Cassels Brock and the Third Parties delivered amended pleadings and amended affidavits of documents and productions later that year.

63. Mr. Saltman's examination for discovery was resumed following the resolution of the foregoing document and pleading issues. Mr. Saltman would ultimately be examined over the course of 6 days between August of 2015 and October 2016. Mr. Saltman delivered answers to the Plaintiff's written follow-up questions on January 8, 2019.

64. The Third Party Prenick Langer was examined for discovery on November 15, 2015. Prenick Langer delivered answers to undertakings in April 2018. The Third-Party Mintz and Partners was examined for discovery on December 1, 2015 and delivered answers to undertakings in July of 2017.

65. Given that Mr. Farano is deceased, the examination for discovery of Gardiner Roberts and the Estate of Ronald Farano was conducted in writing. Various answers to the Plaintiff's and Cassels Brock's written interrogations were eventually provided by Gardiner Roberts and the Estate of Ronald Farano between July 2019 and November of 2020.

66. Jeffrey Lipson was examined for discovery on August 17, 2015. Answers to undertakings and supplemental answers to undertakings were delivered on October 3, 2017 and May 16, 2018.

67. The Parties argued a refusals motion on September 9, 2019. A copy of the Reasons for Decision of Perell J. on that motion is attached to this affidavit at **Exhibit "N"**. Following the release of that decision, the Plaintiff delivered answers to refusals on November 15, 2019.

68. A follow-up examination for discovery of Lorne Saltman was conducted on September 6, 2019.

69. In March of 2020, the COVID-19 pandemic broke out. Despite the outbreak, the Parties continued to work on this proceeding.

70. A follow-up examination of Mr. Lipson was conducted via Zoom on May 6, 2020.

71. Following the completion of the discovery process and the exchange of various (but not all) expert reports (as discussed further below), this action was set down for trial on January 7, 2021.

72. The Parties attended a number of case conferences before Justice Perell and then Justice Wilson to address a number of issues regarding the trial process. I note that a number of those issues (including the extent to which, if at all, the common issues trial would have to address Mr. Lipson's individual claim) would have to be resolved before the trial of the common issues. Pursuant to the Order of Justice Wilson dated December 3, 2021, the pre-trial in this matter was scheduled for November 2022. Pursuant to that same Order, the Parties were directed to attend a mediation before June 30, 2022. A copy of Justice Wilson's December 3, 2021 Order is attached to this affidavit as **Exhibit "O"**.

Exchange of Expert Reports

73. Numerous expert reports were exchanged in this proceeding. The expert reports exchanged to date fall into three categories: i) reports authored by tax law experts regarding whether Cassels Brock met the standard of care of reasonably competent tax solicitor; ii) reports authored by other experts regarding whether Cassels Brock was independent or in a conflict or quasi-conflict of interest; and, iii) for the purposes of the mediation, reports authored by

forensic accountants regarding the quantification of the class members damages. It was possible that additional reports (e.g. regarding the quantum of Mr. Lipson's individual damages) would have been exchanged before the common issues trial in this action. More specifically, the following reports were exchanged in this proceeding:

Taxation Law Expert Reports

a. **Plaintiff – Report of Professor Vern Krishna dated June 7, 2010[9]:** Professor Krishna is a leading tax law expert in Canada. Professor Krishna has provided three reports in this proceeding. Throughout the course of this litigation, Professor Krishna opined that Cassels Brock failed to analyze central and essential components of the Timeshare Program and that it failed to fully inform participants of the risk of CRA assessment and potential denial of the tax credits under the Program;

b. **Gardiner Roberts – Expert Report of Brian Nichols dated October 27, 2020**: In 2020, Gardiner Roberts, who defended the main action, served the expert report of tax specialist Brian Nichols. In short, Mr. Nichols opined that both Cassels Brock's Opinions and Mr. Farano's concurring opinion met the standard of care, that the law of charitable gifting changed over the life of the Program, and that until 2007, it was possible for a taxpayer to make a "profitable" gift and still properly claim a tax credit;

9 The Plaintiff subsequently served a revised report from Professor Krishna (that added one paragraph to the June 7, 2010 report) on March 18, 2011 and then a further revised report, correcting typographical errors in the report's footnotes, on July 13, 2011.

c. **Cassels Brock – Expert Report of Edward Heakes dated November 19, 2020:** In 2020, Cassels Brock served the expert report of tax specialist Edward Heakes. In short, Mr. Heakes opined that the Opinions properly set out the risks faced by investors in the Program, that Cassels Brock met the standard of care of a competent tax lawyer at the time, and that Cassels Brock remained appropriately independent in the provision of its Opinions;

d. **Plaintiff – Expert Report of Vern Krishna dated September 30, 2021**: Professor Krishna's second report was in part produced with the benefit of discovery evidence. It responded to the report of Mr. Heakes. In Mr. Krishna's view, Cassels Brock did not give adequate weight to the risk that the Class Members' donations would not amount to voluntary gifts that qualify for a tax credit;

e. **Cassels Brock – Responding Report of Edward Heakes dated December 15, 2021:** In his 2021 response, Mr. Heakes expanded on his 2020 report and took issue with Mr. Krishna's gift analysis. In short, Mr. Heakes opined that numerous contemporaneous tax cases supported the proposition that, at the time the Program was offered to the public, it was possible to make a profitable gift that would qualify for a tax credit. Mr. Heakes' report cited numerous cases where such an outcome was allowed by the tax court. He disagreed with Professor Krishna's interpretation of the caselaw, and opined that did not reflect the law at the time the Opinions were provided, but rather was influenced by the benefit of hindsight;

f. **Omnibus Reply Opinion of Vern Krishna dated February 16, 2022:** Professor Krishna's third report is an omnibus response/reply that addresses Mr. Heakes' December 2021 reply, the report of Mr. Nichols and comments made by Cassel

Brock's second expert, Peter Jewett, on the propriety of Cassels Brock acting as corporate counsel while providing a legal opinion on the Program.

According to Professor Krishna's third report, Cassels Brock's and Gardiner Roberts' experts, among other things, failed in his view to read the caselaw in the correct context and/or failed to consider that several key features of the Program (e.g., the expectation of an immediate profit, the presence of a pre-determined series of transactions, its non-arms' length structure, etc.) would likely raise serious concerns about the Program with the CRA;

Reports Regarding Professional Duties

g. **Expert Professional Report of Gavin MacKenzie dated May 1, 2019:** In addition to Professor Krishna's reports regarding tax issues, the Plaintiff has served the expert report of noted expert Gavin MacKenzie on the issue of whether Cassels Brock breached any duties owed to the Class Members. In Mr. MacKenzie's view, Cassels Brock did owe duties to the Class Members and breached those duties by purporting to offer an independent Opinion, while simultaneously offering advice about the structure and operation of the Program;

h. **Responding Expert Report of Peter Jewett dated November 19, 2020**: In response to Mr. MacKenzie's report, Cassels served the report of Peter Jewett. Mr. Jewett opined that Cassels acted appropriately in rendering the Opinions and did not breach any duties of independence. He also opined that Cassels was not in a conflict of interest (as all parties were interested in facilitating the success of the Program) and that it owed no duty of care to the Class Members (who were not clients of Cassels Brock).

i. **Reply Report of Gavin MacKenzie dated October 1, 2021**: In his Reply Report, Mr. MacKenzie reiterated the effect of how the interests of those to whom Cassels Brock was providing advice on the Program and Class Members diverged. In short, Mr. Mackenzie opined that, while those promoting the Program benefited financially from the Program even if it failed, the Class Members faced costly CRA reassessments and years of litigation.

Mediation Damages Reports

74. The Plaintiff and the Defendant each prepared reports on potential class-wide damages for the purposes of mediation. Without waiving settlement privilege over these reports, they are summarized for the purpose of this settlement approval motion below.

a. **Mediation Damages Report of Errol Soriano dated February 16, 2022**: For the purposes of the mediation, the Plaintiff obtained an expert report from a leading forensic accountant, Errol Soriano of KSV Advisory. The purpose of that report was to provide an estimate of Class Members' damages in respect of the estimated of their lost capital (the 52.1% of the cash investment that was not returned by way of tax credit).

As set out above, Mr. Soriano's report was based on information on the value of the Class Members donations/investments as gathered from Class Members years ago by Thorsteinssons. The data provided by Thorsteinssons appeared to be the best evidence available to the Parties as to the cash donations and was a reasonable basis on which to base an out of pocket damages estimate. As set out above, where no information was available for a Class Member's donation, Mr. Soriano's damages

report applied what he calculated as the average donation across all participants in that province in the given year of the donation.

Mr. Soriano also calculated an investment return on the out-of-pocket damages. Mr. Soriano's damages report in that regard was based on the premise that, had the Class Members not made their donations to the Program expecting a 30% plus immediate profit, they would have otherwise invested those funds in some other relatively profitable investment (which was set at 5%). As set out in his damages report, Mr. Soriano calculated the aggregate amount of the Class Members' capital out of pocket losses plus a 5% return on those cash losses. The Class Members' out of pocket or cash loss was calculated by Mr. Soriano as the difference between the cash donation they made and tax credit that was available on that donation as a result of the settlement with CRA. Mr. Soriano illustrated an Ontario Class Members' cash losses as follows:

> a. The cash donation (paid by the Class member) per timeshare week (in 2000) was $4,700.
>
> b. The top marginal tax rate (in Ontario) at the time was 47.9%.
>
> Based on the foregoing, the "tax benefit" for an Ontario resident (assuming the top marginal tax rate according to the Guide) is $2,251 (i.e. $4,700 x 47.9%). The (cash) loss on the donation in this example is therefore $2,449 (i.e. $4,700 - $2,251).

As set out in his report, Mr. Soriano calculated that Class Members' out of pocket or cash losses at approximately $23.3 million. On top of that out-of-pocket loss, Mr. Soriano calculated a 5% compound return on the cash losses, which generated approximately $38 million in additional interest/return.

b. **Mediation Damages Reply Report of Robert Low dated April 21, 2022**: In response to Mr. Soriano's damages report, Cassels Brock produced a damages report from the financial expert Robert Low. Mr. Low disagreed with Mr. Soriano's theory of the Class Members' damages. Among other things, Mr. Low opined that as the Program was structured around a charitable gift, Class Members had no expectation of a profit and that their damages totaled $0.00. Mr. Low also opined that there was no basis to apply a 5% compounding interest rate, or to otherwise deviate from the 1.3% prejudgment interest provided for under the *Courts of Justice Act*. If that rate was applied to what Mr. Soriano calculated as the cash losses, Mr. Low noted that the Class Members total theoretical damages would amount to a maximum of $27,497,302.

Copies of the foregoing expert reports (with the exception of the reports of Errol Soriano and Robert Low) are attached to this affidavit as Exhibits P(1) through (9). I have not attached the expert reports of Mr. Soriano and Mr. Low as they were prepared for and used at mediation.

75. I pause to note that the CJA rate is the presumptive interest rate and that it would have been most likely that the court would award that rate on any damages (and not a compound notional annual 5% rate of return). I also pause to note that the $23.3 million in cash or out of pocket losses was calculated based on 100% of the Class Members recovering all of their out-of-pocket losses, which as noted earlier and discussed further below is unlikely.

Mediation before the Hon. Frank Marrocco

76. The Parties agreed to attend a mediation before retired Ontario Superior Court Judge, the Honourable Frank Marrocco. Messrs. O'Connor and Dewar attended the mediation on

behalf of the Plaintiff. Before and throughout the mediation process, I was consulted by Messrs. O'Connor and Dewar. Messrs. Dewar and O'Connor also consulted with Mr. Lipson before and during the mediation process. To the extent that the following three paragraphs regarding the dynamics of the mediation are not based on my personal knowledge, I have been informed by Adam Dewar and believe their content to be true.

77. The Parties exchanged mediation briefs. The Parties then attended a one-day virtual mediation before Mr. Marrocco on June 21, 2022. That mediation session extended well into the afternoon but did not result in a settlement. The Parties did generally agree to take part in additional discussions with Mr. Marrocco. We subsequently had various discussions with Mr. Marrocco over the summer. We understand that he had discussions with the Defendant and Third Parties as well. Our discussions with Mr. Marrocco culminated with a further in-person mediation session with the Defendant on October 4, 2022. That final mediation session resulted in the proposed settlement discussed in detail below.

78. Without waiving settlement privilege, I note that the negotiations in the summer and autumn of 2022 were intense. On a number of occasions throughout the mediation process, discussions seemed to be on the verge of breaking down and appeared to be lost. The Parties seemed to believe in their respective cases and were simply too far apart throughout much of the mediation process. A contested common issues trial seemed more likely than not and RO's lawyers took a number of steps to prepare for trial.

79. Over the course of the negotiations, we were eventually able to secure the $8.25 million payment discussed herein. Details of the proposed settlement and our reasons for recommending the settlement are discussed further below.

80. On October 20, 2022, the Parties attended a case conference before Justice Perell and,

among other things, set a timetable for the next steps in the settlement approval process. A copy of Justice Perell's file direction dated October 22, 2022 is attached to this affidavit as **Exhibit "Q"**.

Settlement Approval Considerations

81. The next section of this affidavit addresses the relevant factors considered generally by our courts when determining whether a proposed settlement is reasonable and fair and in the best interests of a class, namely:

    a. The range of possible recoveries in the litigation and the methodologies used to estimate the value of the settlement to the Class Members;
    b. the likelihood of recovery or success;
    c. the proposed settlement terms and conditions;
    d. the amount and nature of evidence disclosed or obtained in the litigation;
    e. the recommendations and experience of class counsel;
    f. the future expense and likely duration of the litigation;
    g. the number of objectors and responses received from class members to date;
    h. the presence of arms-length bargaining and the absence of collusion;
    i. the dynamics of the settlement negotiations; and,
    j. the nature of the communications between class counsel and the plaintiff.

Range of Possible Recoveries & Methodology for Valuing Settlement – AND – Likelihood of Recovery

82. For the reasons discussed below, we believe that the $8.25 million settlement is fair, reasonable and indeed a strong result for the class.

83. At the outset, I note that, while the Opinions stated that they could be relied upon by the

Class Members,[10] there was at least some risk that, in answering the common issues, a trial judge could have found that Cassels Brock simply did not owe a duty of care to the Class Members (they were not the Cassels Brock clients) or that any such duty was somewhat limited and that such a limited duty was satisfied in the circumstances.

84. Further, and as noted above, the Opinions did not, as Mr. Lipson assumed, opine that the claimed tax credits would in fact be allowed or upheld. The Opinion concluded that any challenge by CRA would likely not be successful. The Opinions also contained various caveats, disclaimers, limiting assumptions and disclosure of various risks.

85. The added claim and allegations relating to the lack of independence and conflict, even if proven, would not have guaranteed success. Obligations relating to conflicts and independence are most often only considered relevant to a fiduciary relationship between a lawyer and their direct client. Given that the Class Members were not clients of Cassels Brock and that there are no fiduciary related common issues (fiduciary duty is most often considered on an individual not class basis), the Defendant would certainly argue that only the accuracy of Cassel Brock's advice (not its independence) was relevant and in issue.

86. The claim in simple negligence (negligence *simpliciter*) and the related proposed causation common issue were relatively novel in these circumstances. As noted above, it is not difficult to conceive that a trial judge would choose to consider the case as one in the realm of negligent misrepresentation. In addition, the motions judge had indicated real concerns with the pure or simple negligence causation proposed common issue (i.e., "but for" the Cassels Brock Opinions, the Program would not have been promoted or offered). While the Court of Appeal certified the pure negligence causation common issue, the trial judge

10 *Lipson v. Cassels Brock & Blackwell* LLP, 2013 ONCA 165 (CanLII) at paras. 20 & 23

could have found that the promoters would have proceeded with the Program regardless whether Cassels Brock offered its opinions on the Program. As the Court of Appeal itself stated:

> *"[98] ...The allegation is that class members suffered damage because they participated in the program, which, but for Cassels Brock's negligent opinion, would not have been marketed by the promoters and thus not available to class members. In our view, this issue is common to the claims of all class members.*
>
> *[99] It may be that, at the trial of this common issue, evidence will emerge that the Cassels Brock legal opinion was not a necessary precondition for the promoters to market the program. For example, there may be evidence that the promoters were satisfied to go to market without any legal opinion, or because of legal opinions other than those of Cassels Brock. However, that determination is for the trial..."*

87. As the certification motions judge stated, Cassels Brock did not have a monopoly on legal opinions for tax programs[11]. We had to recognize that a trial judge could have reached the same conclusion.

88. As alluded to above, the case would have involved the testimony of various experts.

89. On the question whether the advice in the Opinions satisfied the standard of care, our expert stood against various experts in the tax field. Mr. Saltman of Cassels Brock was steadfast in his view that his Opinions were fair and accurate in terms of the law at the time the Opinions were drafted. His evidence would have been bolstered by the evidence from James Parks. James Parks was a tax partner with Cassels Brock who reviewed the various drafts of the Opinions in detail and provided input and comments to Mr. Saltman. Cassels Brock produced a number of memos and draft Opinions authored or annotated by Mr.

11 See: *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724 (CanLII) at para 101. See also paras 97-112.

Parks. While Mr. Parks had some notable concerns on earlier drafts of the Opinions, he was satisfied with the final product. According to Mr. Parks memorandum dated September 21, 2000:

> "Having said all of that, I agree that our views have been well researched and thought through and if the arrangement is successfully attacked for any reason, it would not be for any lack of due diligence on our part."

Mr. Parks had provided similar responses in answer to undertakings given at Mr. Saltman's discovery.

90. As noted above, the Defendant and third parties also tendered various tax expert reports in response to our report from Professor Krishna. The Defendant also had the benefit of opinions expressed in real time by Thorsteinssons and Mr. Farano supporting the propriety of the Cassels Brock Opinions.

91. Cassels Brock has indicated on a number of occasions throughout this litigation that it intended to rely upon the analysis and opinions of Thorsteinssons to refute the Plaintiff's allegations that Cassels Brock did not meet the relevant standard of care. Thorsteinssons issued a series of opinions and updates throughout the course of the test case litigation at the Tax Court of Canada. Thorsteinssons would ultimately advise the Class Members to the effect that the state of the law had changed and that, while the Program was initially lawful, recent developments in the case law put that conclusion in doubt. According to Thorsteinssons letter to Program participants dated November 20, 2007:

> "As a result of the examinations for discovery, we have now have a clearer idea of the CRA's case. Stated simply, its case is that the contribution of cash and the timeshare units to the "registered Canadian amateur athletic association" ("RCAAA") was not a donation at law because it was one step in a preordained scheme and was motivated solely by self-interest and thus not a true gift or donation. On this basis, the DOJ will argue in court that there should be no tax credit – not even for the cash portion. The DOJ's

two alternative positions are that the donors did not have legal title to the timeshare units and that the value of the units (as encumbered by the lien) is zero. In either of these alternatives, the tax relief would be based solely on the cash component of the donation.

When you made your donation to the RCAAA, the state of law was such that, the DOJ's primary theory that there should be no relief even for the cash component would have been considered far-fetched. Even at the time the Tax Court appeals were commenced, we view it as very unlikely that such an argument would be successful.

While we remain doubtful that the DOJ's argument would be accepted by a court, the DOJ is clearly emboldened by the hostile stance that the Tax Court has taken towards all "retail" tax programs. Since 2004, not one publicly marked tax-motivated transaction subject to judicial scrutiny has been able to deliver the tax benefits claimed by the participants. The courts have used a variety of approaches to deny the tax benefits but have always found a way to rule against the taxpayers. When you made your decision to participate in the Program, this line of cases did not exist and many tax practitioners are surprised that the courts have strained so vigorously to deny the tax benefits. Nevertheless, the reality is that you are now facing a hostile judicial environment.

A current case-in-point is the recent Tax Court decision in *McPherson v. The Queen*, 2006 TCC 648. In that case, the Crown succeeded with the argument that the entire donation should be disregarded because it lacked donative intent. The taxpayers received no tax relief, not even for the cash portion. While the facts of the *McPherson* case were considerably more offensive to the Court than the timeshare Program and the decision of the Court was poorly reasoned, it does demonstrate that the DOJ's primary theory may find a receptive audience before some judges of the Court. On that basis, the DOJ's primary theory cannot be dismissed entirely."

According to Thorsteinssons letter to Program participants dated January 30, 2008:

"In our earlier correspondence we discussed the growing tendency of the courts in tax shelter cases to depart from the traditional approach to determining fair market value. That traditional approach equates the fair market value to the hypothetical highest price paid in an open and unrestricted market. In contrast, in tax shelter cases the courts have adopted a less rigorous and more results-oriented analysis. Two notable examples that raised in our November 20, 2007 letter are the art donation cases *Klotz v. The Queen* and *Nash v. M.N.R.* In *Klotz* the Court concluded that the fair market value for a group of art prints should be determined on the basis of

> the bulk purchase price. Similarly, in *Nash*, the Court concluded that the price that the donors had paid for a group of prints was the best evidence of their value."

92. The Defendant (and Third Parties) would also rely on an opinion obtained in December 2000 or January 2001 from tax specialist Ronald Farano. In his opinion, Mr. Farano concluded that:

> *"Based upon my understanding of the law as it exists as of this date, the Opinion properly reflects the legal situation in an income tax context.*
>
> *With respect to the Athletic Trust of Canada, it appears to be properly settled and structured for the purpose intended.*
>
> *From my review of the ancillary documents in the Due Diligence Book, the documents appear to reflect the substance of the transactions intended by the parties herein."*

93. In short, on the question whether Cassels Brock met the standard of care, there is good reason to believe that we may have had a distinctly uphill battle.

94. Lastly, there was a risk, that the Plaintiff's investment-based damages theory would be rejected by the Court. Moreover, given the Court of Appeal's recent decision in *Aylmer Meat Packer's Inc. v. Ontario*, 2022 ONCA 629 (CanLII), that given the length of time this action has taken to get to trial, that any award of pre-judgment interest could be dramatically reduced.

95. In addition, we had to consider the arguments (as noted earlier) to the effect that the Class Members confirmed their charitable donative intent (to give away their cash) as part of the tax credit settlement offered by CRA. If that was established or accepted at trial, there would not be any damages recoverable for losses related to the cash donations.

96. It is important to emphasize that, if the Plaintiff was successful at the trial of the common issues establishing the Cassels Brock Opinions were negligently made (but assuming that pure negligence was not established), Class Members would still likely have to come

forward to satisfy the balance of the liability test/elements for negligent misrepresentation. They would also likely have to address the limitation defence, and not all class members would necessarily be able to overcome that defence. They would also arguably have to establish the quantum of their own losses. In addition, individual Class Members may not have been indemnified by the CPF for any costs incurred at the individual issues hearings. Class Members may have faced adverse costs awards that could have swamped their possible recovery. Overall, it is unlikely that 100% Class Members would choose to go through an individual phase/analysis and, even if they did, they could potentially face some offsetting costs (depending on the conduct and offers by the Defendant).

97. As noted above, even if the Plaintiff was successful in establishing that statements in the Opinions were negligently made and all Class Members remarkably came forward as part of any individual damages analysis, the number of class members who would be able to establish that they read and reasonably relied upon the content of the Cassels Brock Opinions may have been quite limited and thus the damages recoverable could have been dramatically reduced. As referred to above, Mr. Lipson himself (who made a significant investment on his own) did not read the Opinions. It is not unreasonable to assume that a potentially large percentage of the Class Members did not read the Opinions.

98. Assuming that Cassels Brock would be found liable and be held responsible for 100% of the out-of-pocket losses, Mr. Soriano's damage report estimated such total losses at $23.3 million. If pre-judgment interest available under the CJA was added to that amount, the total damages (on a very good day) would top out at $27.5 million. The Defence damages expert opined that the damages may be $0 based on the charitable donation argument referred to above. Assuming that liability could be established, the damages were

reasonably somewhere between that $0 and $27.5 million.

99. Given the other issues noted above relating to liability and damages, and given the delay attendant with prosecuting the case through a trial, individual issues and appeals, a significant reduction (70% or more) of the maximum damages available was appropriate in our view. One could easily argue that liability was 50/50 (at best) and, thereafter, that a 50% (or more) further reduction was appropriate in light of the issues that would have to be addressed even if the court found that the standard of care was breached – that would see the highest possible damages being reduced to 25% (or less than $7 million).

Proposed Settlement Terms & Conditions

100. As set out in the Settlement Agreement, Cassels Brock and the Plaintiff have agreed to settle this Class Action for a total, all-inclusive payment of $8.25 million ("Settlement Fund").

101. If approved by the Court, the Settlement Fund will reasonably compensate the Class Members for some portion of their donations. The Settlement Fund will also cover all legal fees and related disbursements (including taxes), any Davies Costs, the costs of administration and distribution of the Settlement Fund to the Class Members, and a 10% statutory levy (as discussed further below) payable to the Class Proceedings Fund ("CPF").

102. In exchange for its $8.25 million payment, the Defendant will receive a full release of all claims and potential claims that Class Members may have against it.

103. The compensation paid to Class Members will be paid from the amount of money remaining after deducting the Court-approved legal fees and disbursements (including taxes) as well as the costs of administering and distributing the money to Class Members, from the Settlement Fund.

Payment of Compensation

104. If approved by the Court, the Settlement will be paid out or distributed to Class Members in two stages. Under the first stage of the distribution, Class Members will receive their *pro rata* share of the Net Settlement Fund based on their relative cash contribution to the Program.

105. If and to the extent that funds remain one year after the first stage (e.g., if certain cheques from the first stage are not cashed by some Class Members), the remaining funds will be used in phase two to make further payments to those Class Members who actually cashed their cheques under the first phase of the distribution. Any funds remaining after that second distribution will be donated to a charity.

Administration of the Settlement

106. We have tried to balance simplifying the administration process with taking reasonable steps to ensure that maximum amount of settlement funds get into the hands of Class Members.

107. If this Settlement is approved, most Class Members will not have to provide evidence of their cash donations in order to receive compensation. As set out in the Settlement Agreement, calculations of the Class Members' share of the Net Settlement Fund will be based on the information already provided to the Parties by Thorsteinssons. The Settlement Agreement also sets out the steps to be taken to attempt to update or improve that information including, among other things, contacting the Program's master marketing agent to ascertain whether that master marketing agent has records of the Class Members' contributions to the Program.

108. Where the Parties do not have information regarding a Class Member' participation

in the Program (approximately 290 Class Members), those Class Members will be asked to provide information confirming the value of their donations to the Program.

109. Most Class Members will receive a letter or letters explaining the calculation of their entitlement to compensation for each stage and a corresponding cheque for the total amount of their compensation. Other class action settlements can involve Class Members making individual claims before any funds are forwarded to them – that is not the case here.

110. If this Settlement is approved by the Court, the costs of the administration of this Settlement are to be deducted from the Settlement Fund. We designed the structure of the Settlement, in part, to minimize administrative expenses and maximize the compensation that can be distributed to the Class Members. Administrative tasks include: i) the delivery of notice to the Class; ii) the calculation of Class Member compensation; and iii) the delivery of compensation to the Class.

111. After reviewing a number of proposals, RO has retained Ricepoint Administration Inc. ("Ricepoint") to act as the Administrator of this Settlement. Ricepoint is an experienced class action administrator and has been retained in many class action settlements in Ontario. Ricepoint estimates that administration expenses should range between $90,000 and $100,000. In our experience, that is a reasonable estimate for such expenses.

The Amount & Nature of Evidence & Investigation

112. The nature and extent of factual investigation varies from case to case depending on the nature of the case, and can vary based on the specific allegations or issues being considered as part of any particular case. In our view, more than enough information was

disclosed or otherwise obtained through the certification, discovery, mediation and settlement processes described above to allow us to recommend the Settlement to the Court and the Class Members.

113. As set out above, the parties exchanged an extensive factual record leading up to the certification motion. Following certification, the Parties engaged in the lengthy discovery process. Several motions were argued as a result of the discovery process. Following the completion of the discovery process, the Parties and Third-Parties exchanged the various expert reports listed above regarding the issues raised in this action.

114. In our view, there was more than enough information exchanged to develop a detailed understanding of this action and to recommend the Settlement descried herein.

Experience & Recommendations of Class Counsel

115. RO's experience is summarized at paragraphs 16 through 19 above.

116. In short, we are of the view that the benefits of this Settlement outweigh the risks of proceeding to a contested common issues trial. We believe that the Settlement is fair and reasonable, and indeed an excellent result, for the following reasons:

a. As set out above, the Common Issues trial would not result in a monetary award for the Class Members. If unsuccessful at the forthcoming Common Issues trial the Class Members would be awarded $0.00;

b. Based on an analysis of liability and individual issues risks and factors, a settlement of $8.25 million is reasonable;

c. All settlements, of course, involve some element of compromise. Litigants should not reasonably expect to recover 100% of their purported damages. This Settlement provides Class Members with a remedy in circumstances where the case may have

been totally unsuccessful or unsuccessful for many Class Members. This Settlement avoids the risks associated with proceeding to trial and individual assessments and exposure to negative personal cost awards;

d. even if the Plaintiff is successful at a trial of the common issues, there was virtually no chance that an aggregate assessment of damages would be awarded by the trial judge and it was a virtual certainty that each individual Class Member would be required to establish his/her purported entitlements and damages at an individual damage assessment;

e. putting cash compensation into the hands of Class Members today outweighs the risks of further years of delays, risks and unknown results, and a potential unfavourable finding, if the case had proceeded to a contested trial of the common issues. Based on our experience, that process could easily take, including appeals, three to five years (or more) to complete. If approved, this Settlement will remove that kind of delay and procedural risk, and provide more timely and meaningful compensation.

Future Likely Duration of the Litigation

117. If this Settlement is not approved, the trial itself will take 6 weeks of court time. It could easily take, based on our experience, two to three years to set a new pre-trial and trial date, conduct the common issues trial, and allow for any appeals therefrom. Thereafter, if the case was successful on any basis, the following steps would still need to be taken:

a. a procedure would then have been set for the determination of non-common and/or individual issues (potentially including individual reliance, claims, damage assessments and/or limitation arguments);

b. that procedure may lead to appeals or the need for further directions from the Court;

c. the distribution of notices regarding the non-common and/or individual issues process;
d. the resolution of such individual claims and damage assessments; and,
e. possible appeals from the non-common and/or individual issue determinations.

118. It is difficult to predict how long it may have taken to resolve any individual issues arising from a judgment on the common issues. It could certainly take years.

119. The presence of the Third-Party claims further complicates any estimates as to the future length of this Class Action.

120. As to the likely future expense of this litigation, I note that, as set out below, we have already incurred fees in excess of $2.4 million. While difficult to predict, I estimate that millions more in fees and disbursements would be required to bring this action to a final resolution for the Class Members.

Objectors & Other Class Member Responses

121. As of the date of this affidavit, notice of the Settlement Approval has not been provided to the Class Members. I will, if necessary, swear a further affidavit to address any comments from Class Members if any are received within the specified comment period and if the comments require a factual response.

The Presence of Arms-Length Bargaining & Dynamics of the Settlement Negotiations

122. The dynamics of the settlement negotiations are set out above at paragraphs 76 through 79 of this affidavit.

123. As set out above, the Settlement is the product of an extensive series of arms-length and hard-fought negotiations. Each side zealously advanced the interests of their clients and that the Parties did not collude to reach the Settlement.

124. As set out above, the negotiations ultimately resulted in the Defendant substantially

increasing its initial unacceptable offer to the agreed upon $8.25 million Settlement Fund. The total value of the Settlement Fund is well into the Plaintiff's reasonable range of settlement and represents a reasonable percentage of the Class Members' possible damages (and potentially more than may have been secured even if liability was found by a court). RO is of the view that the maximum settlement amount was extracted from Cassels Brock.

Communications with the Plaintiff

125. As noted above, RO consulted Mr. Lipson throughout this litigation. David O'Connor, Adam Dewar and, to a lesser extent more recently, myself provided the Plaintiff with numerous updates on the status of the action over the many years that we have had carriage of this case. Moreover, we sought out Mr. Lipson's input and confirmed his instructions on every major decision in this proceeding as required, including on this settlement. Mr. Lipson will provide his own view of this Settlement in his own affidavit to be filed in support of this settlement.

COUNSEL FEES AND DISBURSEMENTS

126. In the next section of this affidavit, I address the factors often considered on a class action fee approval motion, namely:

a. the Complexity of the Case;
b. the Degree of Risk;
c. the Monetary Value & Importance of the Matters to the Class;
d. the Competence of Class Counsel;
e. the Results Achieved;
f. the Expectations of the Plaintiff and Class Members regarding Class Counsel's Fee; and,
g. the Opportunity Cost to Class Counsel.

Many of these factors have been addressed (at least in part) above but are addressed again

below if and as necessary.

Complexity of This Case

127. This Class Action was factually and legally complex. As set out above, it involved a complex tax transaction and highly technical, competing views on the validity of the transaction by experienced tax professionals. There were nuances and qualifications in each and every expert's view of the Program that added an element of complexity not found in more straight-forward proceedings (e.g. product liability or employment actions) with well-established standards of care. The examination of Mr. Saltman took additional time in part because of the examination of him on various technical tax issues and caselaw. Our approach to this case required us to become steeped in various relevant tax cases, tax principles and concepts.

Degree of Risk

128. Class proceedings are inherently risky. Our firm and its predecessor firms have taken on some very difficult cases, both large and small, with an uncertain outcome because the issues were compelling to us. While we have achieved successes in some class proceedings, we have also experienced some real and costly defeats. For example:

a. RO was counsel on *Larcade v. The Province of Ontario* – regarding access to "special needs agreements" for thousands of profoundly disabled children whose parents were allegedly practically compelled to surrender custody of their disabled child to the Province. Certification was initially denied by Justice Cullity, then was subsequently certified by the Divisional Court, but that certification order was later overturned by the Court of Appeal[12];

b. RO was counsel on *Williams v. AGC et al.* – a proposed class action arising from the second wave of the SARS epidemic that resisted a motion to strike before being

12 *L. (A.) v. Ontario (Minister of Community and Social Services)*, 2006 CanLII 39297 (ON CA).

struck by the Court of Appeal[13];

c. RO was co-counsel on *McCracken v. CNR* – an unpaid overtime class action regarding the alleged misclassification of CNR workers. The action was initially certified by Justice Perell but later overturned by the Court of Appeal. Class Counsel invested millions in unrecovered fees and disbursements[14];

d. In *Monckton v. Canadian Business College*, RO acted for a class of dental hygiene students (many of whom earned less than $30,000/year) in an action where it was alleged that the students were enrolled in a dental hygiene program (at a cost of approximately $16,000-$17,000) without being advised that they would not automatically be entitled to write a dental hygienist certification exam. Although the case was small and was not expected by RO to generate any significant fee payments, RO took the case on and prosecuted it vigorously. RO incurred over $512,500 in time and disbursements before a favourable settlement for the class was reached. In approving the settlement, the Court noted that RO "should be commended for taking on this small class action". The fees requested and awarded by the Court in that case were less than $50,000[15]; and,

e. RO was counsel in *Ginther v. Bell Canada et al.* where we brought an action to the brink of certification to then only find, despite investing hundreds of hours of legal time, that various facts recently disclosed by the Defendant made the case inappropriate for certification. In that case, the Court approved a without-costs discontinuance of the proceeding[16].

129. In this case, RO undertook a relatively high degree of risk against the Defendant (particularly when that risk is viewed against the size of the case). The Defendant is represented by one of Canada's leading litigation firms that counts some of Canada's best counsel among its lawyers. The resistance mounted by the Defendant was detailed, thoughtful and sophisticated.

---

13 *Williams v. Canada (Attorney General)*, 2009 ONCA 378 (CanLII).
14 *McCracken v. Canadian National Railway Company*, 2012 ONCA 797 (CanLII).
15 *Monckton v. C.B.S. Interactive Multimedia*, 2012 ONSC 5227.
16 *Ginther v. Bell Mobility Inc. et al.*, Court File No. CV-19-00631662-00CP.

130. Serious risks taken by RO in advancing this action include:

a. Certification Risk – we were not successful in having the case certified (dismissed initially on limitations grounds) and the causation common issue was also initially rejected. We were only successful in having the case certified on appeal;

b. Risk of Litigation on the Merits – As set out above at paragraphs 83 through 95 there was a distinct risk that the Plaintiff would not be successful in establishing that Cassels Brock was negligent or that it made negligent misrepresentations;

c. Risk relating to Damages and Individual Assessments – as set out above, the damages that may have established and recovered may have been quite limited. It may have been difficult and costly for some individual Class Members to establish that Cassels Brock's negligence caused their damages. We would, of course, not be able to collect a fee on a failed individual assessment. And for those that were successful, we may have to wait for each one over the course of many years before we could collect our fees;

d. Hours/Work Required to Date – RO invested more than 12 years of time into this case. We carried enormous fees for years. The Settlement in this case was not achieved in one or two hours, but took more than 4,200 hours from professionals to achieve. A summary of our hours invested to date is set out below at paragraph 144.

The Monetary Value & Importance of the Matter to the Class

131. This action was of importance to the Plaintiff and the Class. Unlike many class proceedings where the monetary value of individual claims can be miniscule (e.g., credit card or gas bill overcharges amounting to pennies or a few dollars, etc.), the individual

compensation payable under the Settlement for many of the Class Members will be much more significant. Depending on the amount of money donated to the Program, compensation for individual Class Members may total several thousand or even tens of thousands of dollars or more per Class Member.

Competence of Class Counsel

132. RO is a recognized in the area of Class Proceedings. Our expertise and experience were brought to bear in this complex case and this case generally benefited from our experience in this specialized area of practice. We expect that our efforts to drive this case forward and our reputation as effective class action counsel assisted significantly in achieving this settlement.

133. Lawyers at RO are not tax counsel and had to engage in a large amount of research and review a large volume of cases, text books and journal articles in order to become conversant as Class Counsel in this specialized and highly technical area of law.

Results Achieved

134. In our view, this Settlement is an excellent result for the Class. Most Class Members will receive a material refund of their cash donation without having to make an individual application or provide support for any kind of individual assessment. As set out in detail above, all Class Members are eligible for some compensation. The payments to the Class as part of this Settlement may be as much or more compensation than the Class would have seen at the end of a contested common issues trial and years of individual assessments.

Expectations of the Class as to the Amount of the Fees

135. Mr. Lipson fully expected that, in the event this action was successful, RO would be well-compensated for our work and taking on the real risks. Mr. Lipson's retainer

agreement provides for a 25% contingency fee for a successful outcome in this case. I have reviewed the affidavit of Mr. Lipson sworn in support of the settlement and fee approval motion and note that the Representative Plaintiff supports our fee request. I can confirm that we explained the retainer agreement and our 25% fee at length to Mr. Lipson and to former proposed Class Counsel Davies. Mr. Lipson and Davies asked us questions on various issues, and understood and agreed with, and at times specifically requested, the terms of the retainer.

136. Pursuant to the notification process regarding this Settlement, the Class will be advised that RO will be paid only in the event this action is successful and that we would be seeking a 25% contingency fee plus disbursements, taxes, the CPF's levy and the Davies Costs. Any responses received from the Class Members regarding RO's requested fee (or the Davies fees requested) will, of course, be filed with the Court in due course.

Opportunity Cost to Class Counsel

137. As noted below, RO incurred more than 4,200 hours of time amounting to more than $2.4 million (including the fees component of the certification costs referred to above) in prospective fees to bring this Settlement before the Court. That is a serious investment of time and money for any firm and a particularly serious investment for a litigation boutique like RO. Time and resources risked on this case represent time and resources that could not be invested in either conventional paying files or other class proceedings.

Fee Sought

138. As set out in the Plaintiff's Retainer Agreement (Exhibit G to this affidavit), RO would only be paid its fees and disbursements upon the successful resolution of the action. Success is defined as either a final judgment on the common issues in favour of some or

all Class Members, or a court-approved settlement that benefits one or more Class Members.

139. The Retainer Agreement further provided that, subject to the approval of the Court, RO would be entitled to a fee of 25% of any amounts recovered by the Class on any judgment, order, report on a reference or settlement, and that the Counsel Fee shall be calculated after all disbursements incurred by us have been deducted.

140. I note that we are seeking the percentage-based contingency fee Retainer Agreement only provided for under the Retainer Agreement. In our experience, this structure best aligns the interests of the Class and Class Counsel and maximizes the incentive to achieve the highest possible settlement on behalf of the Class. Various cases and judges in Ontario have approved a 30% contingency fee in the context of class action settlements. A sample list of cases in Ontario approving a 30% (or more) contingency fee is attached hereto as **Exhibit "R"**.

141. Pursuant to paragraph 19 of the Retainer Agreement we could have requested, as the percentage based contingency fee is less than the value of our straight docketed time, to be paid our straight time out of the Settlement Fund. We are not pursuing such greater straight time compensation.

Total Fee Requested

142. The following sets out our fee request:

Total Settlement Fund:	$8,250,000.00
Minus Disbursements:	$543,752.65
Subtotal	$7,706,247.35
Multiplied by 25% Fee	$1,926,561.84
+ HST on 25% Fee	$250,453.01
TOTAL FEE & HST:	**$2,177,014.88**

143. In addition to the foregoing, we will request at the hearing of the approval motion that the $130,500 fee component (excluding tax) of the aforesaid certification costs award not be deducted from our approved fees. I note that, among other things, if the fee portion of the foregoing certification costs is taken into account when calculating our fees ($1,926,561.84 + $130,500 = $2,057,061.84) as a percentage of the total recovered (the $8.25 million plus the $130,500, for a total of $8,380,500), the fee percentage would be 24.5%. If the payment of all of Davies Costs is approved, the total fees for all legal services including Davies Costs ($2,057,061.84 + $275,000 = $2,332,061.84) would still represent 27.8% of the total $8,380,500 recovered.

Straight Time Incurred to Date

144. While our Retainer Agreement with Mr. Lipson provides that we will be paid 25% of the Class Members' recovery, some courts have reviewed the time incurred on a class proceeding to confirm that the requested fee is reasonable when compared to what multiplier is implicit in the fee requested as compared to the actual docketed time/fees. In this case, RO has incurred, as of the date of this affidavit, more than 4,200 hours in time and fees (without taxes) in excess of $2.4 million. As set out below, if our 25% contingency fee request is approved by the Court, RO will not earn a premium or multiplier on our time incurred to date.

145. The tasks performed by RO include:

a. factual and documentary research;
b. interviewing the Plaintiff and the drafting of his affidavit in support of certification;
c. reviewing the Defendant's certification record;
d. arguing the certification motion;
e. arguing the appeal;

f. overseeing the certification notice and opt-out process;
g. interviewing numerous potential witnesses and experts;
h. reviewing the Defendant's and Third-Parties' extensive productions;
i. conducting the examinations for discovery of the Defendant and the Third-Parties who defended the main action;
j. preparing for and attending the mediation and related negotiations;
k. communicating with putative Class Members;
l. drafting the Settlement Agreement and preparing material for settlement approval;
m. drafting the Notice Program for the proposed Settlement;
n. attending various case management meetings; and,
o. retaining and instructing the proposed Settlement Administrator.

146. I note that we will incur additional time to implement the Settlement if it is approved. Based on my experience, I estimate that RO will incur an additional $150,000 in fees to implement the Settlement. Additional tasks include arguing the approval motion and, if the Settlement is approved, responding to Class Member enquiries, and overseeing the administration of the Settlement.

147. If this estimated future time or fees of $150,000 is added to the actual time incurred to date of (in excess of) $2,400,000, the fees incurred will total (in excess of) $2,550,000. When $2,550,000 is compared to the 25% contingency fee calculated above the implicit multiplier is approximately 0.76.

Disbursements Incurred to Date

148. As set out above, RO incurred disbursements, inclusive of taxes, totaling approximately $544,000.00 in this action. We will incur several thousand dollars of additional disbursements throughout the settlement approval process. A more detailed list of the disbursements incurred in this action are set out in **Exhibit "S"** attached hereto.

Class Proceedings Fund Levy

149. The Plaintiff was approved for funding by the CPF. As this action resulted in settlement in favour of the Class, the CPF is, pursuant to s. 10(1) of O. Reg. 771/92, entitled to the repayment of its funded disbursements and 10% of the amount of the award or settlement funds payable to the Class Members. An extract from the Fund's website illustrating how its levy is to be calculated is attached to this affidavit as **Exhibit "T"**.

Request for Plaintiff's Honourarium

150. While our Retainer Agreement with the Plaintiff provides that we may seek an honourarium on his behalf, Mr. Lipson has confirmed that he will not seek an honourarium in this case.

SWORN BEFORE ME)
at the City of Toronto,)
in the Province of Ontario)
this 29th day of November, 2022.)
)
)
)
A Commissioner for Taking Affidavits)

PETER L. ROY

This is Exhibit "A" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

SETTLEMENT AGREEMENT

Made as of this 14th day of November, 2022

B E T W E E N:

Jeffrey Lipson

(hereinafter "Plaintiff")

and

Cassels Brock & Blackwell LLP

(hereinafter "Defendant")

(The Plaintiff and Defendant are individually a **"Party"** and collectively the **"Parties"**)

WHEREAS the Plaintiff Jeffery Lipson (**"Plaintiff"**) is the representative plaintiff in a class action proceeding bearing Court File Number CV-09-376511-00CP which was commenced against the Defendant in the Ontario Superior Court of Justice at Toronto pursuant to the *Class Proceedings Act, 1992* (Ontario) (**"Action"**) in relation to the Defendant's preparation of certain legal opinions (the "**Opinions**") on the Timeshare Program (as defined below);

AND WHEREAS the Defendant commenced a Third Party Claim (as defined below) against the Third Parties (as defined below) claiming, among other things, contribution and indemnity for any amounts which the Defendant may have been found to be responsible to the Plaintiff;

AND WHEREAS the counsel who initially acted for the Plaintiff and issued the Action was Davies Ward Phillips & Vineberg with Roy Elliott O'Connor LLP and subsequently Roy O'Connor LLP assumed carriage of the Action through the certification, appeal, discovery, mediation, and settlement steps to date;

AND WHEREAS by Order of the Court of Appeal for Ontario dated March 19, 2013, the Action was certified as a class proceeding;

AND WHEREAS the Class (as defined below) has been notified of the certification of

this action as a class proceeding and the opt-out period is now closed;

AND WHEREAS the Plaintiff has previously been provided, by the non-party Thorsteinssons LLP, with contact information and some information for most Class Members (as defined below) regarding the value of their Cash Donations (as defined below) in the Program and the number of Timeshare Weeks (as defined below) acquired through the Program;

AND WHEREAS the discovery process has been completed, expert reports regarding liability have been exchanged, the Action has been set down for trial, a pre-trial has been scheduled for November 14, 2022, and a 30-day trial has been scheduled to commence on January 30, 2023;

AND WHEREAS the Parties and the Named Third Parties (as defined below) attended a mediation before the Honourable Frank Morocco, which took place over various days;

AND WHEREAS the Parties entered into settlement terms for which approval of the Defendant Cassels was to be sought and which were subsequently approved by Cassels;

AND WHEREAS the Parties wish to conclusively resolve the issues which were or could have been advanced against the Defendant in the Action;

AND WHEREAS the Parties understand and acknowledge that this Settlement Agreement (as defined below), including the Schedules hereto, must be approved by the Ontario Superior Court of Justice and incorporated into a final Settlement Approval Order (as defined below);

NOW THEREFORE in consideration of the covenants, agreements, and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

DEFINITIONS

1. In addition to the defined terms in the recitals above and throughout the body of this Settlement Agreement, in this Settlement Agreement and its Schedules:
    a. **"Action"** means the main action commenced by the Plaintiff against the Defendant bearing Ontario Superior Court File Number CV-09-376511-

00CP commenced in Toronto, but excludes the Third Party Claim bearing Ontario Superior Court File Number CV-09-376511-00CPA-1.

b. **"Administration Expenses"** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable by the Plaintiff, Class Counsel, or otherwise for the approval, implementation, and operation of this Settlement Agreement, including but not limited to the costs of the Settlement Administrator and notices, but excluding Class Counsel Fees and Class Counsel Disbursements;

c. **"Cash Donation"** means the cash portion of any Class Member's donation to the RCAAAs pursuant to the Program;

d. **"Class"** means those who meet the certified Class Definition; namely:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs […]

but excludes any such persons who opted out of this class Action.

e. **"Class Action Case Management Judge"** means the judge assigned by the Court to case manage or oversee the Action;

f. **"Class Counsel"** means counsel for the Class in the Action, Roy O'Connor LLP;

g. **"Class Counsel Disbursements**" means the disbursements and applicable taxes incurred by Class Counsel in the prosecution of the Action;

h. **"Class Counsel Fees"** means the fees of Class Counsel and any applicable taxes or charges thereon;

i. **"Class Member"** means a member of the Class;

j. **"CPF"** means the Class Proceedings Fund created pursuant to Section 59.1 of the *Law Society Act* and administered by the Class Proceedings Committee of the Law Foundation of Ontario;

k. **"CPF Levy"** means a levy from the Settlement Fund equal to the amount of financial support paid to the Plaintiff by the CPF plus 10% of the balance of the Settlement Fund (net of Class Counsel Disbursements, Class Counsel Fees, and Administration Expenses) to which the CPF is entitled pursuant to Ontario Regulation 771/92, having approved the Plaintiff for financial support in 2016;

l. **"Court"** means the Ontario Superior Court of Justice;

m. **"Distribution Procedure"** means the procedure for distributing the Net Settlement Fund described at paragraphs 25 through 41 below;

n. **"Effective Date"** means the date following which: (1) a final Settlement Approval Order has been granted; and (2) the required dismissal of the Action against the Defendant (but not necessarily the dismissal of the Third Party Claim as noted in paragraphs 45 and 46 below) has been granted, and (3) all appeal periods have expired or, if applicable, all appeals taken from such orders have been dismissed;

o. **"Execution Date**" means the date this Settlement Agreement is executed by the Parties;

p. **"Final Settlement Approval**" means the date of issuance of the Settlement Approval Order together with the expiration of any appeal periods and, if applicable, the dismissal of all appeals taken from such order of the Court;

q. **"First Stage of the Distribution"** means the initial distribution to the Class Members of a *pro rata* share of the Net Settlement Fund as set out in this Settlement Agreement;

r. **"Individual Payment"** means the payment of a Class Member's *pro rata* share(s) of the Net Settlement Fund as calculated in paragraphs 27-28 of this Settlement Agreement;

s. **"Named Third Parties"** means i) Mintz and Partners LLP, ii) Prenick Langer LLP, iii) Gardiner Roberts LLP, and iv) the Estate of Ronald Farano;

t. **"Net Settlement Fund"** means the amount of the Settlement Fund available for distribution to the Class Members following the deduction (as approved by the Court) of Class Counsel's Fees, Class Counsel Disbursements, CPF Levy, Administration Expenses, taxes, Plaintiff's Honorarium (if any) and any legal expenses reimbursed or paid to the Plaintiff and certain Class Members in respect of the amounts that they paid to Davies Ward Phillips & Vineberg (before Class Counsel assumed carriage of this matter on a contingency basis) for fees, disbursements, or taxes thereon (the "**Davies Costs**") if any as may be approved and directed by the Court (the "**Approved Reimbursed Davies Costs**").

u. **"Notice of Approved Settlement"** means the notice, in a form to be agreed upon by the Parties acting reasonably and to be approved by the Court, to be provided to the Class in the event that this Settlement is approved at the Settlement Approval Hearing, a proposed draft of which is attached as **Schedule "B"** hereto; **"Notice of Proposed Settlement"** means the notice of the settlement approval hearing to be approved by the Court and provided

to the Class that summarizes this Settlement Agreement and the process by which the Parties will seek its approval, in a form to be agreed upon by the Parties acting reasonably, a proposed draft of which is attached as **Schedule "A"** hereto;

v. **"Notice Program**" is the program for publishing and distributing notices as set out in paragraphs 15 through 20 of this Settlement Agreement;

w. **"Plaintiff's Honorarium"** means the amount, if any, approved by the Court to acknowledge the role played by the Plaintiff in this Action to be paid from the Settlement Fund;

x. **"Program"** means the charitable donation program operated from 2000-2003 by the Athletic Trust of Canada through which Class Members received Timeshare Weeks and donated the Timeshare Weeks along with a corresponding Cash Donation to an RCAAA;

y. **"RCAAAs"** means the Registered Canadian Amateur Athletic Associations which received donations pursuant to the Program;

z. **"Released Claims"** means any and all manner of claims, crossclaims, counterclaims, actions, demands, suits, charges, obligations, debts, setoffs, rights of recovery, causes of action, or liabilities of any kind whatsoever whether class, individual, or otherwise in nature, whether personal or subrogated, known or unknown, suspected or unsuspected, forseen or unforseen, actual or contingent, asserted or unasserted, personal or subrogated, liquidated or unliquidated, in law or equity, under statute, regulation, ordinance, contract, or otherwise in nature for relief of any kind (including without limiting the generality of such relief, compensatory,

punitive, or other damages, declaratory or injunctive relief, interest, costs, expenses, penalties, and professional fees (including Class Counsel Fees)) that any of the Releasors, whether directly, indirectly, derivatively, or in any other capacity ever had, now have, or hereafter could, shall, or may have at any time in the future against the Released Parties relating in any way directly or indirectly to the Program, the Opinions, any reliance on the Opinions, the acquisition and/or donation of Timeshare Weeks, the Cash Donation, as well as any tax consequences, tax credits, tax credit denials, tax assessments, tax re-assessments, or settlements with the Canada Revenue Agency relating to the Program, the Timeshare Weeks, or the Cash Donation and all claims that were raised or which could have been raised in the Action. For the purpose of clarity, the Released Claims include, but are not limited to, any claims that arise after the Effective Date, whether known or unknown;

aa. **"Releasors"** mean individually and collectively, the Plaintiff and each of the Class Members and their respective predecessors, agents, representatives of any kind, insurers, beneficiaries, successors, heirs, executors, administrators, and assigns, whether or not such Class Members receive any portion of the Settlement Fund;

bb. **"Released Parties"** mean jointly and severally, individually and collectively, Cassels Brock & Blackwell LLP and its former, present, and future partners, employees, agents, lawyers, insurers, reinsurers, subrogees, successors, executors, administrators, beneficiaries, and assigns;

cc. **"Residue"** means the funds remaining in the Net Settlement Fund following the First Stage of the Distribution as set out in paragraphs 25 through 33 of this Settlement Agreement;

dd. **"Second Stage of the Distribution"** means the distribution of the Residue of the Net Settlement Fund to those Class Members who cashed their compensation cheques under the First Stage of the Distribution pursuant to paragraphs 34 through 41 of this Settlement Agreement;

ee. **"Settlement"** means the settlement between the Plaintiff and the Defendant as agreed to in this Settlement Agreement;

ff. **"Settlement Administrator"** means such firm as may be appointed by the Court to administer this Settlement. The duties of the Settlement Administrator are set out at paragraph 9 below;

gg. **"Settlement and Fee Approval Hearing"** means the motion returnable before the Court for approval of the Settlement;

hh. **"Settlement Approval Order"** means the order obtained approving the Settlement substantially in the form attached hereto as **Schedule "C"** (or in a form as may be amended upon the written consent of the Parties prior to the issuance of the Order);

ii. **"Settlement Fund"** means the eight million, two hundred and fifty thousand dollars ($8,250,000.00) (CDN) amount to be paid by the Defendant;

jj. **"Timeshare Weeks"** means the timeshare weeks acquired and donated by the Class Members through their participation in the Program;

kk. "**Third Parties**" means all third parties to this Action, including the unnamed John Doe parties, persons or entities;

ll. **"Third Party Claim"** means the claim commenced by the Defendant against the Third Parties in the Action, bearing Ontario Superior Court Court File Number CV-09-376511-00CPA-1.

PARTIES' EFFORTS

2. The Parties shall endeavour in good faith to implement the terms and conditions of this Settlement Agreement.

SETTLEMENT FUND

3. In consideration of the terms and covenants herein, within fifteen (15) days of the Effective Date, the Defendant shall pay to Class Counsel the $8,250,000.00 Settlement Fund to be held in Trust.
4. The Settlement Fund shall be managed and paid out by Class Counsel and the Settlement Administrator in accordance with the terms of this Settlement Agreement. Class Counsel and the Settlement Administrator shall not pay out all or any part of the monies in the Settlement Fund, except in accordance with the Settlement Agreement or an Order of the Court obtained on notice to the Parties.
5. Once a Settlement Administrator has been appointed, Class Counsel shall transfer the Settlement Fund to the trust account of the Settlement Administrator.
6. The Settlement Fund (or any portion thereof) may be held in an interest-bearing trust account subject to the Settlement Administrator and Class Counsel evaluating whether it is economical (given any expenses associated with maintaining, administering, and reporting with respect to any such interest-bearing account relative to the interest to be generated therefrom). Class Counsel and the Settlement

Administrator shall have no liability with respect to the use (or not) of an interest-bearing account for the Settlement Fund or any portion thereof. Class Counsel and the Settlement Administrator shall maintain the Settlement Fund as provided for in this Settlement Agreement.

7. The Defendant shall have no reversionary interest in and otherwise no right or claim to reimbursement or reversion from the Settlement Fund or any portion thereof. The Defendant shall bear no risk related to the management or investment of the Settlement Fund. The Defendant shall not be required to deposit additional funds as a result of investment or other losses to the Settlement Fund or for any other reason.

8. The Settlement Fund is inclusive of all amounts, including, without limitation, taxes, interest, costs, Administration Expenses, Class Counsel Fees, Class Counsel Disbursements, the Approved Reimbursed Davies Costs, and Plaintiff's Honorarium (if any as may be approved by the Court). For greater certainty, the Defendant shall not be required to make any payments pursuant to this Settlement Agreement other than the payment of the Settlement Fund as described in paragraph 3 above.

DUTIES OF THE SETTLEMENT ADMINISTRATOR

9. Subject to the terms of this Settlement Agreement, the duties of the Settlement Administrator shall include but not be limited to:

    a. Taking, as set out below, reasonable and proportionate steps to verify and/or update the Class Members' contact information that currently is, or may become, within the possession of the Parties;

    b. Facilitating dissemination of any notices to the Class as the Settlement may

require;

c. Holding the Settlement Fund or Net Settlement Fund and all accrued/accruing interest (if any), maintaining all necessary records, providing such calculations as are required hereunder, performing any necessary accounting, withholding (if any), reporting, remittance (if any), and tax filing functions, making payments as directed by the Settlement Approval Order;

d. Reporting to the Parties and the Court on the administration of this Settlement, and

e. Performing such other duties as implementation of the Settlement Approval Order may require.

THE SETTLEMENT APPROVAL ORDER

10. Within fifteen (15) days of the Execution Date, the Plaintiff shall serve and file materials for a motion for approval of this settlement and issuance of the Settlement Approval Order. The Settlement Approval Order shall be substantially in the form set out in Schedule "C" to this Settlement Agreement.

11. Within seven (7) days of the Execution Date, the Plaintiff shall provide draft motion materials for the motion to approve this settlement and issue the Settlement Approval Order to counsel for the Defendant to allow counsel to the Defendant to review and comment on such materials.

12. Subject to paragraph 60 below, this Settlement Agreement shall be null and void and of no force and effect unless a Settlement Approval Order and the required dismissal is granted and the Effective Date occurs.

IDENTIFICATION OF CLASS MEMBERS

13. Class Counsel and/or the Settlement Administrator shall prepare a list of all Class Members along with, wherever available, their last known physical address, telephone number, and email addresses, as well as the value of their Cash Donations in the Program and the number of Timeshare Weeks acquired through the Program. Such information will be compiled from information already provided by the non-party Thorsteinssons LLP. Class Counsel shall also make reasonable enquiries of the following entities in order to improve or update the contact and/or donation information of the Class Members:

    a. the Named Third Parties, by their counsel;

    b. Thorsteinssons LLP;

    c. Tuscany Marketing Services or one of its principals via counsel for the Named Third Party, Mintz & Partners LLP.

14. Prior to the distribution of the Notice of Proposed Settlement (as described in paragraphs 16 and 17 below), the Settlement Administrator shall also take reasonable and proportionate steps (e.g. by using the Canada Post change of address database) to verify and/or update the Class Members' contact information as described in paragraph 16 below.

NOTICE OF THE PROPOSED SETTLEMENT AND FEE APPROVAL HEARING

15. Within fifteen (15) days of the Effective Date, the Plaintiff shall bring a motion to approve the content and distribution of the Notice of Proposed Settlement. Subject to the direction of the Class Action Management Judge, this motion may proceed in person, in writing, or by way of virtual case conference.

16. Subject to the approval of the Court, the Settlement Administrator and/or Class

Counsel shall provide the Notice of Proposed Settlement to the Class Members by regular mail, email (to the extent such email addresses are available), by posting the Notice of Proposed Settlement on the website(s) controlled by Class Counsel, and by press release by Class Counsel.

17. Any Notice of Proposed Settlements returned to the Settlement Administrator will be subject to a reasonable "bad address resolution process" to be recommended by the Settlement Administrator, agreed upon by Class Counsel (acting reasonably and cost effectively), and approved by the Court. The Notice of Proposed Settlement will be re-sent to any new addresses identified through the bad address resolution process.
18. If following the publication and distribution of the Notice of Proposed Settlement the Defendant or Named Third Parties receive inquiries from Class Members about this Action or this Settlement, they shall re-direct such inquiries to the Settlement Administrator or Class Counsel.

NOTICE OF APPROVED SETTLEMENT

19. If the Settlement is approved, the Class Members shall be notified of the approval by way of the Notice of Approved Settlement.
20. The Notice of Approved Settlement shall, among other things, enclose a letter ("**Claim Summary Letter**") from the Settlement Administrator advising individual Class Members of the information available, if any, regarding the value of their Cash Donation, the number and nature of the Timeshare Weeks (e.g. one or two bedroom) they acquired and donated to RCAAAs, and the tax years in which they participated in the Program. The Notice of Approved Settlement will also request that Class Members confirm the accuracy of the foregoing information as

set out in their Claim Summary Letter or, alternatively, correct such information (while providing back up documentation verifying or confirming the corrected information) by way of regular mail or email to the Settlement Administrator.

21. Class Members will have sixty (60) days to respond to the Notice of Approved Settlement ("**Response Period**").

    a. For any Class Member who receives a Claim Summary Letter setting out the value of their Cash Donation(s) and who (a) confirms the accuracy of the value of their total Cash Donation(s) during that Response Period, or (b) does not respond during the Response Period, the information on the Cash Donation(s) as set out in their Claim Summary Letter will be used to calculate their share of the Net Settlement Fund;

    b. For any Class Member who believes that the information in their Claim Summary Letter about their Cash Donation(s) is incorrect, their respective Claim Summary Letter will so advise and ask the Class Member to provide corrected information regarding their Cash Donation(s), their Timeshare Weeks, and the relevant tax years they participated in the Program, as well as back up documentation verifying or confirming same (the "**Additional Information**") within the same 60-day Response Period.

    c. For Class Members for whom the Parties do not have information allowing the calculation of their respective Cash Donation(s), their respective Claim Summary Letter will so advise and ask the Class Member to provide any Additional Information within the same 60-day Response Period. For such Class Members who fail to respond within that 60-day Response Period, they will be deemed to have not acquired and donated any Cash Donation(s)

or Timeshare Weeks.

d. Any Notice of Approved Settlement and related Claims Summary Letters shall be subject to a potential "reminder program" (whereby some reasonable step may be taken to re-contact the Class Member in writing, by email or otherwise to remind them a response may be required) to be recommended by the Settlement Administrator, agreed upon by Class Counsel (acting reasonably and cost effectively), and approved by the Court.

22. The Settlement Administrator shall, within 90 days of the close of the Response Period, take reasonable steps to review any Additional Information, and where it can make a reasonable conclusion on the accuracy of the Additional Information, use that Additional Information to calculate such Class Member's share of the Net Settlement Fund as set out in paragraphs 26 through 28 below. The Settlement Administrator shall be entitled to communicate with Class Members in order to seek further information, documentation, or clarification in respect of any Additional Information provided.

23. The cost of the aforesaid Notices and related correspondence and communications shall be paid or reimbursed from the Settlement Fund.

DISTRIBUTION OF NET SETTLMENT FUND

Deductions

24. The Settlement Administrator shall deduct and pay out all Administration Expenses, Class Counsel Fees, Class Counsel Disbursements, the Approved Reimbursed Davies Costs, and Plaintiff's Honorarium (if any as may be approved by the Court). Following the deduction of the foregoing amounts, the Net

Settlement Fund shall be distributed to the Class Members in accordance with paragraphs 25 through 41 below.

First Stage of the Distribution

25. Within 120 days following the close of the Response Period, the Settlement Administrator shall make an initial distribution of the Net Settlement Fund as set out below (the "**First Stage of the Distribution**").
26. Each Class Member who responded to the Claim Summary Letter or for whom the Settlement Administrator has satisfactory information about their Cash Donation(s) shall be entitled to receive a payment as part of the First Stage of the Distribution from the Net Settlement Fund.
27. The Settlement Administrator shall calculate each Class Members' distribution from the Net Settlement Fund *pro-rata* based on the total dollar value of the total Cash Donations for all years in question made by the particular Class Member divided by the total dollar value of all such Cash Donations for all years in question made by all Class Members in the Program, multiplied by the Net Settlement Fund.
28. For illustrative purposes only, a simplified example of the distribution of the Net Settlement Fund follows: i) If the Net Settlement Fund totals $5,000,000; and the number of Class Members totals 1,000; iii) and the Class Members' total cash donations to the Program total $20,000,000; then, each Class Member's *pro rata* share of the Net Settlement Fund shall be calculated as being 25% of the total value of their cash donation(s) to the Program. If a Class Member's cash donation totaled $10,000.00, their share of the Net Settlement Fund would amount to $2,500.00.
29. Within 120 days following the Response Period, as described above, the Settlement Administrator shall prepare and deliver payment notification letters ("**First Stage**

Payment Notification Letters") individualized for each Class Member describing the amount of compensation payable to that Class Member as part of the First Stage of the Distribution. Each Class Member will, at the same time, be provided with a cheque payable to him/her in the amount of his/her Individual Payment under the First Stage of the Distribution. The First Stage Payment Notification Letter will advise Class Members that they may also be entitled to a payment from the Residue (if any) and that they should advise the Settlement Administrator of any change of their mailing and contact addresses in the next 15 months.

30. The Settlement Administrator shall deliver the First Stage Payment Notification Letters and cheques via regular mail to Class Members' last known mailing address, as may be updated through paragraphs 13 and 14 of this Settlement Agreement.

31. There are no appeals available from the calculation of any Individual Payment as set out in the First Stage Payment Notification Letters as part of the First Stage of the Distribution.

32. Any First Stage Payment Notification Letters and cheques returned to the Settlement Administrator will, out of an abundance of caution, be subject to a further reasonable and proportionate "bad address resolution process" to be recommended by the Settlement Administrator, agreed upon by Class Counsel (acting reasonably and cost effectively), and approved by the Court. If such a further bad address resolution process does not result in the Class Member in question being located, the Individual Payment that would otherwise have been payable to that Class Member will remain in Trust and form part of the Residue. If such Class Member is subsequently located and requests his/her Individual Payment at any point not longer than 11 months following the earliest date of the

first mailing of a First Stage Payment Notification Letter to any Class Member, then such Individual Payment may be paid by replacement cheque to the Class Member to be delivered by ordinary mail to the Class Member at the updated address that they provide and any such replacement cheque must be cashed by the Class Member within 30 days.

33. Any cheques accompanying the First Stage Payment Notification Letters that are not returned to the Settlement Administrator and are not cashed by a Class Member within 6 months of their issuance may be subject to a "reminder program" (whereby some reasonable step may be taken to re-contact the Class Member in writing, by email or otherwise to remind them that a cheque was available and could be re-issued and, if re-issued, must be cashed within 30 days) to be recommended by the Settlement Administrator, agreed upon by Class Counsel (acting reasonably and cost effectively), and approved by the Court. If such reminder program does not result in the re-issuance of a cheque representing the Individual Payment to the Class Member in question within 9 months following the earliest date of the first mailing of a First Stage Payment Notification Letter to a Class Member, then such Individual Payment shall remain in Trust and form part of the Residue.

Second Stage of the Distribution

34. The Residue may be used or reserved to pay any reasonable additional or reasonably anticipated additional Administration Expenses.

35. The process to distribute the Residue (after the payment or reserve for the aforesaid additional Administration Expenses) will commence thirteen (13) months following the earliest date of the first mailing of a First Stage Payment Notification Letter to any Class Member.

36. The Residue will be distributed among the Class Members who cashed their cheques representing their Individual Payment as part of the First Stage of the Distribution by calculating their *pro rata* share of the Residue. Their *pro rata* share of the Residue will be the total cash value of their Cash Donation(s) relating to the Program divided by the total cash value of all Cash Donation(s) relating to the Program made by all Class Members who cashed the cheques representing their Individual Payment as part of the First Stage of the Distribution, multiplied by the total of the Residue available.
37. The Residue will be paid by cheques mailed to the most up to date address of the Class Members who cashed cheques representing their Individual Payment as part of the First Stage of the Distribution.
38. There is no appeal, correction, or challenge relating to this Second Stage of the Distribution.
39. Subject to reasonable discretion of Class Counsel with input from the Settlement Administrator and while considering any additional costs, etc., it is not expected that this Second Stage of Distribution will be subject to any bad address resolution or reminder program.
40. If there are any funds remaining in Trust following the foregoing and payment of all Administration Expenses, the Plaintiff will request that the Court approve the payment of that remaining balance to a charity approved by the Parties acting reasonably.
41. Following the completion of the First Stage of the Distribution process and the completion of the Second Stage of the Distribution process (as described above), and otherwise at other times at the reasonable request of either Party or the Court,

the Settlement Administrator will provide a report on the results of the distribution of the Net Settlement Fund to Class Counsel, who in turn will update the Defendant and thereafter will report to the Court in person or in writing if and as the Court may direct.

RELEASES & COVENANTS NOT TO SUE

42. Subject to the approval by the Court of this Settlement Agreement, Class Members:
    a. Shall be conclusively deemed to have, and by operation of the Settlement Approval Order shall have, fully, finally, and forever released, relinquished and discharged all Released Claims as against the Released Parties;
    b. Shall not assert or prosecute any of the Released Claims against the Released Parties in any other action or proceeding in this or any other jurisdiction;
    c. Shall not assert or prosecute any claim whether for damages, disgorgement, injunctive relief, declaratory relief, or other relief of any other kind against anyone who could claim over against the Released Parties in respect of the Released Claims whether for damages, disgorgement, injunctive relief, declaratory relief, or relief of any other kind; and,
    d. Shall not bring any cause of action, proceeding, claim, action, suit or demand, or in any way commence, or continue any proceeding, claim, action, suit or demand, in any jurisdiction, against the Released Parties in respect of the Released Claims.
43. Notwithstanding any other terms in this Settlement Agreement, it is the intent of the Parties hereto that the Released Parties shall not be liable, either at the present or in the future, to make any payment to the Class Members whatsoever in respect

of the Released Claims and the Action, other than the payment by the Defendant of $8,250,000.00 as set out in paragraph 3 above.

44. The Plaintiff hereby acknowledges and agrees, and the Class Members are hereby advised and are deemed to have acknowledged and agreed, that the Plaintiff, Class Counsel, the Defendant, and its counsel have no obligation to provide and are in fact not providing any advice about any potential taxes, tax consequences, tax obligations, deductions, financial or tax reporting or filing obligations/requirements, remittance obligations, withholdings, or any other potential consequences or any other payment, remittance, reporting or filing obligations (whether statutory, regulatory or otherwise) relating to any compensation payable to Class Members under the Settlement. The Class Members shall have no claims or remedies as against the Plaintiff, Class Counsel, the Defendant, or its counsel in respect of the foregoing matters. Class Members are advised to seek their own independent tax, financial, accounting, legal or other advice in respect of the foregoing matters.

THIRD PARTY CLAIM

45. Nothing in this Settlement Agreement is or shall be construed to restrict the Defendant's ability to accept any contribution from Third Parties towards the settlement of the Third Party Claim or to pursue any claims for contribution or otherwise from the Third Parties.

46. If and to the extent that the Defendant chooses to pursue the Third Party Claims, the Defendant (and not the Plaintiff) shall be responsible for any costs sought or claimed by any such Third-Party pursued by the Defendant. For clarity, no costs sought by or awarded to any Third Party shall be sought from, awarded against or

payable by the Plaintiff, the Class, or Class Counsel.

DENIAL OF LIABILITY

47. The Defendant denies all claims made by the Plaintiff against it in this Action. Without limiting the generality of the foregoing, the Defendant denies that its Opinions regarding the Program were negligent and/or that it made any misrepresentations regarding the Program.

48. This Settlement Agreement shall not be deemed or construed to be an admission or evidence of any breach or violation of any duty, contract, warranty, statute, rule, regulation or law, or of any liability or wrongdoing by the Defendant, or of the truth of any of the claims or allegations alleged in the Action or otherwise, and such is specifically denied by the Defendant.

49. The Parties agree that whether or not this Settlement Agreement is finally approved or is terminated, neither the Settlement nor any document or statement relating to it shall be offered in evidence in any other action or proceeding in any court, agency, or tribunal, except to seek court approval of this Settlement Agreement, obtain the required dismissals, give effect to and enforce the provisions of this Settlement Agreement, by a Released Party to defend against the assertion of any Released Claims, or for purposes of the fee approval motion.

RESPONSIBILITY FOR FEES, DISBURSEMENTS & TAXES

50. The Defendant shall not be liable for any Class Counsel Fees, Class Counsel Disbursements, or taxes of any of the experts, advisors, agents, or representatives retained by Class Counsel, the Plaintiff or the Class Members, or any lien of any person on any payment to any Class Member from the Settlement Fund.

51. The Defendant recognizes that Class Counsel Fees and Class Counsel

Disbursements payable are a matter between Class Counsel and the Class, subject to approval by the Court. The Defendant will not object to or oppose Class Counsel's request for approval of Class Counsel Fees and Disbursements (or any Davies Costs sought for reimbursement) so long as such amounts do not exceed the amount set out in its Retainer with the Representative Plaintiff.

COURT APPROVAL OF CLASS COUNSEL FEES & DISBURSEMENTS

52. Class Counsel will seek the Court's approval to pay Administration Expenses, Class Counsel Disbursements, Class Counsel Fees, taxes thereon, the reimbursement for the Davies Costs, and the Plaintiff's Honorarium contemporaneous with seeking approval of this Settlement Agreement. The foregoing shall be reimbursed and paid solely out of the Settlement Fund after the Effective Date. Except as provided herein, Administration Expenses may only be paid out of the Settlement Fund after the Effective Date. No other Class Counsel Fees and Disbursements (or any other counsel fees and disbursements) shall be paid from the Settlement Fund prior to the Effective Date.

53. The approval, or denial, by the Court of any requests for Class Counsel Fees (or the reimbursement for Davies Costs) to be paid out of the Settlement Fund are not part of the Settlement provided for herein, except as expressly provided in paragraph 52, and are to be considered by the Court separately from its consideration of the fairness, reasonableness, and adequacy of the Settlement provided for herein.

54. For greater certainty, the failure of the Court to approve a request for Class Counsel Fees or the Davies Costs has no impact or effect on the rights and obligations of the Parties to the Settlement Agreement, shall not affect or delay the issuance of the Settlement Approval Order, and shall not be grounds for termination of the

Settlement Agreement.

DISMISSAL OF THE MAIN ACTION

55. In the event that this Settlement Agreement is approved, the Action against the Defendant shall be dismissed with prejudice and without costs pursuant to the terms of the Settlement Approval Order, substantially in the form attached as **Schedule "C"**.

TERMINATION OF SETTLEMENT AGREEMENT

56. The Plaintiff or Defendant may terminate this Settlement Agreement only in the event that:
    a. The Court declines to grant a Settlement Approval Order substantially in the form attached as Schedule "C" or if any such Settlement Approval Order is overturned or reversed in whole or in part on appeal; or,
    b. The Court declines to grant an Order dismissing the Action against the Defendants with prejudice and without costs.
57. In addition, if the Settlement Fund is not paid in accordance with paragraph 3 above, the Plaintiff shall have the right to terminate this Settlement Agreement, at his sole discretion.
58. To exercise a right of termination under paragraph 56 or 57, the terminating party shall deliver a written notice within thirty (30) days following an event described above.

IF SETTLEMENT AGREEMENT TERMINATED

59. If this Settlement Agreement is not approved, is terminated in accordance with its terms, or otherwise fails to take effect for any reason:

a. No motion to approve this Settlement Agreement, which has not been decided, shall proceed;

b. The Parties will cooperate in seeking to have any orders made in respect of this Settlement Agreement set aside and declared null and void and of no force or effect;

c. All negotiations, statements, proceedings, and other matters relating to the settlement and the Settlement Agreement shall be deemed to be without prejudice to the rights of the Parties, and the Parties shall be deemed to be restored to their respective positions existing immediately before the Settlement Agreement was executed; and

d. Without limiting the generality of subparagraph c immediately above, the Defendant shall retain any and all available defences to the Action and the Plaintiff/Class shall retain all of their claims, rights, and interests relating to the Action and what are defined as the Released Claims.

SURVIVAL OF PROVISIONS AFTER TERMINATION

60. If this Settlement Agreement is not approved, is terminated, or otherwise fails to take effect for any reason, the provisions of paragraphs 47 through 49 and the definitions and Schedules applicable thereto shall survive the termination and continue in full force and effect. The definitions and Schedules shall survive only for the limited purpose of the interpretation of paragraphs 47 through 49 within the meaning of this Settlement Agreement, but for no other purposes. All other provisions of this Settlement Agreement and all other obligations pursuant to this Settlement Agreement shall cease immediately.

PUBLIC STATEMENTS

61. The Parties shall not make any public announcements, statements, press releases, comments, website postings (e.g. "FAQs"), responses to media inquiries, or communications whatsoever ("**Public Statement(s)**") without prior written notice to counsel for the other Party reasonably in advance of the Public Statement being made.
62. Any Public Statements made by the Plaintiff or Class Counsel shall contain reasonable neutral commentary and fairly reflect the Defendant's denial of liability contained in paragraphs 47 through 49 above.

MOTIONS FOR DIRECTIONS AND ONGOING JURISDICTION

63. The Parties may apply to the Court as may be required for directions in respect of the interpretation, implementation, operation and administration of this Settlement Agreement.
64. All motions contemplated by this Settlement Agreement shall be on notice to the Parties.
65. The Court shall retain and exercise continuing and ongoing jurisdiction with respect to implementation, administration, interpretation and enforcement of the terms of this Settlement Agreement. The Plaintiff, Class Members, and the Defendant attorn to the jurisdiction of the Court and motions styled in this Action before the Class Action Case Management Judge for such purposes.

HEADINGS, ETC.

66. In this Settlement Agreement:

a. The division of the Settlement Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement; and

b. The terms "this Settlement Agreement," "hereof," "hereunder," "herein," and similar expressions refer to this Settlement Agreement and not to any particular section or other portion of this Settlement Agreement.

COMPUTATION OF TIME

67. In the computation of time in this Settlement Agreement, except where a contrary intention appears, where there is a reference to a number of days between two events, the number of days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and only in the case where the time for doing an act expires on a holiday as "holiday" is defined in the *Rules of Civil Procedure*, RRO 1990, Reg 194, the act may be done on the next day that is not a holiday.

GOVERNING LAW

68. This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

ENTIRE AGREEMENT

69. This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle, and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions, or representations with respect to the

subject matter of this Settlement Agreement, unless expressly incorporated herein.

AMENDMENTS

70. This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment must be approved by the Court.

BINDING EFFECT

71. This Settlement Agreement shall be binding upon, and enure to the benefit of, the Plaintiff, the Class Members, the Defendant, and all of their successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made herein by the Plaintiff shall be binding upon all Class Members and each and every covenant and agreement made herein by the Defendant shall be binding upon it.

COUNTERPARTS

72. This Settlement Agreement may be executed in counterparts, each of which will be deemed an original and all of which, when taken together, will be deemed to constitute one and the same agreement, and a facsimile or electronic signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

NEGOTIATED AGREEMENT

73. This Settlement Agreement has been the subject of negotiations and discussions among the undersigned, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties

further agree that the language contained in or not contained in previous drafts of this Settlement Agreement, or any agreement in principle (or other like document), shall have no bearing upon the proper interpretation of this Settlement Agreement.

LANGUAGE

74. The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English; les parties reconnaissent avoir exigé que la présente convention et tous les documents connexes soient rédigés en anglais. Nevertheless, if required by the Court, Class Counsel, a translation firm selected by Class Counsel, or some combination thereof shall prepare a French translation of the Settlement Agreement, the cost of which shall be paid from the Settlement Fund. In the event of any dispute as to the interpretation or application of this Settlement Agreement, only the English version shall govern.

RECITALS & SCHEDULES

75. The recitals to this Settlement Agreement are true and accurate, and form part of the Settlement Agreement.

76. The schedules to this Settlement Agreement also form part of the Settlement Agreement.

ACKNOWLEDGEMENTS

77. Each of the Parties hereby affirms and acknowledges that:

    a. He, she, or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood the Settlement Agreement;

b. The terms of this Settlement Agreement and the effects thereof have been fully explained to him, her, or the Party's representative by his, her, or its counsel;

c. He, she, or the Party's representative fully understands each term of the Settlement Agreement and its effect; and

d. No Party has relied upon any statement, representation, or inducement of any other Party, beyond the terms of the Settlement Agreement, with respect to the first Party's decision to execute this Settlement Agreement.

AUTHORIZED SIGNATURES

78. Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement on behalf of the Parties identified below their respective signatures and their law firm(s).

NOTICE

79. Where this Settlement Agreement requires a Party to provide notice or any other communication or document to another, such notice, communication, or document shall be provided by email, facsimile, or letter by overnight delivery to the representatives for the Party to whom notice is being provided, as identified below:

For the Plaintiff and for Class Counsel in the Action:

c/o David O'Connor and Adam Dewar
ROY O'CONNOR LLP
1920 Yonge Street, Suite 300
Toronto, ON M4S 3E2
Tel: 416.362.1989
Fax: 416.362.6204
Email: dfo@royoconnor.ca
Email: jad@royoconnor.ca

For Cassels Brock & Blackwell LLP's Counsel:

c/o Peter Griffin, Rebecca Jones and Jessica Kras
Lenczner Slaght Royce Smith Griffin LLP
130 Adelaide Street West, Suite 2600

Toronto, ON M5H 3P5
Email: pgriffin@litigate.com
Email: rjones@litigate.com
Email: jkras@litigate.com

DATE OF EXECUTION

80. The Parties have executed this Settlement Agreement effective as of November 14, 2022.

JEFFREY LIPSON on his own behalf and on behalf of the Class, by his counsel:

Name of Authorized Signatory: J. Adam Dewar

Signature of Authorized Signatory:

Roy O'Connor LLP
Ontario Counsel

CASSELS BROCK AND BLACKWELL LLP:

Name of Authorized Signatory: Kristin Taylor

Signature of Authorized Signatory:

Cassels Brock and Blackwell LLP
Managing Partner

Schedule A – Settlement Hearing Notice

ATHLETIC TRUST OF CANADA TIMESHARE PROGRAM CLASS ACTION

NOTICE OF PROPOSED SETTLEMENT

A. **TO: ALL CLASS MEMBERS IN *LIPSON v. CASSELS BROCK AND BLACKWELL LLP***
B. COURT FILE NO.: CV-09-376511-00CPA1
C.

This Notice is directed to all Class Members in this certified class proceeding. The Plaintiff and the Defendant, Cassels Brock and Blackwell LLP ("Cassels"), (together, the "Parties") have agreed to settle this class action for the all-inclusive amount of $8.25 million. The settlement was reached following extensive negotiations between the parties and with the assistance of a retired judge (mediator).

This Notice is published by Order of the Ontario Superior Court of Justice and explains the proposed settlement and how Class Members may comment (in support of or, in opposition to) the proposed settlement. The agreement to settle this matter does not imply any such liability, wrongdoing, or fault on the part of Cassels, none of the allegations against Cassels have been proven and Cassels expressly denies any liability, wrongdoing, or fault.

History of this Class Proceeding

As set out in the Notice of Certification published in 2014 and 2015, Jeffrey Lipson was appointed to act as the Representative Plaintiff for the following Class:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "Class Members").

The Class was notified of the certification of this class action in 2014 and 2015 and given the opportunity to exclude themselves (opt-out) from this class action. Anyone remaining in this class action following the close of the opt-out period agreed to be bound by any decision at trial or court-approved settlement in this action.

In this action, the Plaintiff alleged that Cassels was, among other things, negligent in the preparation of its legal opinions relating to the Athletic Trust Timeshare Program, pursuant to which Class Members acquired and donated Timeshare Weeks to athletic charities (the "Program").

The lawsuit claimed general compensatory damages and special damages for other potential expenses as well as expenses for prosecuting this action.

Following several years of litigation, including the completion of an extensive discovery process, the exchange of various expert reports, preparations for a contested 35-day trial to start in January 2023, and a mediation before a retired judge, the Parties reached the proposed settlement summarized below.

The Proposed Settlement

The $8.25 million Settlement Fund includes all compensation to the Class Members for any potential damages arising from their participation in the Program as well as all other expenses or costs, including all court-approved legal fees and related disbursements (including taxes), the costs of administration and distribution of money to Class Members, and a 10% statutory levy (as discussed further below) to the Class Proceedings Fund (all such other costs and expenses collectively referred to below at times as the "Total Expenses"). In exchange for its $8.25 million payment, Cassels will receive a full release of all claims and any potential claims that Class Members may have against Cassels relating to, among other things, the Program, the donation of Timeshare Weeks and any tax consequences or damages arising therefrom.

The compensation paid to Class Members will be paid from the amount of money remaining after deducting the Total Expenses from the $8.25 million (the "Net Settlement Fund"). The money to be distributed to the Class Members is intended to reimburse them for some of portion of their cash (out of pocket) donations to the charities pursuant to the Program, less the amount of the tax credits on the cash donations made available by CRA in settlement of CRA's challenges to the tax credits claimed by Class Members relating to donated Timeshare weeks.

In general terms, the settlement will be paid out of the Net Settlement Fund in two stages following the approval of the Settlement. The first stage payments will be based on the Class Members' *pro rata* or proportionate share of the total cash donations made to the Program by all Class Members. The second stage of payments will distribute *pro rata* any remaining balance or residue of funds to Class Members who cashed cheques in the first stage.

The Representative Plaintiff and Class Counsel recommend the settlement because it will provide monetary compensation to Class Members in the near future, weighed against the delays, significant risks, unknown results, and potential unfavorable findings if the case proceeds to a contested trial and any steps thereafter. The reasons in support of the settlement will be further explained and set out in materials to be filed with the Court and made available for your review through a posting or link on ●. Those materials should be posted on ● in advance of the settlement approving hearing (as described below). A full copy of the Settlement Agreement is available now for your review through the same posting or link.

Motion for Settlement Approval

The settlement is subject to the approval of the Court, which will decide whether the settlement is fair, reasonable, and in the best interests of Class Members. The Court will hold a hearing, via Zoom, to decide whether to approve the settlement in Toronto on January 20, 2023.

The Court will decide whether to approve or reject the settlement. It does not have the authority to unilaterally change the material terms of the settlement. If the Court does not approve the settlement, the lawsuit will continue. If the lawsuit continues, it may take several more years to complete the pre-trial procedures, trial, and possible appeals. The Class may or may not be successful at trial and, even if successful, the trial of the common issues would not result in payments of any compensation to Class Members. Any compensation available to Class Members would be addressed and decided in the individual issues phase of this proceeding after the trial. Any compensation that was awarded to any Class Member may not necessarily be greater than the compensation available under this proposed settlement.

How to Comment on the Proposed Settlement

Class Members may, but are not required to, attend the Settlement Approval hearing. Please contact Class Counsel as set out below for instructions on how to access the Zoom hearing.

Class Members are also entitled, but not obligated, to express their opinions about the settlement and whether it should be approved. If you wish to make a submission to the Court supporting or objecting to the proposed settlement, you must send the submissions in writing (by mail or email) to Class Counsel, at the address below, and ensure they are received no later than ●. Please note that Class Counsel will provide all submissions to the Court and the Defendant in advance of the hearing, and the submissions may be referred to publicly. The written submissions should include:

a. Your name, address and telephone number;
b. A brief statement of the reasons that you support or oppose the proposed settlement terms; and
c. Whether you plan to attend the virtual (Zoom) settlement approval hearing.

Updating Class Member Contact Information

In order to communicate with you better and, in the event this Settlement is approved, to be able to mail you a cheque for your share of the Settlement Fund, Class Members are requested to confirm or update their contact information by sending an email to the proposed settlement administrator INSERT NAME at INSERT EMAIL ADDRESS or through the change of address link or portal at INSERT WEBSITE.

Class Counsel's Motion for Fee Approval

The law firm of **Roy O'Connor LLP** is Class Counsel and represents the members of this Class in this action for the last 13 years of the litigation. Roy O'Connor LLP can be reached as set out below.

Class members will not have to personally pay for the legal work done or for the disbursements incurred over the years since this case began. The proposed class action was initially commenced in April 2009 by a different law firm in Toronto, namely, Davies Ward Phillips and Vineberg ("Davies"). The fees, disbursements and taxes of Davies (fees of $●, disbursements and taxes of $●, totaling all in approximately $●) were paid personally by the Representative Plaintiff and ● number of other Class Members (Davies was not prepared to be retained on a contingency basis and required timely payment for its fees and disbursements). When Roy O'Connor LLP (Class Counsel) assumed carriage of this action from Davies in the latter half of 2009, the Representative Plaintiff entered into a contingency fee agreement with Class Counsel, which provided that legal fees and disbursements are to be paid by the Class Members only in the event of a successful settlement or trial judgment and then such fees and disbursements are only recoverable from the amounts paid by the Defendant. In that way, Class Members (other than those who had already personally paid Davies for its services at the outset of this case) would not have to pay out of their own pocket for any legal costs incurred to prosecute this case.

The contingency fee agreement with Class Counsel set out that Class Counsel would be asking the Court to approve legal fees of 25% of any settlement funds, plus their disbursements and applicable taxes. The contingency fee agreement also set out that the Court would be asked to approve reimbursement to the specific Class Members who personally paid the costs of Davies out of their own pockets, so that those specific Class Members would not be responsible for a greater (disproportionate) share of the total legal costs incurred if this case was prosecuted to a successful conclusion. If the fees requested by Class Counsel (Roy O'Connor LLP) and sought for reimbursement for the fees paid to Davies are both approved, the approved legal fees will in total represent ●% of the $8.25 million settlement funds.

Approval of the Settlement Agreement ***will not*** be contingent upon the court approval of legal fees. For clarity, and to repeat, any approved legal fees and disbursements (and related taxes) will be paid out of the $8.25 million settlement funds.

In this case, the Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through class actions in Ontario. The Fund agreed to reimburse the Plaintiff for some disbursements incurred in pursuing this action. The Fund would also have been responsible for costs that may have been awarded against the Plaintiff in this case. In exchange, the Fund is entitled to recover, from any court award or settlement in favour of the Class Members, the amounts it has reimbursed the Plaintiff for disbursements as well as 10% of any amounts payable to Class Members.

Interpretation

This notice only contains a general summary of some of the terms of the Settlement Agreement. As stated above, a full copy of the Settlement Agreement can be found at ●. If there is a conflict between the provisions of this notice and the Settlement Agreement, the terms of the Settlement Agreement shall prevail.

More Information

For more information about the class proceeding lawsuit, you may contact:

ROY O'CONNOR LLP
Barristers
1920 Yonge Street
Suite 300
Toronto, Ontario
M4S 3E2

Attn: TBD **
Tel: (416) 362-1989
Fax: (416) 362-6204
Email: TBD
Web: TBD

PLEASE DO NOT CALL CASSELS BROCK AND BLACKWELL LLP, THE COURTHOUSE, OR THE REGISTRAR OF THE COURT ABOUT THIS ACTION. THEY WILL NOT BE ABLE TO ANSWER YOUR QUESTIONS ABOUT THE LAWSUIT OR SETTLEMENT.

This notice is published pursuant to the Ontario *Class Proceedings Act* and was approved by the Court.

Schedule B –Notice of Approved Settlement

ATHLETIC TRUST OF CANADA TIMESHARE PROGRAM CLASS ACTION

NOTICE OF SETTLEMENT APPROVAL

D. **TO: ALL CLASS MEMBERS IN *LIPSON V CASSELS BROCK AND BLACKWELL LLP***
E. COURT FILE NO.: CV-09-376511-00CPA1

In reasons for decision released on ●, 2023 the $8.25 million Settlement of this proceeding was approved by the Ontario Superior Court of Justice as being fair, reasonable, and in the best interests of the Class Members.

The agreement to settle this matter does not imply any liability, wrongdoing or fault on the part of Cassels Brock and Blackwell LLP ("Cassels"). None of the allegations against Cassels have been proven and Cassels expressly denies any liability, wrongdoing, or fault.

For more information about this class action and the approved settlement please visit: ●

History of this Class Proceeding

As set out in the Settlement Hearing Notice published in ● 2022, Jeffrey Lipson was appointed to act as the Representative Plaintiff for the following Class:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "Class Members").

The Class was notified of the certification of this Class Action in 2014 and 2015 and given the opportunity to exclude themselves (opt-out) from this Class Action. Anyone remaining in this Class Action following the close of the opt-out period agreed to be bound by any decision at trial or court-approved settlement in this proceeding.

In this Action, the Plaintiff alleged that Cassels was, among other things, negligent in the preparation of its legal opinions relating to the Athletic Trust Timeshare Program, pursuant to which Class Members acquired and donated Timeshare Weeks to athletic charities (the "Program").

The lawsuit claimed general compensatory damages and special damages for accounting, legal and other professional fees as well as the expenses for prosecuting this action.

Following several years of litigation including the completion of an extensive discovery process, the exchange of expert various reports, preparations for a contested 30 day trial

to start in January 2023 and a mediation before a retired judge, the Parties reached the settlement summarized below and approved by the Court on ●.

The Approved Settlement

The $8.25 million Settlement Fund includes all compensation to the Class Members for any potential damages arising from their participation in the Athletic Trust Tax Reduction Program, legal fees and related disbursements (including taxes), the costs of administration and distribution of money to Class Members, a contribution to the legal expenses incurred by the Plaintiff and certain Class Members before Roy O'Connor took carriage of this action (as discussed further below), and a 10% statutory levy (as discussed further below) to the Class Proceedings Fund. In exchange for its $8.25 million payment, Cassels will receive a full release of all claims and potential claims that Class Members may have against Cassels for any sort of alleged or perceived damages.

The compensation paid to Class Members will be paid from the amount of money remaining after deducting the Court-approved legal fees and disbursements (including taxes) as well as the costs of administering and distributing the money to Class Members, from the $8.25 million (the "Net Settlement Fund"). The money to be distributed to the Class Members from the Net Settlement Fund is intended to reimburse them for some of their cash donations to the charities under the Program. In general terms, the settlement will be paid out of the Net Settlement Fund in two stages following the approval of the Settlement. The first stage payments will be based on the Class Members' *pro rata* or proportionate cash donation made to the Athletic Trust Program. The second stage of payments will distribute the remaining balance or residue of funds to the Class Members who cashed their cheques in the first stage of payments.

Attached to the copies of this Notice delivered directly to individual Class Members will be a letter from ●, the Court appointed Settlement Administrator, INSERT NAME, regarding any information located in the Parties' records regarding your individual donations to charities under the Program. This information will be used to determine your share of the Net Settlement Fund. Do nothing if this donation information is correct. Please contact the Settlement Administrator as instructed in the enclosed letter if the information is incorrect or if the enclosed letter indicates that there is no information available as to your donation(s). **Responses must be received by ● in order to be considered for payment by the Settlement Administrator. Responses received after that date will not be considered by the Settlement Administrator.**

Class Members entitled to compensation will subsequently receive another letter from the Settlement Administrator, enclosing a cheque for their share of the Net Settlement Fund.

Updating Class Member Contact Information

In order to communicate with you better and in order to be able to mail you a cheque for your share of the Net Settlement Fund, Class Members are requested to confirm or update their contact information by sending an email to the Settlement Administrator INSERT NAME at INSERT EMAIL ADDRESS or through the change of address link or portal at ●.

Class Counsel's Motion for Fee Approval

The law firm of **Roy O'Connor LLP** is Class Counsel and represents the members of this Class in this action. Roy O'Connor LLP can be reached at ●.

As set out above, Class Members do not have to personally pay Class Counsel for the work that they have done or for the disbursements that they have carried over the years since this case began. The Representative Plaintiff entered into a contingency fee agreement with Class Counsel at the outset of the case, providing that Class Counsel are to be paid only in the event of a successful settlement or trial judgment. As provided for in that contingency fee agreement, the Court approved legal fees and disbursements of ●.

In this case, the Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through class actions in Ontario. The Fund agreed to reimburse the Plaintiff for some disbursements incurred in pursuing this action. The Fund would also have been responsible for costs that may have been awarded against the Plaintiff in this case. In exchange, the Fund is entitled to recover, from any court award or settlement in favour of the Class Members, the amounts it has reimbursed the Plaintiff for disbursements as well as 10% of any amounts payable to Class Members.

Interpretation

This notice only contains a general summary of some of the terms of the Settlement Agreement. A full copy of the Settlement Agreement, the Reasons of the Court approving the Settlement and the related Court Order can be found at ●.

More Information

For more information about the class proceeding lawsuit you may contact the Court-appointed Settlement Administrator at: ● **INSERT ADMIN CONTACT INFO**

PLEASE DO NOT CALL CASSELS, THE COURTHOUSE, OR THE REGISTRAR OF THE COURT ABOUT THIS ACTION. THEY WILL NOT BE ABLE TO ANSWER YOUR QUESTIONS ABOUT THE LAWSUIT.

This notice is published pursuant to the Ontario *Class Proceedings Act* and was approved by the Court

Schedule C – Draft Settlement Approval Order

Court File No.: CV-09-376511

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	**)**
MR. JUSTICE PERELL	**)**
	)

BETWEEN:

JEFFREY LIPSON

Plaintiff/Moving Party

-and-

CASSELS BROCK & BLACKWELL LLP

Defendant/Responding Party

Proceeding under the *Class Proceedings Act, 1992*

ORDER – SETTLEMENT APPROVAL

THIS MOTION, made by the Plaintiff, on his own behalf and on behalf of the Class, for an Order approving the settlement agreement entered into between the Plaintiff and the Defendant dated ● (the "Settlement Agreement") as being fair reasonable and in the best interests of the Class, was heard this day by videoconference in Toronto, Ontario.

ON READING all materials filed, on being advised of the consent of the Defendant, and on hearing submissions of counsel for all Parties,

1. **THIS COURT ORDERS & DECLARES** that the Settlement Agreement, a copy of which is attached to this Order as Schedule "1" and incorporated herein, is fair, reasonable and in the best interests of the Class and is hereby approved pursuant to s. 29 of the *Class Proceedings Act*, *1992* S.O. 1992, c.C.6, and shall be implemented and enforced in accordance with its terms.

2. **THIS COURT ORDERS** that, except to the extent they are modified by this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.

3. **THIS COURT ORDERS** that this Order is binding upon each member of the Class including those persons who are minors or mentally incapable and the requirements of *Rules* 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of this Proceeding.

4. **THIS COURT ORDERS** that ● (the "Settlement Administrator") is appointed to administer and oversee implementation of the Settlement Agreement in accordance with its terms.

5. **THIS COURT ORDERS** that the costs of the administration of this Settlement, including, but not limited to the reasonable fees and disbursements of the Settlement Administrator and the costs of the notice program described below, shall be remunerated from the Settlement Fund without further approval of the Court.

6. **THIS COURT ORDERS** that the Notice of Approved Settlement (the "Notice") attached hereto as Schedule "2" is approved and shall be published or distributed as specified in

paragraphs 7a and 7b of this Order, subject to the right of the Parties to make minor, non-material amendments to the form of the Notice by mutual agreement, as may be necessary or desirable.

7. **THIS COURT ORDERS** that within forty-five (45) days of the date of this Order, the Representative Plaintiff, through Class Counsel and the Settlement Administrator, shall cause the Notice to be distributed to the Class by:

    a. causing the Notice to be sent to the last known email addresses of the Class Members and, where no email address is available, cause the Notice to be sent by regular mail to the Class Members' last known mailing addresses; and,

    b. causing the Notice to be posted on the website(s) controlled by Class Counsel (●) and by a press release by Class Counsel.

8. **THIS COURT ORDERS** that for the purposes of the administration and enforcement of the Settlement Agreement and this Order that this Court will retain ongoing jurisdiction and supervisory role.

9. **THIS COURT ORDERS** that pursuant to section 10(1)(b) of the *Law Society Amendment Act (Class Proceedings Fund) 1992,* the Administrator shall deduct 10% from any compensation payable to individual Class Members under the Settlement and hold that money in trust pending the final determination of the quantum of the Class Proceeding Fund's section 10(1)(b) levy.

10. **THIS COURT ORDERS** that, no amounts shall be distributed to any Class Members until the Class Proceedings Committee has had an opportunity to review and confirm the calculation of the Levy in paragraph 9. If there is any dispute or question as to the

calculation of the levy to the Fund, Class Counsel and counsel for the Fund shall arrange an appearance before the class action case management judge to resolve the issues and that, pending any appearance, no amounts shall be distributed to any Class Members.

11. **THIS COURT ORDERS** that the Action is hereby dismissed against the Defendant without costs and with prejudice.

12. **THIS COURT ORDERS** that there be no costs of this motion.

_____

This is Exhibit "B" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Biography of David F. O'Connor

David F. O'Connor

Partner

David F. O'Connor is one of the founding partners in Roy O'Connor LLP. Prior to founding the firm, David was a partner in a large national law firm in Canada. His practice is now focused on, and essentially split between, corporate/commercial/shareholder litigation and class action litigation.

David has been recognized by *Benchmark Canada* (the guide to Canada's leading litigators) as a litigation star in class actions and commercial litigation every year since *Benchmark's* arrival in Canada (2012), with peer praise and respect for his "prowess" in both areas. David was also noted by Benchmark as one of the 50 litigators in Ontario who were awarded an additional "*Honourable Mention*".

David was named as one of the finalists for the Top 25 Most Influential Lawyers in Canada in 2015 and again in 2016, as nominated in Canadian Lawyer magazine. He was also recognized as a finalist for the *Benchmark Canada* national award for Class Action Litigator of the Year in 2015 and again in 2017, and plaintiff litigator of the year in 2019, 2020, 2021 and 2022.

He is ranked in the Chambers Guide to Canada's Leading Lawyers in the area of Class Actions, with one source quoted by Chambers stating: *"I hold him in the highest regard. He's a brilliant guy and when he's on your team he's a huge asset. He has great courtroom presence and a superb intellect."*

David is also a *Lexpert*® ranked leading class action litigator. David has also been listed in the Lexpert Special Edition of Lexpert – Canada's Leading Litigation Lawyers – as published in the Globe and Mail's Report on Business. He was also listed in the Lexpert Guide to the Leading US/Canada Cross-Border Litigation Lawyers in Canada. In 2006, he was first recognized by *Lexpert*® as a finalist for the top 40 under 40 ranking in Canada.

David is ranked by The Best Lawyers in Canada in the area of Corporate and Commercial Litigation.

David is also a Fellow of the Litigation Counsel of America. The Counsel is an invitation only trial lawyer association composed of less than one-half of one percent of all litigation lawyers in North America.

David and his partners were previously featured in the Canadian Bar Association National Magazine and recognized as one of the best class action firms in the country, with an undeniable track record for excellence. At the same time, David and his partners were further recognized as a stellar example of lawyers making a difference.

David has achieved significant success in class actions.

On the defence side, he was, for example, successful recently (January 2021) on behalf of defendant corporations and individuals in defeating a motion for certification in an investment/financial advisor proposed class action involving claims of breach of fiduciary duty, breach of trust, oppression, etc. By way of further example on the defence side, David was successful on behalf of defendant directors in defeating motions for certification (involving claims of oppression/shareholder disputes) and for leave to commence a secondary market securities class action seeking over $200 million in damages – that case was the first time that any court in Canada had rejected an application for leave to commence such a securities claim. David was also successful in striking out a $200 million product liability class action against

Toshiba. He has successfully negotiated and/or argued for the termination of other class actions. Among other defence retainers, David is currently defending corporations and/or directors and officers in various proposed class actions.

On the plaintiff side, David is one of the eight senior litigators from across the country who form the Steering Committee controlling and directing the Canada-wide class actions against VW and Audi in the widely known diesel emissions scandal. Those class actions against VW and Audi have resulted in settlements to date worth as much as $2.3 billion. He is also one of the lead counsel in the recent (December 2020/January 2021) settlement of a separate class action against Audi and VW for inaccurate fuel economy representations. He is also lead counsel in the closely watched national overtime class actions that were certified against *CIBC* and *Scotiabank*. Among other things, David was central to the innovative settlement of the *Scotiabank* overtime case. In 2020, David was one of the lead counsel in successfully advocating for summary judgment on the merits of the overtime claims against CIBC. He was also co-lead counsel in the class action overtime settlement as against Livingston. He is lead counsel in the recently (2021) settled class action relating to medical marijuana against Mettrum (now owned by Canopy Growth). David is lead counsel in the certified class actions relating to investment funds (*Fantl*) and tax shelters (*Lipson*) as well as one of the lead counsel on the certified Elliot Lake Mall Collapse class action. On the *Fantl* case, he was lead counsel on the $50 million settlement of one aspect of the case (excess management fees) and continues to prosecute the balance of that certified action. David also acted as co-counsel in successfully resisting appeals by the Federal Government from a significant *Charter* class action judgment (*Hislop v. Canada*).

On corporate/commercial litigation (non-class action), David has been involved in many cases over his 29 years of practice. He has been successful in pursuing and resisting various claims, including oppression claims/shareholder disputes, seeking tens of millions in damages against multi-national corporations as well as individual directors. For example, David successfully acted for the City of Waterloo in connection with various complex claims by the City arising out of a $50 million financing. David is currently involved in various actions and applications involving, among other things, oppression claims, breach of fiduciary and contractual duties, directors' duties and liability, misappropriation, unfair competition and solicitation, *Mareva* (freezing assets) remedies, complex expert issues and shareholder remedies.

He is one of the Editors for the Canadian Institute's Class Action Review. David often speaks about various litigation topics, including class actions, oppression/shareholder disputes and director's liability, at conferences and law schools.

This is Exhibit "C" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Biography of J. Adam Dewar

J. Adam Dewar

Partner

J. Adam Dewar is a partner in the firm and his practice focuses on both plaintiff and defence side class actions and commercial litigation.

In 2019 Adam was named a "Litigation Star" by Benchmark magazine.

In the area of class actions he is part of the firm's counsel team in:

- Christiansen v Mettrum Ltd (Tainted Medical Marijuana – certification motion in May 2019)
- Stibbe v Audi et al (Gasoline Emission Manipulations – certification motion in March 2019)
- Quenneville et al v Volkswagen (Volkswagen Diesel Emission Manipulations – settled 2018)
- Quinte v Eastwood Mall et al (collapse of the Algo Centre Mall in Elliot Lake Ontario – certified February 2014)
- Bozsik v Livingston International (unpaid overtime – certified 2017)
- Fantl v. Transamerica Life (management fee overcharges – settled Summer 2009)
- Monckton v. Canadian Business College (private college class action – settled 2011)
- Fulawka v. Scotiabank (unpaid overtime – settled 2015 & 2016)
- Fresco v. CIBC (unpaid overtime – certified June 2012)
- Lipson v. Cassels Brock (negligent tax advice – certified March 2013)
- Sa'd v Remington Group (excess development fees – settled March 2013)

On the Defence side, Adam is part of the firm's counsel team in several alleged defective goods class actions against a Fortune 500 technology company.

Adam is involved in a variety of corporate commercial matters dealing with oppression, derivative actions, regulatory matters and employment issues. As a result of his activities in various aspects of litigation, Adam has appeared as counsel at all levels of court in Ontario.

Adam has written articles for a number of publications on a variety of class action, evidence and commercial litigation topics.

This is Exhibit "D" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Biography of Peter L. Roy

Peter L. Roy

Partner

Peter L. Roy is the firm's senior litigation counsel and is a founding partner in Roy O'Connor LLP. Peter is very experienced in all aspects of civil litigation involving both individual and class proceedings. He has particular expertise in complex corporate commercial and securities litigation, shareholder and derivative actions, Director and Officer Duties and Responsibilities, mining related litigation and Class Actions. He has been recognized by Benchmark Canada as a National Securities Litigation Star and an Ontario Securities, Class Action Litigation Star and one of the Top 50 Trial Lawyers in Canada. Peter is also a Fellow of the Litigation Counsel of America. The Counsel is an invitation only trial lawyer association composed of less than one-half of one percent of all litigation lawyers in North America.

Peter had been a senior partner, litigation co-chair and executive committee member of one of Canada's largest firms. Peter decided to join in the formation of our boutique litigation practice in order to be free of the myriad of conflicts that routinely arise in a large full service firm.

Peter has been counsel on many noteworthy reported cases. His more recent and on-going publicly disclosed cases include his work as senior litigation counsel for:

- Pre-1986 and past-1990 Hepatitis C plaintiff class that resulted in a $1,000,000,000 settlement in favour of those claimants;
- BHP with respect to claims against the Government of Canada for contribution toward the long term tailings maintenance costs arising from Cold War uranium production;
- Oppression remedy claims by the shareholders and former board members of Coalcorp Mining Inc.;
- Defending a proposed securities class action on behalf of Directors of Western Coal;
- An action commenced under the Class Proceedings Act against Cassels Brock & Blackwell LLP with respect to allegedly negligent tax advice;
- Hislop same sex survivor pension benefits class action against the Federal Government;
- An action commenced under the Class Proceedings Act with respect to unpaid overtime against the Bank of Nova Scotia;
- An action commenced under the Class Proceedings Act with respect to alleged misclassification of employees and related overtime entitlements against CNR;
- Indemnification and damage claims on behalf of the founder of Unique Broadband Systems including CCAA proceedings and related Take Over Bid Injunction;
- BMO Nesbitt Burns with respect to the Defence of various national and international multi-billion dollar individual and class proceedings arising out of the collapse of Bre-X Minerals;
- Kinross Gold Corporation with respect to contractual and fiduciary claims arising out of the acquisition and disposition of Greek mining assets.

Peter is a frequent contributor to professional development conferences. He has written and presented papers on complex and international litigation, electronic discovery and arbitration in Canada, Mexico and the United States.

Peter is a frequent speaker on class action proceedings and trial practice.

This is Exhibit "E" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

AMENDED THIS Feb 12/16 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 (
☑ THE ORDER OF Justice Perell
L'ORDONNANCE DU
DATED / FAIT LE Feb 11/16
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No. CV-09-376511 - 00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. 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 does not have a lawyer, serve it on the plaintiff, 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 April 15, 2009 Issued by "F. Yousef"
Local registrar

Address of court office 393 University Avenue
10th Floor
Toronto, ON M5G 1E6

TO: Peter Griffin
LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
130 Adelaide Street West
Suite 2600
Toronto, Ontario
M5H 3P5

Counsel for the Defendant

CLAIM

1. The plaintiff claims on his own behalf and on behalf of the other Class Members (as defined in paragraph 10 below):

(a) an order pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 certifying this action as a class proceeding and appointing Jeffrey Lipson ("**Lipson**") as representative plaintiff for the Class Members;

(b) damages in the amount of $55,000,000 for professional negligence and negligent misrepresentation;

(c) special damages for accounting, legal and other professional fees and expenses that have been or will be incurred, in an amount to be provided prior to the trial of this action;

(d) an order directing a reference or providing such other directions as may be necessary to determine any issues not determined at the trial of the common issues;

(e) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(f) costs of this action on a full indemnity basis; and

(g) such further and other relief as this Honourable Court may deem just.

I ~ OVERVIEW

2. This action concerns a series of favourable tax opinions (the "**Legal Opinions**") negligently prepared by the defendant, Cassels Brock & Blackwell LLP ("**Cassels Brock**") respecting the tax consequences and benefits of a timeshare program (the "**Timeshare Program**") operated and promoted by, among others, the Athletic Trust of Canada (the "**Athletic Trust**"). The Legal Opinions were prepared by Cassels Brock knowing that a favourable tax opinion was a necessary precondition to the creation and successful promotion of the Timeshare Program, that tax opinion

was to be an independent opinion on the evaluation of the Timeshare Program, and that the Class Members (including Lipson) would rely on the existence of a favourable tax opinion in deciding whether to participate in the Timeshares Program.

3. In reliance upon the Legal Opinions and the representations (both express and implied) therein, the Class Members decided to participate in the Timeshares Program on the understanding they could both support amateur athletics and reduce their tax liability. Pursuant to the Timeshare Program, qualifying donors, including the Class Members, received timeshare weeks from the Athletic Trust (the "**Timeshare Weeks**") and donated them, together with a cash donation (of between approximately $4,600 and approximately $9,700 per Timeshare Week) to certain registered Canadian amateur athletic associations ("**RCAAAs**"). In return for their donations, the Class Members (including Lipson) were issued charitable donation receipts (of between approximately $13,275 and $28,600 per Timeshare Week) from the RCAAAs and claimed the related tax credits.

4. The Legal Opinions addressed the Canadian federal income tax consequences of making donations under the Timeshare Program. More particularly, they advised the Class Members that donations made under the Timeshare Program would entitle the Class Members to the tax credits advertised by the Athletic Trust.

5. Contrary to the Legal Opinions, the Canada Revenue Agency ("**CRA**") concluded that the Class Members (including Lipson) were not entitled to **at least** the majority of the tax credits that they had been promised and which they had claimed in connection with the Timeshare Program. As detailed more fully below, initially, CRA denied **all** of the tax credits claimed by the Class Members (including Lipson) in

connection with the Timeshare Program. Later, as part of a settlement with the Class Members, CRA allowed a deduction in respect of the tax credits claimed by the Class Members for the amount of their cash donations to the RCAAAs, but continued to disallow the Class Members any tax credits for their donations of Timeshare Weeks. The value of the tax credits which were disallowed far surpassed the value of those which were not.

6. As a result, the Class Members were collectively required to pay millions of dollars in arrears interest and, among other damages, paid more cash into the Program than was offset by the effect of the tax credits subsequently permitted and thus suffered a cash loss.

7. In all of the relevant circumstances, Cassels Brock ought to have known that the Class Members would not be entitled to deductions for the full amount of the tax credits claimed by them in respect of the donation receipts issued by the RCAAAs, and **at least** not for the portion of those tax credits relating to the Class Members' donations of Timeshare Weeks.

7A. Cassels Brock knew or ought to have known that its Legal Opinions, which were directed to and were intended to be relied upon by the Class Members and Canadian Athletic Advisors Ltd. (CAA (as defined below), the company acting as agent for the RCAAAs as discussed further below), were not independent. Cassels Brock had acted for, and was continuing to act for and advise, the designers and promoters of the Timeshare Program (or their related companies), and had acted as the corporate and tax counsel on the design, structure and operation of the Timeshare Program and in respect of the documentation (including marketing

material) for the Timeshare Program. In providing the Legal Opinions, Cassels Brock was in fact offering an opinion or evaluation on its own prior advice.

7B. In the circumstances, Cassels Brock had an undisclosed joint retainer, divided duties of loyalty and judgment, and conflicts of interest. Among other things, the interests of the designers and promoters to take the Timeshare Program to market and who would earn commissions or fees from the sale of timeshare units regardless whether the Timeshare Program withstood scrutiny by CRA or the courts, conflicted with the interests and expectations of Class Members and CAA in having an independent evaluation of the tax consequences and purported benefits of the Timeshare Program and conflicted with the fact that Class Members would only benefit if the Program withstood such scrutiny.

7C. Cassels Brock knew that its Legal Opinions would be used by the designers, promoters and the marketers (including the Master Marketing Agent as described below) as a marketing or promotional tool with Class Members and would be considered as a form of blessing of the Program. Cassels Brock took instructions and direction from the promoters and marketers on the content and wording of the Legal Opinions. Cassels Brock made changes to, and deleted wording from, the Legal Opinions at the request of the designers, promoters and marketers in part to satisfy the promotional objectives of the designers, promoters and marketers, without the knowledge of the Class Members and CAA. Absent being subject to the promotional objectives and interests of the designers, promoters and marketers, the Legal Opinions should have candidly disclosed in plain language, *inter alia*:

(a) all of the material risks associated with the Program;

(b) the fact that certain arguments or assumptions underlying the Program were, to the knowledge or understanding of Cassels Brock, sophistry;

(c) the critical facts that the Program was:

(i) very risky,

(ii) aggressive,

(ii) solely tax motivated,

(iii) played off technical provisions of the tax laws,

(iv) designed to provide an artificially inflated tax cost for the Timeshare units,

(v) designed and intended to generate a cash profit for Class Members,

(vi) likely to be regarded as offensive and challenged by CRA, and would require Class Members to possess a tolerance both for increased risk and for a challenge by CRA, otherwise they should not participate in the Program, and

(vii) likely to be successfully challenged, and if successfully challenged, would lead to, among other things, Class Members losing all of the funds invested in the Program or, alternatively, only receiving a tax credit for their cash payments and accordingly still suffering a cash loss, plus interest and penalties.

7D. In the circumstances, Cassels Brock should not have provided the Legal Opinions. In the alternative, if the Legal Opinions had been provided, they should have disclosed the aforesaid lack of independence, joint retainer, divided duties and conflicts, and in such circumstances the Program would not have been taken to market or successfully promoted. In the further alternative, if the aforesaid disclosure had been made in the Legal Opinions and the Program was taken to market, the Class Members would not have invested in the Program. In the yet further alternative, without the aforesaid disclosure, the Class Members lost the opportunity or chance of obtaining or reviewing a truly independent evaluation of the tax consequences and purported benefits of the Timeshare Program.

8. In providing the Legal Opinions, Cassels Brock was negligent. Further, the Legal Opinions contained misrepresentations (both express and implied) that were negligently made by the defendants and relied on by the Class Members. Cassels Brock repeatedly breached its duty to the Class Members (including Lipson) to exercise the care and skill to be expected of a reasonably competent tax solicitor by, among other things:

(a) providing the Legal Opinions when Cassels Brock had an undisclosed joint retainer with pre-existing clients, had divided duties of loyalty and judgment, was not independent and was in a conflict of interest;

(b) failing to have systems or policies in place to identify and properly address and disclose the joint retainer, divided duties, lack of independence and conflicts of interest;

(c) taking instructions, direction and revisions in respect of the Legal Opinions from, and vetting the Legal Opinions through, the designers, promoters and representatives of, or individuals with a direct or family interest in, the Master Marketing Agent for the Timeshare Program (namely, Tuscany Marketing Services);

(d) failing to disclose to the Class Members the facts set out in subparagraphs (a) and (c) above;

(e) failing to disclose or advise that Class Members and CAA should seek independent legal advice on the tax consequences and purported benefits of the Timeshare Program;

(f) failing to properly and fully consider and explain the tax consequences of the Timeshare Program to the Class Members;

(g) making misleading, inaccurate and/or incorrect statements, both expressly and impliedly, concerning the operation of the Timeshare Program and its tax consequences; and

(h) failing to warn the Class Members of the material risks associated with participating in the Timeshare Program.

II ~ THE PARTIES

9. The plaintiff, Lipson, is an individual residing in Toronto, Ontario.

10. Lipson brings this action under the Class Proceedings Act, 1992 on behalf of a class consisting of all individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "**Class Members**").

11. The defendant, Cassels Brock, is a full-service law firm with nearly 200 lawyers carrying on business in Toronto, Ontario. Cassels Brock holds itself out as having and applying "expertise, knowledge and skills in both technical and practical aspects of taxation".

12. The Legal Opinions were prepared by Lorne H. Saltman ("Saltman"), a partner in the Tax & Trusts Practice Group of Cassels Brock. Saltman has over 35 years of experience as a tax lawyer. He has been an instructor in the Taxation Section of the Law Society of Upper Canada's Bar Admission Course. He is also a past member of the Executive of the Taxation-Committee of the International Bar Association.

12A. In addition to preparing the Legal Opinions, Cassels Brock also provided advice to the designers and promoters of the Timeshare Program, which included Stephen Elliott and Steven Mintz or companies controlled by them (the "Stevens") . Cassels Brock had an existing relationship with the Stevens and had advised them in respect of a program for timeshare units in Las Vegas in 1999. In 2000 and thereafter, Cassels Brock was retained by the Stevens in respect of and provided advice on, among other things, the design, structure and operation of the Timeshare Program at issue, and drafted, approved, revised or provided advice on

the documents relevant to the Timeshare Program. Cassels Brock acted as the corporate and tax counsel on the Timeshare Program. The retainers with the Stevens were not disclosed by Cassels Brock to the Class Members or CAA in the Legal Opinions or at all.

III ~ THE TIMESHARE PROGRAM

13. **As described in the Legal Opinions, the Athletic Trust's promotional materials, the constating documents of, and/or the various agreements relating to, the Timeshare Program,** the Timeshare Program was structured and ultimately operated as follows.

A. Athletic Trust and Timeshare Weeks

14. In October 2000, Adrian Crosbie-Jones (the "**Settlor**"), a party unknown and unrelated to Lipson or to any of the other Class Members, established the Athletic Trust under the laws of Ontario for the purpose of financially assisting amateur athletes and amateur athletics organizations in Canada.

15. In 2000, 2001 and the spring of 2002, the Settlor acquired Biennial Timeshare Resort Weeks at the Sandyport Beaches Resort in Nassau, Bahamas, from Portfolio Vacations International Ltd. ("**PVIL**").

16. In the fall of 2002 and 2003, the Settlor also acquired Biennial Timeshare Weeks from the Alexandra Resort & Villas Ltd. (together with PVIL, the "**Developers**").

17. The purchase price paid by the Settlor to the Developers for each Timeshare Week was an amount equal to the appraised fair market value of the Timeshare Week in question ($13,275 in 2000 and $17,250 in 2001, for example). The Settlor satisfied the purchase price by paying a certain amount of cash to the Developers (*i.e.*, $8,575 to $18,900) and by granting a registered, limited recourse vendor take-back charge (the "**Lien**") for the balance of the purchase price (*i.e.*, $4,600, to $9,700).

18. Unbeknownst to Lipson and the other Class Members at all material times (and not disclosed in any of the Legal Opinions):

(a) in the 2000, 2001, 2002 and 2003 taxation years (the "**Taxation Years**") the Settlor acquired a total of approximately 8,396 Timeshare Weeks with an aggregate, appraised fair market value of approximately $144,702,175. The Settlor satisfied the purchase price for these Timeshare Weeks by (temporarily) paying approximately $96,991,725 in cash to the Developers and by granting the Liens for the balance of the purchase price; and

(b) every dollar of the approximately $96,991,725 in cash paid by the Settlor to the Developers was (indirectly) repaid by the Developers to the Settlor. In fact, each time the Settlor made a cash payment to the Developers to acquire a Timeshare Week, that cash was repaid to the Settlor within approximately 60 days of the date of the payment in question.

19. In each of the Taxation Years, the Settlor transferred all of the Timeshare Weeks that he had purchased, subject to the applicable Liens, to the Athletic Trust for no consideration.

B. Distribution and Donation of the Timeshare Weeks

20. In accordance with the terms of the Athletic Trust, in each Taxation Year the trustee was to distribute (and did in fact distribute) the Timeshare Weeks, subject to the applicable Liens, to individuals who indicated a willingness to support Canadian amateur athletics (the "**Beneficiaries**").

21. Lipson and the other Class Members were all Beneficiaries of the Athletic Trust.

22. According to the Legal Opinions, it ~~It~~ was expected (but not required) that the Beneficiaries would then donate the Timeshare Weeks, subject to the applicable Liens, to certain RCAAAs, along with an amount of cash that was sufficient to satisfy the applicable Liens. In return, the RCAAAs would issue two receipts to each Beneficiary in respect of his or her donations in each Taxation Year:

(a) a receipt in the amount of the cash donation made by the Beneficiary to allow the RCAAA to discharge the Liens registered against the Timeshare Weeks (*i.e.*, $4,600 to $9,700 per Timeshare Week); and

(b) a receipt in the amount of the appraised fair market value of the donated Timeshare Weeks, as evidenced by two independent

valuations, less the amount of the Liens, (*i.e.*, $8,575 to $18,900 per Timeshare Week).

C. Re-Sale of the Timeshare Weeks and the Put Option

23. As part of the Timeshare Program, a company called Canadian Athletic Advisors Ltd. ("**CAA**") agreed to represent the RCAAAs in the re-marketing and sale of the Timeshare Weeks donated to the RCAAAs by the Beneficiaries. The RCAAAs entered into Timeshare Marketing and Re-Sale Agreements (the "**Re-Marketing Agreements**") with CAA whereby (unbeknownst to Lipson and the other Class Members at all material times) CAA would be entitled to receive a commission equal to 5% of the revenue from the sale of the Timeshare Weeks, net of expenses.

24. According to the Legal Opinions, CAA also agreed to enter into marketing agreements with the Developers to market the donated Timeshare Weeks to members of the public (the "**Option Agreements**").

25. Unbeknownst to Lipson and the other Class Members at all material times (and not disclosed in any of the Legal Opinions), under the Option Agreements, the Developers were granted the exclusive right and option to purchase the Timeshare Weeks donated by the Beneficiaries to the RCAAAs under the Timeshare Program and, more importantly, CAA had the option to require the Developers to purchase the Timeshare Weeks from the RCAAAs by paying:

(a) the "**Purchase Price**" being the appraised fair market value of a Timeshare Week less a marketing allowance equal to 60% of the appraised fair market value; or

(b) if the Developers purchased 100 or more Timeshare Weeks, the "**Discounted Purchase Price**" of US$1,000 for a one bedroom Timeshare Week and US$1,100 for a two bedroom Timeshare Week (the "**Put Option**").

26. Further, unbeknownst to Lipson and the other Class Members at all material times (and not disclosed in any of the Legal Opinions), CAA always intended to exercise the Put Option and/or did, in fact, exercise the Put Option in respect of all of the Timeshare Weeks donated to the RCAAAs by Lipson and the other Class Members. As a result, the Developers always paid the Discounted Purchase Price for the Timeshare Weeks. Accordingly, for each Timeshare Week donated to an RCAAA by Lipson or another Class Member, the RCAAA would receive (and did in fact receive) only US$1,000 or US$1,100 per Timeshare Week, less the 5% commission payable to CAA under the Re-Marketing Agreements. However, Lipson (or the other Class Member) received charitable receipts for both the cash donated by them to discharge the Liens **plus** the full appraised fair market value of the donated Timeshare Weeks (less the amount of the Liens); in total, between $13,275 and $28,600.

D. The Cassels Brock Legal Opinions

27. Starting in or about the spring of 2000~~ October 2000, CAA retained~~, Cassels Brock was retained to prepare legal opinions (previously defined as the "**Legal Opinions**") regarding the Canadian federal income tax consequences of making donations under the Timeshare Program. More particularly, Cassels Brock was retained to prepare the Legal Opinions in order to advise prospective

Beneficiaries, including Lipson and the other Class Members, and/or their advisors that such donations would entitle Beneficiaries to claim and receive the tax credits under the *Income Tax Act* advertised in the promotional materials relating to the Timeshare Program.

28. Those promotional materials promised "attractive income tax benefits", including an approximately 30% return on the cash donated by the Class Members based on the donation receipts they would receive from RCAAAs (as described in paragraphs 23 and 27, above).

28A. At or about the spring of 2000 or thereafter, Cassels Brock was also retained by the Stevens to provide advice on the structure, design and operation of the Program and advice on the documentation relating to the Program. Cassels Brock did not disclose to the Class Members that it had been retained previously by the designers and promoters of the Program or that it had provided the foregoing advice in respect of the Program itself. Cassels Brock also failed to disclose that it was taking instructions, direction and revisions in respect of the Legal Opinions from, and vetting the Legal Opinions through, both the Stevens and representatives of, or individuals with a direct or family interest in, the Master Marketing Agent (Tuscany Marketing Services). In the circumstances, as noted above, Cassels Brock had an undisclosed joint retainer, divided duties, and conflicts of interest.

29. Cassels Brock prepared a Legal Opinion every time the Athletic Trust made Timeshare Weeks available to the Beneficiaries, including Lipson and the other Class Members. In total, over the life of the Timeshare Program, Cassels Brock prepared at least six Legal Opinions, dated October 6, 2000, May 18, 2001,

September 7, 2001, May 13, 2002, November 8, 2002 and April 8, 2003, respectively.

30. Cassels Brock knew or ought to have known that the existence of a favourable tax opinion was prerequisite to: (a) the creation of the Timeshares Program; and (b) the successful marketing or promotion of the Timeshares Program to the public, including to financial advisors (who could in turn recommend or offer the Timeshares Program to their clients) and to the Class Members. As Cassels Brock knew or should have known, absent a favourable tax opinion, the Timeshares Program would not have been or could not have been made publicly available or successfully promoted.

31. Cassels Brock knew or ought to have known that potential donors, including Lipson and the other Class Members, would rely upon the Legal Opinions, including the existence, ~~and~~ favourable nature and independence of the Legal Opinions, in deciding whether to participate in the Timeshare Program in each Taxation Year.

32. In this regard, the promotional materials in respect of the Timeshare Program distributed by the Athletic Trust to the potential Beneficiaries, including Lipson and the other Class Members, and/or their advisors, referred to the fact that CAA had "retained Cassels Brock & Blackwell LLP to provide the legal opinion with respect to the tax consequences" of the Timeshare Program.

33. In addition, copies of the Legal Opinions were provided to Lipson and the other Class Members and/or their financial advisors as part of the marketing and

promotion of the Timeshare Program. Each of the Legal Opinions was expressly directed at potential Beneficiaries, including Lipson and the other Class Members:

> "**This opinion is specifically directed to potential donors** who are individuals and who acquire and hold the Timeshare Weeks as capital property." (emphasis added)

34. Five out of the six Legal Opinions (*i.e.*, the May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002 and April 8, 2003 Legal Opinions) also stated expressly what was implicit in the preceding statement, namely, that the Legal Opinions were intended to be and could be relied upon by potential donors, including Lipson and the other Class Members, and their agents and advisors, in deciding whether to participate in the Timeshare Program:

> "**This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion.** It may not be relied upon by any other person or for any other purpose, nor may it be quoted in whole or in part or its existence or contents otherwise referred to, without our prior written consent." (emphasis added)

35. In each of the Legal Opinions, Cassels Brock stated that Lipson and the other Class Members would obtain the tax benefits described in the promotional materials. Cassels Brock's ultimate conclusion, as set out in each of the Legal Opinions, was that:

> "**it is unlikely that the [CRA] could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries** who receive a distribution of the Timeshare Weeks from the [Athletic] Trust, and subsequently choose to make a voluntary and complete donation of some or all

> of their Timeshare Weeks to an RCAAA." (emphasis added)

36. In reaching this conclusion, Cassels Brock addressed the issue of valuation, the meaning of "gift" for income tax purposes, and the General Anti-Avoidance Rule ("**GAAR**").

(i) Valuation of the Timeshare Weeks

37. Cassels Brock acknowledged in each of the Legal Opinions that the valuation of the Timeshare Weeks donated by Lipson and the other Class Members would be "a very important factor" in determining whether they would obtain the tax benefits promised under the Timeshare Program:

> "[t]he valuation of any Timeshare Weeks to be donated by the Class A Beneficiaries will be **a very important factor** in determining whether the donations are accepted by the [CRA] at the amount receipted by the RCAAA. A valuation is particularly important in the case of a donation, because there is generally an absence of hard bargaining between the donor and the donee." (emphasis added)

38. In each of the Legal Opinions, however, Cassels Brock identified and considered only two factors as relevant to ensuring that the valuations used for the donations under the Timeshare Program would be defensible: (i) the qualifications and attributes of the selected valuators and (ii) whether CRA would take the position that the fair market value of the Timeshare Weeks should be reduced by the commission "that may have to be paid by the RCAAA in the course of disposing of the Timeshare Weeks".

39. Although each of the Legal Opinions refers to the Option Agreements (which Cassels Brock calls the "Marketing and Sales Agreement with PVIL"), and

although it is clear from the Legal Opinions that Cassels Brock was aware that "contemporaneous transactions in the timeshare market" would be relevant to the likelihood that CRA (and the courts) would accept the donations made by Lipson and the other Class Members in the amounts receipted by the RCAAAs, in **none** of the Legal Opinions did Cassels Brock:

(a) refer to the Put Option under the Option Agreements pursuant to which the Developers would reacquire the Timeshare Weeks from the RCAAAs for the Discounted Purchase Price of US$1,000 or US$1,100 per Timeshare Week;

(b) refer to the fact that CAA always intended to or, alternatively, always did, in fact, exercise the Put Option in respect of all of the Timeshare Weeks donated to the RCAAAs by Lipson and the other Class Members with the result that the Developers always paid the Discounted Purchase Price for the Timeshare Weeks;

(c) refer to, consider or explain to the Beneficiaries, including Lipson and the other Class Members, the importance of and the significant and material risk created by

(i) the Put Option, and

(ii) the fact that it was always intended to be and/or was, in fact, exercised in respect of **all** of the Timeshare Weeks donated to the RCAAAs (with the consequences described in paragraphs 39(d)(i) and (ii), below),

with respect to the defensibility of the valuations and the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;

(d) **refer to, consider or explain to the Beneficiaries, including Lipson and the other Class Members, the highly unfavourable optics, from CRA's or a court's perspective, of the Timeshare Program in light of the** Put Option and the fact that it was always intended to be and/or was, in fact, exercised in respect of **all** of the Timeshare Weeks donated to the RCAAAs. More particularly, Cassels Brock failed to consider or explain to the Beneficiaries, including Lipson and the other Class Members, the negative optics created by:

(i) the fact that the RCAAAs would and did, in fact, receive US$1,000 or US$1,100 per Timeshare Week, less the 5% commission payable to CAA, while Lipson and the other Class Members would and did, in fact, receive charitable receipts of between $13,275 and $28,600 for each Timeshare Week they donated to the RCAAAs; and

(ii) the fact that the RCAAAs paid substantially more to discharge the Liens on the Timeshare Weeks than they received for selling the Timeshare Weeks to the Developers. In particular, the RCAAAs paid between $4,600 and $9,700 per Timeshare Week to discharge the Liens, in circumstances where they knew or

ought to have known that they would (and did in fact) receive only US$1,000 or US$1,100 per Timeshare Week from the Developers, less the 5% commission payable to CAA;

(e) consider whether, upon reacquiring the Timeshare Weeks from the RCAAAs, the Developers ever sold the Timeshare Weeks to members of the general public or consider and explain to the Beneficiaries, including Lipson and the other Class Members, the implications of those actual sales, or lack thereof, for the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;

(f) consider any other "contemporaneous transactions in the timeshare market" or consider and explain to the Beneficiaries, including Lipson and the other Class Members, the implications of those transactions, or lack thereof, for the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs; and

(g) consider the substantial number of Timeshare Weeks that were being donated by Lipson and the other Class Members in each of the Taxation Years or consider and explain to Lipson and the other Class Members the effect the resulting market glut would have on the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs.

(ii) Meaning of "Gift"

40. In the Legal Opinions, Cassels Brock simply assumed that the Beneficiaries donating the Timeshare Weeks would acquire valid and unencumbered title to the Timeshare Weeks. On that basis, Cassels Brock concluded that the Beneficiaries would "have the requisite level of ownership to make a legally effective gift of the Timeshare Weeks". In **none** of the Legal Opinions did Cassels Brock address the possibility that CRA might deny all of the tax credits claimed by Lipson and the other Class Members in connection with the Timeshare Program on the ground that they lacked the required donative intent to make a gift to the RCAAAs and, instead, entered into a series of predetermined transactions merely to obtain a tax benefit.

(iii) GAAR

41. With respect to GAAR, Cassels Brock concluded, in relevant part, as follows in each of the Legal Opinions:

> "[W]e are of the opinion that **a good argument can be made that it cannot reasonably be said that there is a pre-ordained series of transactions that results in a misuse or abuse of the provisions of the Tax Act**.
>
> In our opinion, and based on the foregoing, a donation of the Timeshare Weeks in these circumstances **would not likely be successfully attacked under GAAR**." (emphasis added)

IV ~ LIPSON'S PARTICIPATION IN THE TIMESHARE PROGRAM

42. Starting in the fall of 2000, and at least once in each of the Taxation Years, the trustee of the Athletic Trust made Timeshare Weeks available for

distribution to potential donors. As noted above, in connection with each intended distribution, Cassels Brock prepared a Legal Opinion which was referred to in the promotional materials in respect of the Timeshare Program and was provided to potential donors, including Lipson and/or his advisors.

43. In reliance upon the Legal Opinions, Lipson decided to participate in the Timeshare Program in some or all of the Taxation Years. More particularly:

(a) Lipson decided to participate in the Timeshare Program and receive Timeshare Weeks pursuant to the distribution in the 2000 Taxation Year in reliance upon the October 6, 2000 Legal Opinion;

(b) Lipson decided to participate in the Timeshare Program and receive Timeshare Weeks pursuant to the distributions in the 2001 Taxation Year in reliance upon the May 18, 2001 Legal Opinion;

(c) Lipson decided to participate in the Timeshare Program and receive Timeshare Weeks pursuant to the distributions in the 2002 Taxation Year in reliance upon the May 13, 2002 Legal Opinion; and

(d) Lipson decided to participate in the Timeshare Program and receive Timeshare Weeks pursuant to the distribution in the 2003 Taxation Year in reliance upon the April 8, 2003 Legal Opinion.

44. In total, over the course of the Taxation Years, 276 Timeshare Weeks (with an aggregate appraised fair market value of approximately $2,342,580) were distributed by the Athletic Trust to Lipson who in turn donated them to RCAAAs. The

appraised fair market value of the Timeshare Weeks and the amount of the applicable Liens, as described in the Legal Opinions, are set out in **Schedule "A"** to this Claim.

45. Lipson subsequently filed personal income tax returns and claimed charitable tax credits based upon the tax receipts issued to him by the RCAAAs.

V ~ REASSESSMENTS BY CRA

A. Initial Reassessments Denying All Donation Tax Credits

46. Beginning in or about October 2004, CRA reassessed Lipson's charitable tax credit claims in each of the Taxation Years in connection with his donations under the Timeshare Program, denying the full amount of the tax credits claimed by Lipson in respect of **both** his cash donations and his Timeshare Week donations (based on the appraised fair market value of the Timeshare Weeks, less the value of the Liens) to the RCAAAs. As a result, Lipson was required to pay, as at February 10, 2008, approximately $697,535 in arrears interest.

(i) Valuation of the Timeshare Weeks

47. With respect to the issue of valuation, contrary to the Legal Opinions, CRA took the position that "the reported fair market value ... for each timeshare week is **significantly overstated**, and is therefore considered unacceptable for purposes of ... the [*Income Tax Act*]". (emphasis added)

48. In refusing to accept the donations in any amount, let alone the full amounts receipted by the RCAAAs, CRA placed heavy emphasis and reliance upon the Put Option, the existence and tax consequences of which are nowhere discussed or even mentioned in any of the Legal Opinions. It is also clear that the optics of the

Timeshare Program – which, again, are not even referred to, much less considered or explained, in any of the Legal Opinions – were viewed extremely unfavourably by CRA. CRA took the position that:

> "[i]n addition, **all the steps in the transaction**, whether [the Beneficiaries] donated in bulk or not, **were predetermined with the objective of having the [Developer] 'reacquire' the Timeshare Week(s) at US$1,000 – 1,100 per unit within a ten-year period and for the [Developer] and other 3rd parties to be in receipt of the [Beneficiaries'] cash via the RCAAA**. [...] The Timeshare Week(s) were only to be sold, individually or in bulk, at a price of between US$1,000 – US$1,100 to the [Developer]. **[The Beneficiaries'] donation of the Timeshare Week(s) and Cash was predetermined to benefit the RCAAA by only US$1,000 or US$1,100, within a ten-year period; therefore the fair market value of [the] donation is not in excess of US$1,000 – 1,100**". (emphasis added)

(ii) Meaning of "Gift"

49. With respect to the meaning of gift, contrary to the Legal Opinions, CRA took the position that the Beneficiaries "did not actually receive legal title to the Timeshare Week(s), and hence [they] did not pass legal title to the RCAAAs". In addition, it was CRA's position that there had been no gift at all because:

(a) Lipson and the other Class Members did not have the required donative intent to make a gift to the RCAAAs and, instead, entered into a series of predetermined transactions merely to obtain a tax benefit; and

(b) Lipson and the other Class Members received consideration for their donations in the form of, among other things, having Timeshare Weeks

distributed to them without cost through a predetermined series of transactions.

(iii) GAAR

50. Contrary to the Legal Opinions, which stated that "a good argument can be made that it cannot reasonably be said that there is a pre-ordained series of transactions", CRA took the position that the Timeshare Program was a "predetermined arrangement" pursuant to which the Timeshare Weeks, along with the cash, "would revert back to the [Developer]". CRA also referred to the donations made by Lipson and the other Class Members as "predetermined to benefit the RCAAA by only US$1,000 or US$1,100".

51. In response to these reassessments, Lipson and the other Class Members sought legal and accounting advice at significant personal expense, the particulars of which will be provided prior to the trial of this action. Lipson and the other Class Members also each filed Notices of Objection challenging their reassessments.

B. Litigation in the Tax Court of Canada

52. In January 2006, Victor Peters and Wayne Gregory, two Beneficiaries of the Athletic Trust, formally appealed their notices of reassessment by filing Notices of Appeal in the Tax Court of Canada. The Peters and Gregory appeals proceeded as test cases.

53. In response to the Notices of Appeal filed by Messrs. Peters and Gregory, CRA filed Replies wherein it took the position the appellants were not entitled to **any** of the tax credits claimed by them in connection with their donations

under the Timeshare Program for the reasons set out above (see paragraphs 47 to 50), among others.

54. In or about January 2008, CRA agreed to settle the test case litigation on the basis that Messrs. Peters and Gregory would be entitled to a tax credit for the cash portion of their donations to the RCAAAs under the Timeshare Program, but would not receive any tax credits for their donations of Timeshare Weeks. CRA extended this settlement offer to Lipson and the other Class Members.

55. Faced with the prospect that it was **at least** likely, if not certain – and not "unlikely" as Cassels Brock had represented in each of the Legal Opinions – that CRA would be successful in challenging the tax credits claimed by Lipson and the other Class Members in respect of **at least** their donations of Timeshare Weeks to the RCAAAs, Lipson accepted CRA's settlement offer.

56. Under the terms of the settlement that Lipson and other Class Members were forced to accept, Lipson and the Class Members remained liable for and were required to pay significant tax arrears, totalling in the millions of dollars.

VI ~ NEGLIGENCE AND NEGLIGENT MISREPRESENTATIONS

A. Professional Negligence of Cassels Brock

57. In the circumstances described herein, Cassels Brock owed Lipson and the other Class Members a duty to exercise the care and skill to be expected of a reasonably competent tax solicitor or tax specialist as well as a duty to identify, disclose and avoid any conflicts of interest, a duty of candour, a duty to disclose joint or other related retainers, and a duty to provide independent advice to the Class Members. At a minimum, ~~this~~ the duty to exercise care and skill required them to

provide Lipson and the other Class Members with carefully researched and drafted independent legal opinions which (i) fully considered and accurately explained "the tax consequences relating to a donation [of Timeshare Weeks] by individual Canadian resident taxpayers"; (ii) warned Lipson and the other Class Members of any material tax risks associated with participating in the Timeshare Program; and (iii) advised Lipson and the other Class Members that there was a real likelihood that the tax credits claimed by them under the Timeshare Program (or **at least** the portion of those credits relating to their donation of the Timeshare Weeks) would be successfully denied by CRA.

58. Cassels Brock failed to exercise the care and skill of a reasonably competent tax solicitor, and breached its duties to Lipson and the other Class Members, in rendering the Legal Opinions and concluding in each of the Legal Opinions that it was unlikely the CRA could successfully deny the tax credits claimed by Lipson and the other Class Members in connection with the Timeshare Program.

59. Cassels Brock also breached its duties owed to Lipson and the other Class Members by, among other things:

(a) failing in each of the Legal Opinions to refer to the Put Option under the Option Agreements pursuant to which the Developers would reacquire the Timeshare Weeks from the RCAAAs for the Discounted Purchase Price of US$1,000 or US$1,100 per Timeshare Week;

(b) failing in each of the Legal Opinions to refer to the fact that CAA always intended to exercise the Put Option and/or did, in fact, exercise the Put

Option in respect of all of the Timeshare Weeks donated to the RCAAAs by Lipson and the other Class Members, with the result that the Developers always paid the Discounted Purchase Price for the Timeshare Weeks;

(c) failing in each of the Legal Opinions to refer to, consider or explain to prospective Beneficiaries, including Lipson and the other Class Members, the importance of and the significant and material risk created by

(i) the Put Option, and

(ii) the fact that it was always intended to be and/or was, in fact, exercised in respect of **all** of the Timeshare Weeks donated to the RCAAAs (with the consequences described in paragraphs 59(d)(i) and (ii), below),

with respect to the defensibility of the valuations and the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;

(d) failing in each of the Legal Opinions to refer to, consider or explain to the Beneficiaries, including Lipson and the other Class Members, the highly unfavourable optics, from CRA's or a court's perspective, of the Timeshare Program in light of the Put Option and the fact that it was always intended to be and/or was, in fact, exercised in respect of **all** of

the Timeshare Weeks donated to the RCAAAs. More particularly, Cassels Brock failed to consider or explain to the Beneficiaries, including Lipson and the other Class Members, the negative optics created by:

(i) the fact that the RCAAAs would and, in fact, did receive US$1,000 or US$1,100 per Timeshare Week, less the 5% commission payable to CAA, while Lipson and the other Class Members would and, in fact, did receive charitable receipts of between $13,275 and $28,600 for each Timeshare Week they donated to the RCAAAs; and

(ii) the fact that the RCAAAs paid substantially more to discharge the Liens on the Timeshare Weeks than they received for selling the Timeshare Weeks to the Developers. In particular, the RCAAAs paid between $4,600 and $9,700 per Timeshare Week to discharge the Liens, in circumstances where they knew or ought to have known that they would (and did in fact) receive only US$1,000 or US$1,100 per Timeshare Week from the Developers, less the 5% commission payable to CAA;

(e) failing in each of the Legal Opinions to consider whether upon reacquiring the Timeshare Weeks from the RCAAAs the Developers sold the Timeshare Weeks to members of the general public or to consider and explain to the Beneficiaries, including Lipson and the

other Class Members, the implications of those actual sales, or lack thereof, for the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;

(f) failing in each of the Legal Opinions to consider any other "contemporaneous transactions in the timeshare market" or to consider and explain to the Beneficiaries, including Lipson and the other Class Members, the implications of those transactions, or lack thereof, for the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;

(g) failing in each of the Legal Opinions to consider the substantial number of Timeshare Weeks that were being donated by Lipson and the other Class Members in each of the Taxation Years or consider and explain to Lipson and the other Class Members the effect the resulting market glut would have on the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;

(h) failing in each of the Legal Opinions to consider or explain to the Beneficiaries, including Lipson and the other Class Members, that CRA might deny all of the tax credits claimed by Lipson and the other Class Members in connection with the Timeshare Program on the ground that they lacked the required donative intent to make a gift to the RCAAAs because they had entered into a series of predetermined transactions merely to obtain a tax benefit; ~~and~~

(i) failing to disclose that the Stevens were acting, to the purported understanding of Cassels Brock, as representatives of CAA (the company acting as agent for the RCAAAs), with the result that the promoters were controlling the entire Timeshare Program up to the very point of purportedly controlling CAA thus significantly strengthening the optics and position that the Program was a series of predetermined transactions as aforesaid; and

(j) in permitting Cassels Brock's name and reputation to be used by the Athletic Trust in promoting and legitimizing the Timeshare Program in circumstances where Cassels Brock failed to exercise the requisite reasonable care and skill in assessing the income tax consequences relating to donations under the Timeshare Program.

60. In all of the circumstances, Cassels Brock ought to have known that there was a real likelihood that the tax credits claimed by Lipson and the other Class Members (or **at least** the portion of those credits relating to their donation of the Timeshare Weeks) under the Timeshare Program would be successfully denied by CRA. In this regard, Cassels Brock ought to have known that CRA (and a court) would likely conclude that the Discounted Purchase Price payable pursuant to the Put Option (and not the appraised fair market value) represented the fair market value of the Timeshare Weeks.

61. Further, and in any event, Cassels Brock owed a duty to raise and properly address in the Legal Opinions each of the issues identified in paragraph

59(a) to (i), above, including all of their associated risks. Cassels Brock breached that duty.

61A. The Plaintiff repeats and relies upon the allegations in paragraphs 7A and 7D above, and the breaches of duty referred to in subparagraphs 8(a) through (e), inclusive, above.

62. But for the above breaches of duty by Cassels Brock, the developers and promoters of the Timeshare Program would not have created and made the Timeshare Program available to the public, and could not have successfully promoted the Program (and but for which creation and promotion, no Class Member could have participated in the Program). Further, at all material times, Lipson and the other Class Members relied upon the Legal Opinions, including the existence and favourable nature of the Legal Opinions, in deciding to participate in the Timeshare Program.

B. Negligent Misrepresentations of Cassels Brock

63. In the circumstances described herein, Cassels Brock owed a duty of care to Lipson and the other Class Members based on the special relationship between the parties. Cassels Brock breached its duty of care owed to Lipson and the other Class Members and failed to exercise the care and skill of a reasonably competent tax solicitor in making the following misrepresentation in each of the Legal Opinions:

> "Based on and subject to the foregoing review, **in our opinion it is unlikely that the [CRA] could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries** who receive a distribution

> of the Timeshare Weeks from the [Athletic] Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAAA." (emphasis added)

64. For the reasons set out above, this representation was untrue, inaccurate and/or misleading.

64A. The Plaintiff repeats and relies upon the allegations in paragraphs 7A through 7D, inclusive above, and the failures to disclose as set out in subparagraphs 8(d) and (e) above.

65. Cassels Brock is also liable to Lipson and the other Class Members in negligent misrepresentation by virtue of the material non-disclosures pleaded in paragraph 59(a) to (h), above. Cassels Brock failed to exercise reasonable care and skill in making those material non-disclosures which rendered the Legal Opinions inaccurate, misleading and/or incorrect.

66. At all material times, Lipson and the other Class Members relied upon the defendants' negligent misrepresentations, both express and implied, in deciding to participate in the Timeshare Program.

VII ~ DAMAGES

67. As the result of the negligence and negligent misrepresentations of Cassels Brock as described herein, Lipson and the other Class Members have each suffered foreseeable harm, including without limitation the following:

(a) significant liabilities, including, but not limited to, substantial interest arrears under federal and provincial income tax legislation;

(b) damages by virtue of paying more cash into the Program than was offset by the effect of the tax credits subsequently permitted;

(c) loss of the opportunity to make other donations and/or participate in other opportunities; and

(d) special damages, including accounting and other professional fees that have been or will be incurred in order to respond to and defend against CRA's reassessments of Lipson and the other Class Members arising from their participation in the Timeshare Program.

68. Lipson pleads and relies upon the Class Proceedings Act, 1992. Lipson proposes that this action be tried at Toronto, Ontario.

April 15, 2009

ROY ELLIOTT O'CONNOR LLP
Barristers
2300 - 200 Front Street West
Toronto, ON M5V 3K2

Peter L. Roy (LSUC #16132O)
J. Adam Dewar (LSUC #46591J)
Tel: (416) 362-1989
Fax: (416) 362-6204

Lawyers for the Plaintiff

SCHEDULE "A"

VALUE OF LIENS AND APPRAISED FAIR MARKET VALUE OF THE TIMESHARE WEEKS DONATED BY LIPSON AND THE OTHER CLASS MEMBERS (AS DESCRIBED IN THE LEGAL OPINIONS OF CASSELS BROCK)

2000 – Sandyport

Type	Appraised Fair Market Value	Lien
30-year leasehold biennial timeshare week at Sandyport	$13,275 US$9,000	$4,700 US$3,200

2001 – Sandyport

Type	Appraised Fair Market Value	Lien
One-bedroom 30-year leasehold biennial timeshare week at Sandyport	$13,500 US$9,000	$4,600 US$3,067
Two-bedroom 30-year leasehold biennial timeshare week at Sandyport	$17,250 US$11,500	$5,525 US$3,700

2002 – Sandyport

Type	Appraised Fair Market Value	Lien
Two-bedroom 30-year leasehold biennial timeshare week at Sandyport	$18,055 US$11,500	$5,700 US$3,700

2002 – Alexandra

Type	Appraised Fair Market Value	Lien
One-bedroom 75-year leasehold biennial timeshare week at Alexandra	$18,600	$6,300
Two-bedroom 75-year leasehold biennial timeshare week at Alexandra	$28,600	$9,700

2003 – Alexandra

Type	Appraised Fair Market Value	Lien
One-bedroom 75-year leasehold biennial timeshare week at Alexandra	$18,370	$5,700
Two-bedroom 75-year leasehold biennial timeshare week at Alexandra	$28,200	$8,750

JEFFREY LIPSON

Plaintiff

- and -

CASSELS BROCK BLACKWELL LLP

Defendant

Court File No. CV-09-376511 -00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

AMENDED fresh AS amended STATEMENT OF CLAIM

ROY O'CONNOR LLP
Barristers
200 Front Street West
Suite 2300
Toronto, Ontario
M5V 3K2

David F. O'Connor (LSUC# 33411E)
J. Adam Dewar (LSUC# 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204

Lawyers for the Plaintiff, Jeffrey Lipson

This is Exhibit "F" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP and LORNE H. SALTMAN

Defendants

FRESH AS AMENDED STATEMENT OF DEFENCE

1. This Fresh as Amended Statement of Defence is filed in response to the plaintiff's Amended Fresh as Amended Statement of Claim, issued pursuant to the direction of this Honourable Court on February 11, 2016.

2. The defendant, Cassels Brock & Blackwell LLP ("Cassels Brock"), admits the allegations contained in paragraphs 11-12, 15-17, 19 and 42 of the Amended Fresh as Amended Statement of Claim.

3. Cassels Brock has no knowledge in respect of the allegations contained in paragraphs 5, 6, 9, 10, 21, 28, 29 and 43-56 of the Amended Fresh as Amended Statement of Claim.

4. Cassels Brock denies each and every other allegation in the Amended Fresh as Amended Statement of Claim, except as expressly admitted below, and puts the plaintiff to the strict proof thereof.

APR 14 2016
AMENDED THIS ____ PURSUANT TO
MODIFIÉ CE ____ CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 (
☑ THE ORDER OF Justice Perell
L'ORDONNANCE DU
DATED / FAIT LE February 11, 2016
REGISTRAR
SUPERIOR COURT OF JUSTICE
GREFFIER
COUR SUPÉRIEURE OF JUSTICE

4. Cassels Brock denies each and every other allegation in the Amended Fresh as Amended Statement of Claim, except as expressly admitted below, and puts the plaintiff to the strict proof thereof.

The Common Issues

5. This proceeding has now been certified as a class proceeding, with the following certified common issues:

> 1. Did the Defendant owe the Class a duty of care (in, among other things, negligence or negligent misrepresentation) in the preparation of the Legal Opinions?
>
> 2. If the answer to common issue 1 is "yes", what is the content of the standard(s) of care?
>
> 3. Did the Defendant breach the foregoing standard(s) of care? If so, how?
>
> 4. If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?
>
> 5. If after an individual issues trial, the Defendant were found liable to a Class Member for negligent misrepresentation or negligence, what types or heads of damages, if any, would the Class Members be entitled to?
>
> 6. If after an individual issues trial, the defendant were found liable to a Class member for negligent misrepresentation or negligence what remedy or remedies, if any, would the Class Members be entitled to?

6. The plaintiff has amended his Statement of Claim to purport to add certain other relief.

7. The additional allegations are:

(a) The legal opinions of Cassels Brock should have been independent. How or why is not pleaded;

(b) The legal opinions were not independent;

(c) The plaintiff relied somehow on the independence of the legal opinions, despite having not read them;

(d) Cassels Brock should have disclosed in the opinions that it had done work for the promoters previously and/or that Cassels Brock took certain instructions from the promoters;

(e) In these circumstances, Cassels Brock had:

(i) an undisclosed joint retainer;

(ii) divided duties of loyalty and judgment; and

(iii) conflicts of interest.

8. The allegations do not fit the facts in this case. There was no solicitor-client relationship and none can be imputed. These issues are not capable of certification and do not withstand scrutiny.

9. Despite specifically arguing that damages should not form part of the common issues trial, the plaintiff has also amended his damages pleading.

Overview

10. The plaintiff, a sophisticated businessman, participated in a charitable donation program over the course of four years, claiming $2,342,580 in income tax deductions.

11. The plaintiff's claim against Cassels Brock must fail:

(a) Cassels Brock did not owe a duty of care to the plaintiff or the Class;

(b) If Cassels Brock did owe a duty of care to the plaintiff or any of the Class Members, which is denied, Cassels Brock provided the legal opinions in accordance with the standard of a reasonably competent lawyer in similar circumstances at the time the opinions were given;

(c) Cassels Brock was not in a conflict of interest when it provided the legal opinions;

(d) Cassels Brock did not owe a duty of loyalty to the plaintiff or the Class Members. No solicitor-client relationship was created by virtue of the legal opinions or otherwise;

(e) Whether Cassels Brock owed a duty of loyalty to the Class Members is an individual issue, which has not been and should not be certified;

(f) The plaintiff was advised to and did in fact seek independent legal and accounting advice with respect to participation in the tax program;

(g) Other Class Members were similarly advised to seek independent legal and accounting advice with respect to participation in the tax program. The advice sought and obtained by Class Members is an individual issue;

(h) If Cassels Brock did have a duty of loyalty to the plaintiff or any of the Class Members, which is denied, Cassels Brock did not violate that duty;

(i) Cassels Brock did not have an improperly undisclosed joint retainer when it provided the legal opinions. Cassels Brock was not retained (actually or impliedly in the circumstances) by the plaintiff or any of the Class Members. No solicitor-client relationship was created by virtue of the legal opinions;

(j) Cassels Brock did not have any direct contact with the plaintiff. In fact, the plaintiff did not even read the legal opinions;

(k) Whether a solicitor-client relationship was created between Cassels Brock and the other Class Members is an individual issue, which has not been and should not be certified;

(l) Cassels Brock acted appropriately when it took instructions from Stephen Elliott and Steven Mintz and/or any companies controlled by them ("Elliott/Mintz") in respect of the legal opinions;

(m) Cassels Brock did not fail to make any disclosure it was required to make in the legal opinions;

(n) It was not reasonable for the plaintiff or any of the Class Members (if they did) to impute a duty of independence to Cassels Brock in providing the legal opinions;

(o) Whether the Class Members did or could impute a duty of independence to Cassels Brock is an individual issue, which has not been and should not be certified;

(p) The plaintiff has improperly applied the strategic use of hindsight in framing his action and the standard of care, following a re-assessment by the Canada Revenue Agency ("CRA") and several additional years of relevant jurisprudence, as well as his own particular circumstances;

(q) The plaintiff pleaded in his original Statement of Claim that he had read and relied on the legal opinions and has now attempted to withdraw his admission that this is a reliance based claim centred on the language of the legal opinions. The plaintiff withdrew his admission that he had relied on the legal opinions in the original Statement of Claim when the pleading was amended;

(r) Whether or not the other Class Members relied upon the legal opinions and the circumstances of that reliance (including obtaining other legal advice) are individual issues going to the core of this claim;

(s) Neither the plaintiff nor any of the Class Members have suffered any loss or damage attributable to any actionable act or omission of Cassels Brock, or any duty owed to them by Cassels Brock. Any loss resulting from the CRA's re-assessment is a risk expressly contemplated in the legal opinions;

(t) Any damages suffered by any of the Class Members, which is denied, is an individual issue. Damages have not been certified as a common issue for trial, although heads of damages and types of remedies have been certified;

(u) The plaintiff failed to mitigate any damages suffered. The plaintiff accepted a settlement offer from the CRA in the test case in this matter. Therefore, there has been no decision by the Tax Court of Canada on the charitable donation program at issue; and

(v) Whether the other Class Members failed to mitigate any damages suffered in an individual issue.

12. The claim is misperceived, for the following reasons:

(a) Cassels Brock provided legal opinions which were the application of its professional judgment to an assumed set of facts;

(b) The legal opinions are not representations or misrepresentations as to fact and are not actionable as such;

(c) The legal opinions can only have legal significance within the full context of their language and words, including the language which makes it clear that no guarantees are given as to the treatment which the CRA will ultimately give to the claimed charitable donations; and

(d) The plaintiff seeks to be in a better position than he would have been if he had actually read the opinion – claiming that the opinion was negligently rendered, but attempting to avoid its very language, assumptions, limitations and cautions,

This is legally and, from a common sense point of view, simply wrong.

The Parties

13. Cassels Brock is a full service law firm carrying on business in Toronto as a limited liability partnership.

14. The plaintiff, Jeffrey Lipson ("Lipson"), is retired and living in Toronto. Until 2007 and at all relevant times, Lipson was involved in the real estate investment business. Lipson:

(a) is an active and sophisticated businessman and investor;

(b) ran his family retail business, T. Lipson & Sons for most of his career;

(c) after that business was sold, became a real estate investor;

(d) well understands what a legal opinion is and its significance;

(e) has participated in various strategies to reduce or eliminate income tax and other taxes over the years, recognizing the risks attendant upon them;

(f) obtained legal advice from the Third Party the late Ronald Farano of Gardiner Roberts LLP in respect of the charitable donation program, which advice supported the Cassels Brock legal opinions.

The Charitable Donation Program

15. The description of the charitable donation program contained at paragraphs 13-25 of the Amended Fresh as Amended Statement of Claim is, in a general way, accurate, although contains argument and some mischaracterizations, as set out below. Cassels Brock will rely on the underlying documentation of the program for its true meaning and effect.

16. The charitable donation program was structured as a trust. Canadian residents could apply to become beneficiaries of the trust if they demonstrated past charitable donations and a desire to assist amateur athletics in Canada. The trustee of the trust had the discretion, but was not obliged, to distribute timeshare weeks in certain vacation properties acquired by the trust to qualified beneficiaries. The trust acquired the timeshare weeks subject to a vendor take-back mortgage.

17. A beneficiary was then requested, but not required or compelled, to make a donation to a registered Canadian amateur athletic association ("RCAAA") participating in the program. The donation consisted of cash and the timeshare weeks.

18. The cash portion of the donation was used by the RCAAA to discharge the vendor take-back mortgage on the time-share property.

19. A beneficiary making such a contribution to the RCAAA received a charitable donation receipt from the RCAAA for the cash portion of the contribution and for the fair market value of the timeshare weeks, less the amount of the vendor take-back mortgage.

20. In some instances, the beneficiaries did not donate the timeshare weeks they acquired, but either held them or otherwise disposed of them.

21. The program was marketed to potential participants through various channels and agents, including but not limited to Canadian Athletic Advisors ("CAA" or the "Promoter") and various accountants and lawyers. In some instances, in addition to reviewing the material available, agents and/or potential participants contacted the Promoter of the program and others.

22. Contrary to what is pleaded at paragraph 26 of the Amended Fresh as Amended Statement of Claim, CAA did not always intend to exercise the put option, which was at its discretion.

23. The various agents conducted due diligence to the levels which each, and their clients, including the plaintiff, thought reasonable.

24. One agent obtained a legal opinion of the late Ronald Farano, a senior respected tax lawyer in Toronto, supporting Cassels Brock's legal opinions. The plaintiff was introduced to the program by that agent and received and read, or ought to have read, that supportive opinion and other materials obtained by that agent in the course of its due diligence.

25. Other Class Members sought their own legal advice.

26. The plaintiff obtained various opinions from Thorsteinssons LLP following re-assessment by CRA, opinions which confirm that the Cassels Brock legal opinions reflected the law at the time that they were rendered.

The Opinion Letters

27. On each of October 6, 2000, May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002 and April 8, 2003, Cassels Brock provided the CAA with a legal opinion

regarding "...the Canadian Federal income tax consequences relating to the donation of [certain leasehold vacation properties] by individual Canadian resident taxpayers."

28. Cassels Brock prepared certain legal documents and reviewed others. Cassels Brock provided some advice to Elliott/Mintz as representatives of CAA with respect to those documents and the structure that they reflected.

29. Each of the legal opinions (together, the "Opinion Letters") set out the proposed transactions in respect of which each opinion was given, as well as the factual and legal assumptions upon which each opinion was based.

30. Each Opinion Letter stated at paragraph 2: "Our comments are based on the facts and assumptions expressed below", followed by a detailed description of the relevant facts as understood by Cassels Brock.

31. Cassels Brock set out in the Opinion Letters those facts that were relevant to its opinion. The Opinion Letters did not, and did not purport to, set out in detail every aspect of the charitable donation program. The plaintiff has alleged that the Cassels Brock improperly failed to include in the Opinions Letters details of a put option, which operated outside of the charitable donation program.

32. The put option was not a relevant consideration for the purposes of the Opinions Letters. CRA mischaracterized the put option and improperly relied upon it to support its decision to deny the beneficiaries of the trust tax credits for the fair market value of the timeshare weeks. With the benefit of hindsight, the plaintiff has adopted the same flawed argument.

33. The existence of the put option did not affect the fair market value of the timeshare weeks for the purposes of the Opinion Letters. How the RCAAAs actually disposed of the timeshare weeks was not relevant to the valuation of the timeshare weeks in the hands of the beneficiaries for the purposes of the donation.

34. At page 10, the Opinion Letters state: "A valuation is particularly important in the case of a donation, because there is generally an absence of hard bargaining between the donor and the donee. It is generally accepted that fair market value means 'the highest price available estimated in terms of money which a willing seller may obtain for the property in an open and unrestricted market from a knowledgeable purchaser acting at arm's length.'"

35. The Opinion Letters made it clear that Cassels Brock did not express an opinion on fair market value of the timeshare weeks.

36. With respect to valuation, the Opinion Letters made clear that Cassels Brock had reviewed two valuations performed by "accredited appraisers familiar with the timeshare market."

37. The Opinion Letters go on to say that "although not free from doubt", Cassels Brock is of the opinion that the timeshare weeks would be valued by CRA at the appraised fair market value: "We base our opinion on the fact that the value of the donated Timeshare Weeks is dependent on what a third party would agree to pay at the time of the donation, and not on what the donee would subsequently receive as proceeds net of commission."

38. In any event, CRA was wrong in challenging the actual transactions in the way that it did.

39. Each Opinion Letter contained the following general comments, cautions and limitations, under the heading "General Comments":

(a) "This opinion is based on the current provisions of the [*Income Tax Act (Canada)*], the regulations thereunder, and our understanding of the current administrative practices of the CCRA";

(b) The Opinion Letters considered certain proposed amendments to the *Income Tax Act (Canada)*, but "[n]o assurances can be given that the proposed amendments will be enacted in the form proposed, or at all";

(c) "Except for the proposed amendments, this summary does not take into account or anticipate any changes in law, whether by legislative, administrative or judicial decision or action";

(d) "No advance tax ruling has been sought or obtained from the CCRA to confirm the tax consequences of any of the transactions described herein"; and

(e) The opinions expressed were based on certain factual assumptions and circumstances and "if these facts and circumstances turn out to be different from what we have understood, our opinion may be different, in which event this letter should not be relied upon".

40. The Opinion Letters set out clearly who could rely upon the opinions contained within them and under what circumstances: "[t]his opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purposes of the transactions contemplated in this opinion. It may not be relied upon by any other person or for any other

purpose, nor may it be quoted in whole or in part or its existence or contents otherwise referred to, without our prior written consent."

41. In conclusion, the Opinion Letters stated, subject to the assumptions and limitations contained therein, that "it was unlikely that the [CRA] could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class B Beneficiaries who receive a distribution of the Timeshare Weeks from the Trust, and subsequently chose to make a voluntary and complete donation of some or all of their Timeshare Weeks to and RCAAA."

42. This is very different from the plaintiff's characterization at paragraph 4 of the Amended Fresh as Amended Statement of Claim, wherein he claims that the Opinion Letters "advised the Class Members that donations made under the Timeshare Program would entitle the Class Members to the tax credits advertised by the Athletic Trust."

43. The plaintiff's reliance, if any, on the Opinion Letters without having read them or any of the limitations set out in paragraph 39 above was not reasonably contemplated by Cassels Brock. The plaintiff's mischaracterization of the Opinion Letters at paragraph 4 of the Fresh as Amended Statement of Claim demonstrates exactly the problem with improperly construing the opinions contained therein without reference to the actual language, assumptions and limitations of the Opinions Letters themselves and without authorization from Cassels Brock.

44. The only reasonable reliance in law that could be placed upon the Opinion Letters, and reasonable expectation of Cassels Brock, was a reading of them in their context, with their assumptions and limitations and in light of their cautionary language. Any other reliance is legally and factually unreasonable. No other reliance actually occurred.

45. Each of the other Class Members' reliance, if any and in what respect, on the Opinion Letters is an individual issue.

46. The Opinion Letters contain no assertion in respect of independence nor was one ever sought.

No Professional Negligence

(i) Cassels Brock Did Not Owe a Duty of Care to the Plaintiff

47. Cassels Brock did not owe the pleaded duty of care to the plaintiff.

48. The mere fact that the Opinion Letters were given cannot, and does not, give rise to a duty of care. The Opinion Letters on their face are the actual opinions expressed therein, including the qualifications and factual assumptions.

49. That an opinion existed, absent reference to what it says in its entirety, does not give rise to a duty of care.

50. Absent actual, and legally reasonable, reliance, the requisite foreseeability and proximity cannot be established.

51. Any duty of care cannot extend beyond those people whom Cassels Brock permitted to rely upon the opinions expressed in the Opinion Letters, as set out in paragraph 40 above. The plaintiff did not read the Opinion Letters. No duty of care can be owed to him or any other Class Member who did not read and rely upon the actual opinions, including the qualifications and factual assumptions, set out in the Opinion Letters.

52. There was, therefore, no reasonable foreseeability or legally sufficient proximity between Cassels Brock and the plaintiff.

53. Cassels Brock could not reasonably have foreseen or expected any reliance on the existence alone of the Opinion Letters, without regard to the opinions actually expressed in the Opinion Letters.

54. If the plaintiff had read the Opinion Letters, he could not have reasonably expected a guarantee or assurance that CRA would recognize as valid the charitable donation tax receipt. The Opinion Letters expressly stated that no such assurance could be, or was being, given.

55. The plaintiff could not reasonably have expected that Cassels Brock owed him a duty of care for his purely economic interests outside of the fair reading of a legal opinion within the context of its assumptions, limitations and cautions. Fairly read, the type of reliance asserted in the Statement of Claim is legally and factually unreasonable.

56. The question of whether any Class Members received, read or relied upon the Opinion Letters is a question of fact that is an individual issue.

(ii) If a Duty of Care Exists, Nature and Extent of Duty

57. The Statement of Claim fails to plead material facts to establish the nature or extent of the duty of care alleged to be owed by Cassels Brock, which is in any event denied.

58. If Cassels Brock owed any duty of care, it could be owed only in respect of the contents of the Opinion Letters.

59. If a duty is found to be owed, the nature and extent of that duty was to provide the Opinion Letters in accordance with the standard of a reasonably competent lawyer in similar circumstances at the time the opinion was given. Cassels Brock provided the opinions in accordance with that standard.

60. To the extent that Cassels Brock owed a duty of care, it was owed to the intended recipients of the Opinion Letters who actually read and relied upon them. To hold otherwise would expose Cassels Brock to indeterminate liability, in an indeterminate amount.

(iii) No Breach of Duty by Cassels Brock

61. Cassels Brock did not breach any possible duty owed by it to the plaintiff and the Class Members.

62. An opinion is not a guarantee that the conclusions expressed are correct. It amounts only to a statement of the opinion giver's professional judgment, subject to the assumptions made and qualifications expressed within it, at the time it is made. The Opinion Letters contained the opinion that CCRA was "unlikely to be able to successfully deny" the taxation credit claimed. That opinion was never tested by the plaintiff, as he and other members of the Class, settled with CCRA.

63. In providing the Opinion Letters, Cassels Brock exercised the degree of skill and diligence that a reasonably competent lawyer would have exercised in similar circumstances. This is demonstrated by other leading tax practitioners providing similar opinions, on similar analysis, in respect of this program and other charitable donation programs.

64. Among other things:

(a) Cassels Brock undertook adequate and proper investigation and consideration of the income tax consequences under the *Income Tax Act (Canada)* of an individual resident in Canada making a cash donation to a registered Canadian amateur athletic association in the facts and circumstances described in the Opinion Letters;

(b) Cassels Brock exercised due care and consideration in providing the Opinion Letters; and

(c) Cassels Brock properly and adequately disclosed in the Opinion Letters the assumptions, limitations, uncertainties and disclaimers appropriate in the circumstances.

65. The plaintiff's advisor retained Gardiner Roberts LLP and the late Ronald Farano to perform his own review and due diligence and to provide an opinion which was, in all of the circumstances, supportive of the Cassels Brock Opinion Letters. Based on that and the other due diligence individual to his advisor and his situation, the plaintiff participated in the program.

66. Whether other Class Members read, were told about and/or relied upon the opinion given by the late Ron Farano or any other lawyer is a question of fact and is a matter individual inquiry.

67. The plaintiff has employed the strategic use of hindsight in framing his action and the standard of care, following a re-assessment by CRA and several additional years of relevant jurisprudence, as well as his own particular circumstances.

68. The plaintiff was represented by Thorsteinssons LLP in respect of the challenge by the CRA. Thorsteinssons provided its analysis to the plaintiff and other Class Members periodically, including in a memorandum dated November 20, 2007.

69. In that memorandum, Thorsteinssons confirmed that the state of the law had changed since the Opinion Letters were rendered. The memorandum states in part:

> **When you made your donation to the RCAAA, the state of the law was such that , the DOJ's primary theory that there should be no relief even for the cash component would have been considered far-fetched. Even at the time the Tax Court appeals were commenced, we viewed it as very unlikely that such an argument would be successful.**
>
> **While we remain doubtful that the DOJ's argument would be accepted by a court, the DOJ is clearly emboldened by the hostile stance that the Tax Court has taken toward all "retail" tax programs. Since 2004, not one publicly marketed tax-motivated transaction subject to judicial scrutiny has been able to deliver the tax benefits claimed by the participants. The courts have used a variety of approaches to deny the tax benefits but have always found a way to rule against the taxpayers. When you made your decision to participate in the Program, this line of cases did not exist and many tax practitioners are surprised that the courts have strained so vigorously to deny the tax benefits. Nevertheless, the reality is that you are now facing a hostile judicial environment.**

70. As pleaded at paragraph 40 above, Cassels Brock denies that it delivered the Opinion Letters with any intention or knowledge that they would be used other than in accordance with their terms and content.

71. The Cassels Brock Opinion Letters fairly addressed, by way of the assumptions and considerations within it, the actual structure of the charitable donation program and the state of the law, fairly read, with respect to the elements constituting a gift in law, including donative intent.

72. The allegations at paragraph 62 of the Amended Fresh as Amended Statement of Claim as to what the developers and Promoter of the charitable donation program could have, or would have, done are:

(a) unsound in fact and law;

(b) speculative; and

(c) pleaded without particularity or substance.

No Negligent Misrepresentation

73. For the reasons pleaded above, Cassels Brock did not owe the plaintiff a duty of care. Whether Cassels Brock owed any of the Class Members a duty of care is a question of fact and is a matter of individual inquiry.

74. If Cassels Brock did owe the plaintiff or any of the Class Members a duty of care, which is denied, Cassels Brock exercised the requisite standard of care, namely, that of a reasonably competent lawyer in similar circumstances at the time the opinion was given.

75. The Opinion Letters do not contain any actionable material misrepresentations of fact. They clearly set out the assumptions upon which they were based. The documents read and considered by Cassels Brock are also set out in the Opinion Letters. Those background documents and certain other documents were available to the plaintiff or any other advisor, participant or potential participant on request. Certain advisors, participants and/or potential participants requested and were given access to those documents, including the plaintiff's advisor, Gerald Prenick.

76. Pursuant to the direction of this Honourable Court of July 27, 2011, the plaintiff was permitted to deliver an Amended Statement of Claim by which he withdrew his admission at paragraph 62 of his original Statement of Claim in which he pleaded that he had read and relied upon the legal opinions. That withdrawal was subject to the ability of Cassels Brock to plead the admission. The plaintiff admitted that this was a reliance based claim focused on the language of the Opinion Letters and that that was the basis of his claim. The plaintiff now retreats from that claim having admitted what it actually is, a claim rooted in individual reliance.

77. What additional information each of the Class Members had access to and relied upon is a question of fact and a matter of individual inquiry.

No Breach in Respect of Conflict of Interest, Joint Retainer, Candour or Independence

78. The plaintiff has amended his pleading a second time to assert claims not certified, nor should they be certified.

79. Cassels Brock did not owe the plaintiff, and did not breach, any duty of independence. loyalty or candour. Neither the plaintiff nor any Class Member was a client of Cassels Brock in respect of the Opinion Letters. Cassels Brock did not have any improperly undisclosed joint retainer or conflict of interest by virtue of having worked with Elliott/Mintz in the past and/or in taking instructions from them in respect of the Opinion Letters. Whether Cassels Brock could owe any Class Member a duty of independence, loyalty or candour, or had an improperly undisclosed joint retainer or conflict of interest, is a question of fact and is a matter of individual inquiry.

80. Cassels Brock did not represent in the Opinion Letters or otherwise to the plaintiff that it was independent and/or did not perform any other work for the Elliott/Mintz and/or that it was

not taking instructions in respect of the Tax Program and its preparation of the Opinion Letters. The plaintiff's pleading that Cassels Brock could and should have rendered an opinion on the Tax Program without instruction or consultation is unreasonable and unrealistic.

81. Cassels Brock did not have an obligation to disclose its prior relationship with Mintz/Elliott or that it was taking instructions from Mintz/Elliott in preparing the Opinion Letters.

82. Cassels Brock did not have a conflict of interest, undisclosed or otherwise.

83. There was no solicitor-client relationship between Cassels Brock and the plaintiff. A solicitor-client relationship was not created between Cassels Brock and the plaintiff by virtue of the Opinion Letters, particularly when the plaintiff chose not to read them. Cassels Brock denies that any solicitor-client relationship was created between Cassels Brock and any member of the Class by virtue of the Opinion Letters or otherwise. In any event, it is a question of fact and is a matter of individual inquiry.

84. Cassels Brock exercised the requisite standard of care, namely, that of a reasonably competent lawyer in similar circumstances at the time the opinion was given.

No Causation or Damages

85. Cassels Brock denies that any act or omission by it caused or contributed to the losses claimed by the plaintiff or any of the Class Members. Any damages claimed are, in any event, excessive and too remote to be recoverable against Cassels Brock.

86. The only act or omission alleged against Cassels Brock is the giving of the Opinion Letters. Absent actual and reasonable reliance upon the opinions expressed in the Opinion

Letters, there can be and there is no connection between the loss alleged and Cassels Brock's Opinion Letters.

87. Had the plaintiff or any of the Class Members read the Opinion Letters, they would have been adequately and properly advised. They would have understood that Cassels Brock was not providing any guarantee or assurance that CRA would accept the charitable tax receipt as valid and was not giving advice about whether or not to participate in the program.

No Loss

88. The plaintiff has suffered no loss. He received a charitable deduction for the cash portion of his contribution and subsequently a significant cash refund.

89. Any other charges levied by CRA to the plaintiff do not arise from, and are not causally connected with any alleged duty, breach of duty or other conduct of Cassels Brock.

Limitation Period

90. As admitted in the Fresh as Amended Statement of Claim at paragraph 46, CRA reassessed Mr. Lipson beginning in or about October 2004. By November 2004, CRA had reassessed Mr. Lipson for all years in which he claimed charitable deductions for his contributions to the RCAAAs.

91. Accordingly, this action is statute-barred pursuant to the *Limitations Act, 2002*, c. 24, Sched. B, as amended. The plaintiff knew or ought to have known of all claims asserted against Cassels Brock more than two years prior to the issuance of the Statement of Claim.

92. The Order of this Honourable Court dated February 11, 2016, allowing the Amended Fresh as Amended Statement of Claim and other pleadings provides:

5. THIS COURT DECLARES that nothing in this Order shall affect or impair the defendant's and third parties' pleading of, and reliance upon, the expiry of any applicable limitation period in the main action.

Contributory Negligence

93. If Cassels Brock was negligent, which is denied, the plaintiff and the Class Members were contributorily negligent to the full extent of any losses that may have been caused by any act or omission of Cassels Brock. The plaintiff:

(a) failed to read or review and consider the content and substance of the Opinion Letters;

(b) failed to make any or adequate inquiries to ensure they were fully informed of the content and substance of the Opinion Letters before participating in the program;

(c) if he did rely on the existence of the Opinion Letters, he did so unreasonably by not reading and considering the substance of the Opinion Letters and/or not making any or adequate inquiries about the nature and consequences of the opinions expressed in the Opinion Letters; and

(d) he agreed to settlement terms with the CRA, rather than pursuing a decision from the Tax Court of Canada regarding the propriety of his deductions, leading to the damages he now claims.

94. Each of these considerations is of a factual nature and would require individual inquiry of each of the Class Members.

95. The defendant pleads and relies upon the *Negligence Act*, R.S.O. 1990, c. N-1.

96. The defendant pleads and relies upon the *Class Proceedings Act*, R.S.O. 1992, c.6 and the *Courts of Justice Act*, R.S.O. 1990, c.C.43.

97. The defendant asks that this action be dismissed with costs.

April 13, 2016

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Shara N. Roy (49950H)
Tel: (416) 865-2942
Fax: (416) 865-3973
Email: sroy@litigate.com
Ian MacLeod (60511F)
Tel: (416) 865-2895
Fax: (416) 865-3701
Email: imacleod@litigate.com

Lawyers for the Defendant

TO: **ROY O'CONNOR LLP**
Barristers & Solicitors
200 Front Street West, 23rd Floor
P.O. Box #45
Toronto, ON M5V 3K2

David O'Connor
J. Adam Dewar
Tel: (416) 362-1989
Fax: (416) 362-6204

Lawyers for the Plaintiff

AND TO: **DENTONS CANADA LLP**
Barristers & Solicitors
Suite 400
Toronto-Dominion Centre
77 King Street West
Toronto, ON
M5K 0A1

Frank E.P. Bowman
Deepashikha Dutt
Tel: (416) 863-4511
Fax: (416) 863-4592

Lawyers for the Third Party,
Mintz & Partners

AND TO: **STIKEMAN ELLIOTT LLP**
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Alan D'Silva
Glenn Zacher
Tel: (416) 869-5500
Fax: (416) 947-0866

Lawyers for the Third Party,
Deloitte & Touche LLP

AND TO: **GLENN F. PLOUGHMAN**
620 Clancy Street
Ottawa, ON K1J 7T9

Tel: 1 (613) 745-2349

Third Party

AND TO: **SHELLEY SHIFMAN**
1210 Sheppard Avenue East, Suite 218
Toronto, ON M2K 1E3

Tel: (416) 491-6300
Fax: (416) 491-3975

Third Party

JEFFERY LIPSON Plaintiff	-and-	CASSELS BROCK & BLACKWELL LLP Defendant	-and-	MINTZ & PARTNERS et al. Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

FRESH AS AMENDED STATEMENT OF DEFENCE

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Shara N. Roy (49950H)
Tel: (416) 865-2942
Fax (416) 865-3973
Email: sroy@litigate.com
Ian MacLeod (60511F)
Tel: (416) 865-2895
Fax: (416) 865-3701
Email: imacleod@litigate.com

Lawyers for the Defendant

Court File No. CV-09-376511 CPA1

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP and LORNE H. SALTMAN

Defendants

- and -

MINTZ & PARTNERS LLP and DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, TMK FINANCIAL GROUP LTD., GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100, JOHN DOE LLP 1-100

Third Parties

Proceeding under the *Class Proceedings Act, 1991*

THIRD PARTY CLAIM

TO THE THIRD PARTY

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by way of a Third Party Claim in an action in this Court.

The action was commenced by the plaintiff against the defendant for the relief claimed in the Statement of Claim served with this Third Party Claim. The defendant has defended the action on the grounds set out in the Statement of Defence served with this Third Party Claim. The defendant's Claim against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS THIRD PARTY CLAIM, you or an Ontario lawyer acting for you must prepare a defence in Form 29B prescribed by the *Rules of Civil Procedure*, serve it on the lawyers for the other parties or, where a party does not have a lawyer, serve it on

the party, and file it, with proof of service, WITHIN TWENTY DAYS after this Third Party 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 third party 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 third party 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 third party defence.

YOU MAY ALSO DEFEND the action by the plaintiff against the defendant by serving and filing a Statement of Defence within the time for serving and filing your third party defence.

IF YOU FAIL TO DEFEND THIS THIRD PARTY CLAIM, 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.

IF YOU PAY THE AMOUNT OF THE THIRD PARTY CLAIM AGAINST YOU, and $0.00 for costs, within the time for serving and filing your third party defence, you may move to have the Third Party Claim dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the amount of the Third Party Claim and $400.00 for costs and have the costs assessed by the Court.

Date April 15, 2011 Issued by _____
Local Registrar

Address of
court office: 393 University Avenue, 10th Floor
Toronto, ON M5G 1E6

TO: MINTZ & PARTNERS LLP
1 Concorde Gate, Suite 200
Toronto, ON M3C 4G4

AND
TO: DELOITTE & TOUCHE LLP
2 Queen Street East, Suite 1200
Toronto, ON M5C 3G7

AND
TO: GLENN F. PLOUGHMAN
331 Somerset Street West
Ottawa, ON K2P 0J8

AND
TO: SHELLEY SHIFMAN
1210 Sheppard Avenue East
North York, ON M2K 1E3

AND
TO: PRENICK LANGER LLP
4711 Yonge Street, Suite 1105
Toronto, ON M2N 6K8

AND
TO: TMK FINANCIAL GROUP LTD.
172 Convoy Crescent
Maple, ON L6A 5H2

AND
TO: GARDINER ROBERTS LLP
40 King Street West, Suite 3100
Scotia Plaza
Toronto, ON M5H 3Y2

AND
TO: THE ESTATE OF RONALD J. FARANO, DECEASED

AND
TO: JOHN DOE 1-100

AND
TO: JOHN DOE INC. 1-100

AND
TO: JOHN DOE PARTNERSHIP 1-100

AND
TO: JOHN DOE LLP 1-100

CLAIM

1. The defendant, Cassels Brock & Blackwell LLP (the "defendant" or "Cassels Brock") claims against the third parties:

(a) contribution and indemnity for any amounts for which the defendant may be found to be responsible to the plaintiff;

(b) the costs of the main action, plus all applicable taxes;

(c) the costs of this Third Party Claim, plus all applicable taxes; and,

(d) such further and other relief as to this Honourable Court may seem just.

Introduction

2. The plaintiff in the main action claims against Cassels Brock that it was negligent in the preparation of certain opinion letters respecting a charitable donation program operated by an entity known as the Athletic Trust of Canada, involving the donation by individual participants of timeshare weeks, together with a cash donation (the "Timeshare Program").

3. Cassels Brock is a leading Canadian law firm based in Toronto, Ontario. Cassels Brock prepared certain opinion letters with respect to the Timeshare Program.

4. The plaintiff in the main action alleges that:

(a) the Cassels Brock opinion letters were negligently prepared as to whether donations made under the Timeshare Program would entitle participants to the full amount of tax credits as proposed by the Timeshare Program's promoters;

(b) The plaintiff and other participants in the Timeshare Program relied upon the Cassels Brock opinion letters in electing to participate in the Timeshare Program; and

(c) Cassels Brock failed to warn of the material risks associated with participation in the Timeshare Program.

5. The third parties are tax and/or financial and/or legal advisors, all of whom advised their respective clients, who are putative class members, with respect to the Timeshare Program.

6. The third parties received fees and/or other forms of compensation from the promoters of the Timeshare Program and/or from their respective clients in return for advising their respective clients to participate in the Timeshare Program.

7. Cassels Brock claims contribution and indemnity from the third parties for any amounts for which it may be found to be responsible in the main action.

The Third Parties

8. Mintz & Partners LLP ("Mintz") was until January 28, 2008 an accounting and professional services firm in Toronto, Ontario, that advised numerous clients with respect to the Timeshare Program. Deloitte & Touche LLP ("Deloitte") is a professional services firm and the Canadian member firm of Deloitte Touche Tohmatsu Limited. Mintz merged with Deloitte on January 28, 2008, and Deloitte is the successor entity to Mintz.

9. Glenn F. Ploughman is a financial advisor based in Ottawa, Ontario, who advised numerous clients with respect to the Timeshare Program. Mr. Ploughman holds himself out as

having "acquired and managed well over $100 million in investment assets and well over $50 million of real estate assets on behalf of his clients".

10. Shelley Shifman is a chartered accountant based in Toronto, Ontario, who advised numerous clients with respect to the Timeshare Program.

11. Prenick Langer LLP ("Prenick Langer") is a chartered accountancy firm based in Toronto, Ontario, that advised participants with respect to the Timeshare Program. Prenick Langer holds itself out as having "tax expertise" to "guide you through the taxation maze".

12. TMK Financial Group Ltd. is a financial advisory firm based in Toronto, Ontario, that advised numerous clients with respect to the Timeshare Program.

13. Gardiner Roberts LLP ("Gardiner Roberts") is a law firm based in Toronto, Ontario. Gardiner Roberts has a "tax and estate planning" practice group that, among other things, provides tax expertise to lawyers and accountants at other firms that do not have tax specialists. Gardiner Roberts provided tax advice to participants in the Timeshare Program, either directly or through their individual advisors.

14. Ronald J. Farano, deceased, was a senior tax partner with Gardiner Roberts until his death on May 20, 2010. Mr. Farano provided tax advice to participants in the Timeshare Program, either directly or through their individual advisors.

15. Prenick Langer retained Gardiner Roberts and Mr. Farano to provide a legal opinion to it, or its clients, for their benefit, as to whether donations made under the Timeshare Program would entitle participants to the tax credits proposed by the promoters.

16. John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, and John Doe LLP 1-100 are advisors or advisor entities that provided advice to participants in the Timeshare Program, and whose names are not presently known to the defendant. The title of proceedings will be amended to correct these misnomers once the actual names of these third parties can be ascertained.

The Third Party Claim

17. Cassels Brock denies that its opinions were negligently prepared or could, or did, wrongfully lead participants to make donations under the Timeshare Program.

18. Cassels Brock denies that it made misrepresentations as to fact relied upon by participants in participating in the Timeshare Program.

19. Cassels Brock denies that it failed to warn participants of risks of such participation.

20. If Cassels Brock has any liability to the plaintiff or other participants in the Timeshare Program, it seeks contribution and indemnity from the third parties who advised the participants, and upon whom the participants relied.

21. Each of the third parties owed fiduciary duties and duties of care to their respective clients, including the duty to exercise the care and skill expected of a professional tax and/or financial and/or legal advisor.

22. Each of the third parties expressed the opinion to their respective clients that donations made under the Timeshare Program would entitle participants to the tax credits proposed by the promoters.

23. Each of the third parties had duties to their respective clients in the exercise of their professional responsibilities which they breached by, among other things, failing to advise their clients of the possibility of reassessment by the Canada Revenue Agency ("CRA") and failing to make clear to their clients that any tax deductions claimed in connection with their participation in the Timeshare Program were not certain to be allowed by CRA.

24. Each of the third parties breached their duties to their respective clients in advising them to participate in the Timeshare Program without disclosing, or warning of, risks associated with such participation.

25. All or some of the third parties also breached their duties to their respective clients by failing to advise them that the third parties personally stood to profit from their clients' participation in the Timeshare Program, in the form of fees, commissions, or other forms of compensation.

26. The putative class members relied upon the advice and information provided to them by their respective tax and/or financial and/or legal advisors in deciding to participate in the Timeshare Program.

27. The putative class members would not have participated in the Timeshare Program had it not been for the statements, representations, and advice of their respective tax and/or financial and/or legal advisors.

28. To the extent that the putative class members have suffered any damages whatsoever as a result of their involvement in the Timeshare Program, their respective third party advisors are wholly responsible for such damages.

29. To the extent that Cassels Brock is found to be responsible for any damages suffered by the plaintiff class, it seeks contribution and indemnity from each class member's respective third party advisor(s) for the full amounts of such damages.

30. Cassels Brock reserves its right to amend its Third Party Claim to make further allegations upon receiving the productions of the Third Parties.

31. Cassels Brock asks that this Third Party Claim be tried at Toronto with the main action.

April 15, 2011

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Kristian Borg-Olivier (53041R)
Tel: (416) 865-2978
Fax: (416) 865-2860
Email: kborg-olivier@litigate.com

Lawyers for the Defendants

JEFFERY LIPSON
Plaintiff

-and-

CASSELS BROCK & BLACKWELL LLP et al.
Defendants

-and-

MINTZ & PARTNERS LLP et al.
Third Parties

Court File No. CV-09-376511 CP AL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

THIRD PARTY CLAIM

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Kristian Borg-Olivier (53041R)
Tel: (416) 865-2978
Fax (416) 865-2860
Email: kborg-olivier@litigate.com

Lawyers for the Defendants

Court File No. CV-09-376511-00CP A1

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP and LORNE H. SALTMAN

Defendants

- and -

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP,
GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP,
TMK FINANCIAL GROUP LTD., GARDINER ROBERTS LLP,
THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100,
JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and
JOHN DOE LLP 1-100

Third Parties

Proceeding under the *Class Proceedings Act, 1991*

AMENDED THIRD PARTY CLAIM

TO THE THIRD PARTY

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by way of a Third Party Claim in an action in this Court.

The action was commenced by the plaintiff against the defendant for the relief claimed in the Statement of Claim served with this Third Party Claim. The defendant has defended the action on the grounds set out in the Statement of Defence served with this Third Party Claim. The defendant's Claim against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS THIRD PARTY CLAIM, you or an Ontario lawyer acting for you must prepare a defence in Form 29B prescribed by the *Rules of Civil Procedure*, serve it on the lawyers for the other parties or, where a party does not have a lawyer, serve it on

AMENDED THIS / MODIFIÉ CE APR 14 2016 PURSUANT TO / CONFORMÉMENT À
☐ RULE/LA RÈGLE 26.02 (_____)
☑ THE ORDER OF / L'ORDONNANCE DU Justice Perell
DATED / FAIT LE February 11, 2016

REGISTRAR
SUPERIOR COURT OF JUSTICE
GREFFIER
COUR SUPÉRIEURE OF JUSTICE

the party, and file it, with proof of service, WITHIN TWENTY DAYS after this Third Party 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 third party 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 third party 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 third party defence.

YOU MAY ALSO DEFEND the action by the plaintiff against the defendant by serving and filing a Statement of Defence within the time for serving and filing your third party defence.

IF YOU FAIL TO DEFEND THIS THIRD PARTY CLAIM, 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.

IF YOU PAY THE AMOUNT OF THE THIRD PARTY CLAIM AGAINST YOU, and $0.00 for costs, within the time for serving and filing your third party defence, you may move to have the Third Party Claim dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the amount of the Third Party Claim and $400.00 for costs and have the costs assessed by the Court.

Issued Date April 15, 2011 Issued by "Oliana Palumbo"
Local Registrar

Address of court office: 393 University Avenue, 10th Floor
Toronto, ON M5G 1E6

AND TO: **DENTONS CANADA LLP**
Barristers & Solicitors
Suite 400
Toronto-Dominion Centre
77 King Street West
Toronto, ON
M5K 0A1

Frank E.P. Bowman
Deepashikha Dutt
Tel: (416) 863-4511
Fax: (416) 863-4592

Lawyers for the Third Party,
Mintz & Partners

AND TO: **STIKEMAN ELLIOTT LLP**
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Alan D'Silva
Glenn Zacher
Tel: (416) 869-5500
Fax: (416) 947-0866

Lawyers for the Third Party,
Deloitte & Touche LLP

AND TO: **GLENN F. PLOUGHMAN**
620 Clancy Street
Ottawa, ON K1J 7T9

Tel: 1 (613) 745-2349

Third Party

AND TO: **SHELLEY SHIFMAN**
1210 Sheppard Avenue East, Suite 218
Toronto, ON M2K 1E3

Tel: (416) 491-6300
Fax: (416) 491-3975

Third Party

AND TO: **BENNETT JONES LLP**
Barrister & Solicitor
One First Canadian Place, Suite 3400
P.O. Box 130
Toronto, ON
M5X 1A4

Jeffrey S. Leon (416) 777-7472
Ranjan K. Agarwal (416) 777-6503
Tel: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the Third Party,
Prenick Langer LLP

AND TO: **DEWART GLEASON LLP**
366 Adelaide Street West
Suite 102
Toronto, ON
M5V 1R9

Sean Dewart (416) 583-5755
Tel: (416) 971-8000
Fax: (416) 971-8001

Lawyers for the Third Parties,
Gardiner Roberts LLP and The Estate of Ronald J. Farano, Deceased

AND TO: **JOHN DOE 1-100**

Third Party

AND TO: **JOHN DOE INC. 1-100**

Third Party

AND TO: **JOHN DOE PARTNERSHIP 1-100**

Third Party

AND TO: **JOHN DOE LLP 1-100**

Third Party

CLAIM

1. The defendant, Cassels Brock & Blackwell LLP (the "defendant" or "Cassels Brock") claims against the third parties:

(a) contribution and indemnity for any amounts for which the defendant may be found to be responsible to the plaintiff;

(b) the costs of the main action, plus all applicable taxes;

(c) the costs of this Third Party Claim, plus all applicable taxes; and,

(d) such further and other relief as to this Honourable Court may seem just.

Introduction

2. The plaintiff in the main action claims against Cassels Brock that it was negligent in the preparation of certain opinion letters respecting a charitable donation program operated by an entity known as the Athletic Trust of Canada, involving the donation by individual participants of timeshare weeks, together with a cash donation (the "Timeshare Program").

3. Cassels Brock is a leading Canadian law firm based in Toronto, Ontario. Cassels Brock prepared certain opinion letters with respect to the Timeshare Program.

4. The plaintiff in the main action alleges that:

(a) the Cassels Brock opinion letters were negligently prepared as to whether donations made under the Timeshare Program would entitle participants to the full amount of tax credits as proposed by the Timeshare Program's promoters;

(b) The plaintiff and other participants in the Timeshare Program relied upon the Cassels Brock opinion letters in electing to participate in the Timeshare Program; ~~and~~

(c) Cassels Brock failed to warn of the material risks associated with participation in the Timeshare Program~~.~~; and

(d) Cassels Brock had an undisclosed conflict of interest and breached its duty of independence, loyalty and candour to the plaintiff.

5. The third parties are tax and/or financial and/or legal advisors, all of whom advised their respective clients, who are ~~putative~~ class members, with respect to the Timeshare Program.

6. The third parties received fees and/or other forms of compensation from the promoters of the Timeshare Program and/or from their respective clients in return for advising their respective clients ~~to~~ in respect of their participat~~e~~ion in the Timeshare Program.

7. Cassels Brock claims contribution and indemnity from the third parties for any amounts for which it may be found to be responsible in the main action.

The Third Parties

8. Mintz & Partners LLP ("Mintz & Partners") was until January 28, 2008 an accounting and professional services firm in Toronto, Ontario, that advised numerous clients with respect to the Timeshare Program. Deloitte & Touche LLP ("Deloitte") is a professional services firm and the Canadian member firm of Deloitte Touche Tohmatsu Limited. Mintz merged with Deloitte on January 28, 2008, and Deloitte is the successor entity to Mintz. The partners of Mintz & Partners or certain of them personally participated in the Timeshare Program.

9. Glenn F. Ploughman is a financial advisor based in Ottawa, Ontario, who advised numerous clients with respect to the Timeshare Program. Mr. Ploughman holds himself out as having "acquired and managed well over $100 million in investment assets and well over $50 million of real estate assets on behalf of his clients".

10. Shelley Shifman is a chartered accountant based in Toronto, Ontario, who advised numerous clients with respect to the Timeshare Program.

11. Prenick Langer LLP ("Prenick Langer") is a chartered accountancy firm based in Toronto, Ontario, that advised participants with respect to the Timeshare Program. Prenick Langer holds itself out as having "tax expertise" to "guide you through the taxation maze".

~~12. TMK Financial Group Ltd. is a financial advisory firm based in Toronto, Ontario, that advised numerous clients with respect to the Timeshare Program.~~

13. Gardiner Roberts LLP ("Gardiner Roberts") is a law firm based in Toronto, Ontario. Gardiner Roberts has a "tax and estate planning" practice group that, among other things, provides tax expertise to lawyers and accountants at other firms that do not have tax specialists. Gardiner Roberts provided tax advice to participants in the Timeshare Program, either directly or through their individual advisors.

14. Ronald J. Farano, deceased, was a senior tax partner with Gardiner Roberts until his death on May 20, 2010. Mr. Farano provided tax advice to participants in the Timeshare Program, either directly or through their individual advisors. Mr. Farano participated personally in the Timeshare Program.

15. Prenick Langer retained Gardiner Roberts and Mr. Farano to provide a legal opinion to it, or its clients, for their benefit, as to whether donations made under the Timeshare Program would entitle participants to the tax credits proposed by the promoters.

16. John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, and John Doe LLP 1-100 are advisors or advisor entities that provided advice to participants in the Timeshare Program, and whose names are not presently known to the defendant. The title of proceedings will be amended to correct these misnomers once the actual names of these third parties can be ascertained.

The Third Party Claim

17. Cassels Brock denies that its opinions were negligently prepared or could, or did, wrongfully lead participants to make donations under the Timeshare Program.

18. Cassels Brock denies that it made misrepresentations as to fact relied upon by participants in participating in the Timeshare Program.

19. Cassels Brock denies that it failed to warn participants of risks of such participation.

20. Cassels Brock denies that it had a conflict of interest and that it owed and breached any duty of loyalty, independence and candour to the plaintiff or the other participants in the Timeshare Program.

21. If Cassels Brock has any liability to the plaintiff or other participants in the Timeshare Program, it seeks contribution and indemnity from the third parties who advised the participants, and upon whom the participants relied.

22. Each of the third parties owed fiduciary duties and duties of care to their respective clients, including the duty to exercise the care and skill expected of a professional tax and/or financial and/or legal advisor.

23. Each of the third parties expressed the opinion to their respective clients that donations made under the Timeshare Program would entitle participants to the tax credits proposed by the promoters.

24. Each of the third parties had duties to their respective clients in the exercise of their professional responsibilities which they breached by, among other things, failing to advise their clients of the possibility of reassessment by the Canada Revenue Agency ("CRA") and failing to make clear to their clients that any tax deductions claimed in connection with their participation in the Timeshare Program were not certain to be allowed by CRA.

25. Each of the third parties breached their duties to their respective clients in advising them to participate in the Timeshare Program without disclosing, or warning of, risks associated with such participation.

26. All or some of the third parties also breached their duties to their respective clients by failing to advise them that the third parties personally stood to profit from their clients' participation in the Timeshare Program, in the form of fees, commissions, or other forms of compensation. All or some of the third parties were in a conflict of interest and breached their duties of independence, loyalty and candour to their clients in respect of the Timeshare Program.

27. The third party Mintz & Partners provided accounting advice to Mintz/Elliott (as defined in the Fresh as Amended Statement of Defence) and the CAA with respect to both the structure of the donation program and the Cassels Brock opinion letters.

28. The putative class members relied upon the advice and information provided to them by their respective tax and/or financial and/or legal advisors in deciding to participate in the Timeshare Program. The plaintiff relied upon the legal advice of the late Ronald Farano of Gardiner Roberts LLP. The plaintiff relied on the accounting advice of Mintz & Partners. The class members relied on the advice provided by some or all of the other third parties.

29. The plaintiff and the ~~putative~~ class members would not have participated in the Timeshare Program had it not been for the statements, representations, and advice of their respective tax and/or financial and/or legal advisors.

30. To the extent that the ~~putative~~ class members have suffered any damages whatsoever as a result of their involvement in the Timeshare Program, their respective third party advisors are wholly responsible for such damages.

31. To the extent that Cassels Brock is found to be responsible for any damages suffered by the plaintiff class, it seeks contribution and indemnity from each class member's respective third party advisor(s) for the full amounts of such damages.

32. Cassels Brock reserves its right to amend its Third Party Claim to make further allegations upon receiving the productions of the Third Parties.

33. Cassels Brock asks that this Third Party Claim be tried at Toronto with the main action.

April 15, 2011

~~April 15, 2011~~~~April 13, 2016~~

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
~~Kristian Borg-Olivier (53041R)~~
~~Tel: (416) 865-2978~~
~~Fax: (416) 865-2860~~
~~Email: kborg-olivier@litigate.com~~
Shara N. Roy (49950H)
Tel: (416) 865-2942
Fax: (416) 865-3973
Email: sroy@litigate.com
Ian MacLeod (60511F)
Tel: (416) 865-2895
Fax: (416) 865-3701
Email: imacleod@litigate.com

Lawyers for the Defendants

JEFFERY LIPSON
Plaintiff

-and-

CASSELS BROCK & BLACKWELL LLP et al.
Defendants

-and-

MINTZ & PARTNERS LLP et al.
Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

THIRD PARTY CLAIM

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com

~~Kristian Borg-Olivier (53041R)~~
~~Tel: (416) 865-2978~~
~~Fax (416) 865-2860~~
~~Email: kborg-olivier@litigate.com~~

Shara N. Roy (49950H)
Tel: (416) 865-2942
Fax: (416) 865-3973
Email: sroy@litigate.com

Ian MacLeod (60511F)
Tel: (416) 865-2895
Fax: (416) 865-3701
Email: imacleod@litigate.com

Lawyers for the Defendants

This is Exhibit "G" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

CLASS ACTION
Contingency Fee Retainer Agreement

BETWEEN:

JEFFREY G. LIPSON

Address: 10 Bellair Street, Apt. 608
Toronto, Ontario M5R 3T8

Tel: (416) 963-9606
Fax: (416) 963-9770

- and -

ROY ELLIOTT O'CONNOR LLP

Address: 200 Front Street West, 23rd Floor
Toronto, Ontario
M5V 3K2

Tel: (416) 362-1989
Fax: (416) 362-6204

The parties agree as follows:

Retainer

1. Jeffrey G. Lipson (the "Client") hereby retains, authorizes and instructs Roy Elliott O'Connor LLP ("REO"), 200 Front Street West, 23rd Floor Toronto, Ontario M5V 3K2, to act as his solicitors, counsel, and agent with respect to a proposed class action (known as Lipson v. Cassels Brock & Blackwell et al., Court File No. CV-09-376511 (the "Proceeding") against Cassels Brock & Blackwell and Lorne H. Saltman for claims arising out of, among other things, the Defendants' tax opinions issued in connection with the Athletic Trust Timeshare program. The particulars of the allegations are more specifically set out in the Statement of Claim filed in the Proceeding ("Claim").

2. The Client confirms that he had previously retained the firm of Davies Ward Phillips & Vineberg LLP ("Davies") to prosecute this Claim on a fee for service basis (the

"Lipson/Davies Retainer"). The Client confirms that he was previously advised about, or given the opportunity to seek independent legal advice in respect of, potential claims against parties other than Cassels Brock & Blackwell and Lorne H. Saltman but chose to name only Cassels Brock & Blackwell and Lorne H. Saltman as Defendants. The Client also confirms that, given the mounting costs of proceeding on a fee for service basis, he has decided that he does not want to continue to advance this Claim on a fee for service basis and will only proceed by way of a contingency agreement. The Client further confirms that Davies is not prepared to act as counsel in the Proceeding on a contingency fee basis and, accordingly, the Client was required to locate and retain new counsel in order to prosecute the proposed class action in the best interests of the proposed class.

3. The Client has advised REO that other participants in the Timeshare program in question ("Other Participants") did previously (prior to the decision to issue the class action) retain Davies (as part of a joint retainer with the Lipson/Davies Retainer or otherwise) in connection with the issues or facts generally underlying this Proceeding (the "Other Davies Retainers"). REO understands that the Other Davies Retainers will be terminated.

4. The Client has also advised REO that there were separate agreements between these Other Participants (or some of them) and Hyger Holdings Inc. and/or its principal Gerald Prenick, which were stated to relate to the provision of some support or liaison services by Hyger Holdings Inc. and/or Gerald Prenick (the "Hyger Agreements").

5. The Client hereby acknowledges that REO has not accepted any individual retainer with, and otherwise has not agreed to provide advice to, any other proposed class member in respect of the issues and facts underlying the Proceeding or otherwise relating to the Other Davies Retainers or the Hyger Agreements.

6. The Client has also advised REO that he did not enter into any agreement between himself and Hyger Holdings Inc. and/or its principal Gerald Prenick, relating to the provision of some support or liaison services by Hyger Holdings Inc. and/or Gerald Prenick.

7. The Client acknowledges that REO has experience prosecuting class actions on behalf of plaintiffs and involving thousands of putative class members. REO does not need any third party or external company providing liaison services with the putative class members or otherwise. In light of this, and in order to further safeguard privilege, REO has no intention or desire to enter into any agreements with third parties, whereby the third parties will be communicating or liaising with putative class members on behalf of REO or the Client. In particular, and for various reasons, REO has no intention of entering into any agreement with Hyger Holdings Inc. and/or its principal Gerald Prenick.

8. The Client has advised REO that there were agreements between some of the Other Participants in the Timeshare program in questionand the Client relating to the

funding (payment of legal fees and disbursements) of the prosecution of the claims against the Defendants (known as Funding and Assignment Agreements). The Client has advised that these agreements will be terminated because, in part, the Client is no longer funding the payment of any legal fees for the prosecution of the Claim. The Client has advised REO that he will not be asserting any rights or claims as against the Other Participants under the Funding and Assignment Agreements or otherwise. The Client acknowledges that REO has not provided, and cannot provide, the Client advice in respect of any such agreements with the Other Participants because, among other things, such Other Participants are putative class members. REO cannot be put in a position of being asked to advise a representative plaintiff or a putative class member as against the interests of another putative class member in any matter relating to the very class action in question.

9. The Client agrees to act as a class representative on behalf of the Class Members (as defined in paragraph 10 of the Claim) and, in particular: all individuals who participated in the Timeshare Program in 2000, 2001, 2002 and/or 2003 by receiving Timeshare Weeks from the Athletic Trust and donating them, together with a cash donation, to one or more RCAAA.

10. Subject to the other provisions of this Agreement, or any court order, the Client retains the right to make all critical decisions in this action and that, as acknowledged by the Client, such decisions should accord with the best interests of the class.

Recovery of Paid Fees & Disbursements

11. The Client has advised that he and certain of the Other Participants (putative class members) did pay legal fees and disbursements to Davies with respect to this Proceeding (the "Paid Fees and Disbursements"). The Client has requested, on his behalf and on behalf of such Other Participants (collectively, the "Funders"), that REO seek the full reimbursement or indemnification of the Funders in respect of the Paid Fees and Disbursements, such that the Funders will not bear a greater percentage of the legal fees and disbursements (or case expenses) than the other class members should this action be successful. REO has agreed that it will take the steps set out in sections 12, 13, 14 and 15 below to recover the Paid Fees and Disbursementson behalf of and for the Funders, subject to court approval and subject to any contrary legal or professional obligations. The Funders shall in no circumstance whatsoever be entitled hereunder to claim or receive any funds or amounts on account of the Paid Fees and Disbursements in excess of the actual amounts that they have paid to Davies towards the Paid Fees and Disbursements. The provisions of this retainer agreement as it relates to the steps that REO has agreed to take to recover the Paid Fees and Disbursements does not create, and is not intended to create, any solicitor client relationship between REO and the other Funders (that is, other than the Client who is in a solicitor client relationship with REO) in any manner whatsoever.

12. Subject to the provisions of section 11 above, in the event this action is successful and without limiting or affecting REO's rights and ability to obtain the payment of its fees

and case expenses, as described in more detail below, REO shall take reasonable steps to recover the Paid Fees and Disbursements on behalf of and for the Funders, including but not necessarily limited to:

a) requesting that the Defendants pay as costs, or contribute towards, the Paid Fees and Disbursements;

b) submitting the Paid Fees and Disbursements as fees and/or case expenses in the Proceeding to the Court, and requesting the payment or reimbursement of such fees and/or case expenses as and when appropriate and available from the proceeds of any judgment (s), order(s), report(s) on a reference or settlement(s) which include awards or payments in favour of the class or any class member; and

c) requesting that the Court order that any costs awarded to the Client or the class be:

i. first, paid toward the case expenses of REO and the disbursements forming part of the Paid Fees and Disbursements proportionately (that is, for example, if REO has $80,000 in case expenses and there are $20,000 in disbursements forming part of the Paid Fees and Disbursements, then REO will receive 80 cents out of every dollar paid towards disbursements/case expenses, with the 20 cent balance being paid toward the disbursements from the Paid Fees and Disbursements until those disbursements are paid); and

ii. second, paid toward the straight time legal fees of REO and the straight time legal fees forming part of the Paid Fees and Disbursements on a proportionate basis (that is, for example, if REO has $800,000 in fees and there are $200,000 in fees forming part of the Paid Fees and Disbursements, then REO will receive 80 cents out of every dollar paid towards its straight time legal fees, with the 20 cent balance being paid toward the straight time legal fees from the Paid Fees and Disbursements until those fees are paid).

13. In the context of seeking costs awards against the Defendant(s) or a third party on a preliminary motion or other hearing or attendance prior to the class action being successful (as defined in section 18 below), REO will include a request for the payment of any fees or disbursements forming part of the Paid Fees and Disbursements which reasonably and directly (in REO's view and discretion) relate to the substance of the motion, hearing or attendance then before the Court and otherwise which ordinarily and reasonably could be sought as costs in the context of the particular motion, hearing or attendance. To the extent that REO seeks payment of any part of the Paid Fees and Disbursements, REO will request that the Court specify the extent to which it is ordering costs on any such motion, hearing or

attendance in respect of the REO fees and disbursements (the "REO Costs") or, alternatively, in respect of the Paid Fees and Disbursements (the "Funders' Costs"). To the extent that costs are awarded and paid in the context of any such motion, hearing or attendance prior to success in the class action, REO shall receive such payment and may apply the amount awarded (less any amount specifically allowed for, or specifically attributed by the Court to, the Funders' Costs) on account of its fees or may hold such funds in trust and apply them against any disbursements or future fees of REO. REO shall take any such costs awards that it receives, applies or holds in trust as aforesaid into account in calculating the overall fees to which REO is entitled if and when the class action is subsequently successful. Any amounts specifically allowed for, or specifically attributed by the Court to, the Funders' Costs will be disbursed by REO as soon as reasonably possible in accordance with the provisions in section 14 below.

14. In the context of sections 11 through 13 above, the Client agrees to make available to REO the accounts and detailed docket entries and disbursements (with supporting documentation for the disbursements, to the extent available) of Davies. The Client agrees to obtain necessary consents from any of the other Funders who contributed toward the Paid Fees and Disbursements to allow any such accounts, docket entries and supporting disbursement documentation to be submitted to the Court for review. Should the Court specifically allow the reimbursement of some or all of the Paid Fees and Disbursements, the Client further agrees to obtain the necessary consents and directions from any such other Funders, which may be necessary in REO's view to allow it (REO) to disburse the reimbursement to the Funders proportionately to the amounts that they have paid to Davies in respect of the Paid Fees and Disbursements. If there is any dispute between the Client and any other Funder as to the entitlement, payment or division of any amounts specifically allowed or attributed to reimbursement for the Paid Fees and Disbursements, REO will pay that specific amount into court and will not be required to act for any party in the context of any competing claims to that specific amount, but any such dispute will not preclude REO from receiving and applying any reimbursement or cost award that is not specifically allowed for, or attributed by the Court to, the Paid Fees and Disbursements.

15. Subject to and in accordance with sections 13 and 14 above, any Paid Fees and Disbursements recovered by and paid to REO on behalf and for the Funders shall be paid by REO to the Funders as soon as reasonably possible.

Terms of Payment of Fees and Disbursements

16. The Client and REO have discussed options for retaining REO other than by way of a contingency fee agreement, including retaining REO by way of an hourly-rate retainer. The Client has been advised that hourly rates may vary among solicitors and that the Client can speak with other solicitors to compare rates. The Client has chosen to retain, and indeed has insisted on retaining, REO by way of a contingency fee agreement.

17. The provisions of this agreement regarding fees and disbursements are subject to court approval as provided in s. 32(2) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 ("*CPA*"). REO shall seek court approval as soon as reasonably possible and appropriate in the circumstances, and likely reasonably soon after the class action is (if ever) "successful" as set out below. If the court does not approve such provisions, REO shall not be obliged to continue to act in the Proceeding.

18. REO shall be paid its fees in the event the class action is successful in obtaining final judgment (upheld on appeal, if any) on the common issues in favour of some or all class members or in obtaining a settlement (approved by the Court) that benefits one or more class members. The fees shall be paid by a lump sum payment or payments out of (and only out of) the proceeds of any judgment (s), order(s), report(s) on a reference or settlement(s) which include awards or payments in favour of the class or any class member.

19. Subject to court approval, the legal fees owing to REO in the event the class action is successful shall be calculated as follows, subject to the minimum and maximum set out below in this section 19:

    a) 25% of the amounts (including damages and interest but excluding party and party costs and disbursements), recovered by the class or class members under any judgment(s), order(s), report(s) on a reference, or settlement(s) which includes awards or payments in favour of the class or any class member; and

    b) subject to specific court approval, REO shall also be entitled to receive and be paid as part of its fees, thethe fee portion of any cost award(s) made in favour of the Plaintiff or the class.

    If the total amount of fees payable to REO in accordance with the 2 subsections above is less than the straight time (plus applicable taxes) of all professionals and staff at REO who rendered time on the file, then REO shall be entitled to claim, receive and be paid as fees the value of such straight time (plus taxes). from (and only from) the proceeds of any judgment(s), order(s), report(s) on a reference or settlement(s) which includes awards or payments in favour of the class or any class member. In no circumstance whatsoever, however, shall REO recover more in fees pursuant to this Agreement than the class recovers as damages or receives by way of settlement.

    For clarity, and as indicated in section 19(a) above, the amount of recovery by the class members or any class member to which the 25% applies, excludes any amount awarded that is separately specified or awarded as costs and disbursements payable by the Defendant(s) or any other party to the Client or the class members.

20. In the event recovery is by way of a structured settlement, the contingency fee shall be calculated based on the funding amount of the structure.

21. REO and the Client acknowledge it is difficult to estimate what the expected fee will be, however, the following is an estimate of the fee payable in one circumstance or example:

> If the total amount recovered at trial (including damages and interest but excluding party and party costs), is $20,000,000, and a percentage of 25% is applied, the fee would be $5,000,000 plus (subject to specific court approval) the fee portion of any party and party costs awarded against the Defendant(s) following the trial of this action.

22. The estimate or example referred to above does not include legal fees for (nor obligate REO to act for any particular class members in respect of) any mini-hearings or other proceedings, which may be necessary for some or all class members to deal with individual issues. It is acknowledged that every class member is entitled (i) to retain a personal lawyer to deal with individual issues which may affect the class member and/or (ii) to opt out of the class action, in a manner prescribed by the court, and sue separately or not sue at all. It is acknowledged that the court may require separate individual damage assessments for some or all class members and they may require a personal lawyer to represent them in that regard. The financial arrangement with such a lawyer is a matter to be agreed between the individual class member and the personal lawyer and is not affected by this agreement. REO will reasonably cooperate with any personal lawyers retained by any class members but will not be required in this regard to generally advise or provide advice to individual class members, through their own personal lawyer or otherwise. REO will reasonably provide summary or general advice to class members who do not have personal lawyers, but, unless an individual class member retains REO directly, REO is not responsible for engaging in extensive consultations with individual members, or performing any other individual work for individual class members.

23. The contingency fee shall be calculated on any settlement or any judgment after all case expenses incurred by REO have been deducted. Case expenses are those costs incurred by REO to prosecute the claim. Case expenses include, but are not limited to, reasonable photocopy charges, couriers, travel expenses, other disbursements or payments to third parties, and fees paid to agents, experts and other lawyers.

24. The Client authorizes REO to pay case expenses to prosecute the claim as REO deems necessary and as the Client so instructs. REO shall pay all reasonable case expenses going forward. The Client agrees that the firm shall be entitled to 100% recovery of these expenses from and only from moneys received from an order, judgment or settlement which includes awards or payments in favour of the class or any class member.

25. The Client shall not be obliged to fund any disbursements or taxes, including the GST payable on the solicitor's fees. Ultimately, if the action is successful, the disbursements and taxes, including the GST payable on the solicitor's fees, will be

paid out of (and only out of) the proceeds of any order, judgment or settlement which includes awards or payments in favour of the class or any class member.

26. The Client agrees and directs that all funds claimed by REO for legal fees, costs, taxes and disbursements shall be paid to REO in trust from and only from any order, judgment or settlement which includes awards or payments in favour of the class or any class member.

Costs

27. The Client has been advised by REO that successful litigants may be entitled to part (partial indemnity) or substantially all (substantial indemnity) of their reasonable legal fees and disbursements if successful in the litigation, including interlocutory steps. Successful litigants are typically entitled to substantially all of their legal fees and disbursements only in the event of misconduct or egregious conduct of the opposite party or its counsel, including in the litigation.

28. The Client has requested REO to make, and REO shall make, application(s) to the Class Proceeding Committee of the Law Foundation of Ontario ("the Committee") for funding. The Client acknowledges that, if the Committee grants funding, 10% of any recovery on behalf of the Class may be payable to the Committee (based on the caselaw in Ontario, the 10% is calculated on the net recovery to the Class after payment of any legal fees and case expenses). The Client understands that, if the Committee grants funding for aspects/parts of the Class Action, the Client will not be held liable for the costs associated with those aspects/parts of the Class Action.

29. If despite applications to the Committee, the Client remains liable for any costs awards made up to the final resolution of the trial of the common issues (including in respect of any motions or appeals relating thereto), REO agrees to and shall pay any costs awards made against the Client in the action (including in respect of any motions or appeals relating thereto) if and to the extent that such indemnity is not precluded by law or REO's professional obligations. REO's obligation to pay costs awards made against the Client shall terminate when this Agreement is terminated, without further notice or steps, except that in the event that this Agreement is terminated REO shall remain liable to pay:

    a) any costs awards made against the Client prior to the termination of this Agreement and which are upheld on appeal; and

    b) any costs awards made against the Client in respect of a motion or hearing that was argued by REO but in respect of which the decision or costs award was still under reserve as at the date that this Agreement was terminated.

In event that this Agreement is terminated after REO has paid a costs award under the terms of this indemnity, that costs award is repaid in full by the Defendant(s) and the

class action is subsequently successful, the Client will takereasonable steps to ensure, subject to court approval and without derogating from REO's rights to payment upon termination of this Agreement (as set out in section 34), that REO is reimbursed in respect of such costs out of (and only out of) the proceeds of any order, judgment or settlement which includes awards or payments in favour of the class or any class member.

Assessment of Bill

30. Subject to the ruling or direction of any judge who approves the legal fees for class counsel, the Client has the right to ask the Superior Court of Justice to review and approve the solicitor's bill. For purposes of assessment, if a contingency fee agreement is not one to which subsection 28.1(6) or 28.1(8) of the *Solicitors Act* applies, the client may apply to the Superior Court of Justice for an assessment of the solicitor's bill within 30 days after its delivery or within one year after its payment. If a contingency fee agreement is one to which subsection 28.1(6) or 28.1(8) of the *Solicitors Act* applies, the client or the solicitor may apply to the Superior Court of Justice for an assessment within six months after its delivery.

Negotiations and Replacement/Additional Representative Plaintiff

31. The Client hereby authorizes REO, in its discretion, to enter into preliminary negotiations with the Defendants for the purpose of reaching a settlement. The Client will be consulted about the terms of any proposed or suggested settlement as early as possible. The Client understands that any settlement affecting the class is subject to approval by the court. The Client agrees and acknowledges that any negotiations are for the purpose of reaching a settlement of the claims of the class, not simply the individual claim of the Client.

32. In the event the Client chooses to settle his individual claim without settling the claims of the class or in the event that the Client wishes to withdraw as a representative plaintiff (which withdrawal would be subject to court approval), the Client expressly agrees and acknowledges that REO is permitted to be retained by another representative of the class to continue to assert the claims on behalf of the class. In the event that the Client develops a conflict of interest or potential conflict of interest with the putative class members, the Client expressly agrees and acknowledges that REO is permitted to be retained by another representative of the Class in substitution for the Client (which would be subject to leave of the court or court approval) to continue to assert the claims on behalf of the class members in their best interests and the Client hereby consents to such substitution. In such events, the Client hereby acknowledges and agrees that privileged communications between REO and the Client made for the purpose of advancing the claims of the class and REO's work product created for the purpose of advancing the claims of the class shall be disclosed to the new class representative and may be used on behalf of the class. The Client agrees to keep such communications and the information in any

such work product confidential and to not disclose such information to any other party. The Client also agrees to return to REO any such privileged communications and/or work product should the Client settle his claim against the Defendants or otherwise cease to act as plaintiff or representative plaintiff in the Proceeding.

Termination

33. Subject to section 40 below and the overarching court jurisdiction or authority in the context of class actions, either the Client or REO may terminate this Retainer Agreement at any time in writing.

34. The Client acknowledges that REO will be incurring significant financial risk and case expenses in prosecuting the Class Action and by agreeing only to paid if the Class Action is successful. In keeping with that acknowledgement and otherwise, the Client agrees that, in the event this agreement is terminated, and the Class Action is subsequently successful (as defined in section 18 above) the hours expended by REO to the date of termination will be added to the hours of the lawyer or lawyers subsequently retained by the Client to prosecute the Class Action for purposes of the Court settling or approving the legal fees for Class Counsel in this action. REO shall be entitled to, and will be paid, a percentage of the amount awarded by the Court as fees to Class Counsel. The percentage shall be calculated by taking the number of hours expended by professionals (including clerks and students) at REO multiplied by their respective hourly rates, divided by the total number of hours expended by professionals (including clerks and students) of REO and any subsequent lawyers or law firm(s) subsequently retained to prosecute the Class Action multiplied by their respective hourly rates. In no circumstance, however, will REO be entitled to, or be paid, less than its straight time, that is, the total number of hours expended by REO's professionals (including clerks and students) multiplied by their respective hourly rates. REO will also be entitled to, and paid, its disbursements or case expenses.

35. The Client agrees that any lawyer retained to prosecute the Class Action after the termination of this Agreement will be:

    a) provided with a copy of this Agreement;
    b) competent, knowledgeable and experienced in class actions;
    c) required to acknowledge and agree to the provisions of this section;
    d) required to protect the fees and disbursements of REO in the manner provided above; and
    e) required to provide an indemnity to the Client on the same or reasonably similar terms and conditions as set out in section 27 above.

36. REO agrees to reasonably cooperate with and assist (in accordance and consistent with its professional obligations) any lawyers retained to prosecute the Class Action after the termination of this Agreement.

37. The consequence of any such termination shall be governed by the *Solicitor's Act*, R.S.O. 1990, and, in particular, section 30 thereof and the regulations thereunder.

Laws of Ontario Apply

38. This Agreement will be governed, construed, interpreted and enforced in accordance with the laws of the Province of Ontario. It is the parties' intention that all requirements of contingency fee retainer agreements be included herein and, for such purpose, the parties agree that this agreement shall be deemed to include any further requirements arising from amendments to the *Solicitors Act*, R.S.O. 1990, c. S.15 and the regulations under that Act. Alternatively, the parties to this agreement agree to execute, from time to time, any amendment to this agreement for the purpose of incorporating any such further requirements into this agreement. The Client further understands and agrees that all other applicable protections and controls on retainers between a solicitor and client, as required by the Law Society of Upper Canada, statute and the common law, apply to and are incorporated into this contingency fee agreement, and that nothing in this agreement is intended to supersede or alter those applicable protections and controls.

Division of Fees

39. The Client consents to the reasonable splitting of fees between lawyers who are not part of REO, provided that the fees are divided in proportion to the work done and the responsibilities assumed. The Client, however, must be consulted about and approve the involvement in this class action of any lawyers who are not part of REO.

Act in Best Interests of the Class

40. The Client acknowledges that, while the Client is REO's client and a genuine plaintiff, both REO and the Client must act in the best interests of the Class. The Client agrees that REO is not obliged to follow instructions from the Client which are not in the best interests of the class.

41. The Client authorizes REO to bring motion(s) or case conference(s), *ex parte* the defendant if appropriate, to take directions from the court if REO reasonably believes that the Client is not acting in the best interests of the class. The Client consents to any such motion and case conference and to the release and disclosure by REO of any potentially privileged information to the Court in the context of any such motion or case conference.

42. Without limiting the generality of the foregoing, the Client agrees that in the event that the Client does not agree to accept a proposed settlement that is in the opinion of REO in the best interests of the class, REO is hereby authorized to conditionally accept the offer. The condition shall be a ruling by the court that the proposed settlement is in the best interests of the class. On the motion for such court approval, an affidavit fully disclosing the representative plaintiffs' stated concerns with the proposed settlement shall be filed with the court.

43. While any motion or case conference referred to in sections 41 and 42 above, or any decision or motion for leave to appeal or appeal therefrom, is outstanding, the Client may not terminate this Agreement.

Class Representative's Fee

44. In the event the class action is successful, if reasonable and appropriate, REO shall request that the court award the Client and any other representative plaintiffs' compensation on a *quantum meruit* basis for the time spent by the representative plaintiffs. It is acknowledged that such compensation is not automatic and is entirely within the discretion of the court.

Severability

45. In the event that any particular provision or provisions or a part of one in this agreement is found to be void, voidable, or unenforceable for any reason whatever, then such particular provision or provisions or part of the provision shall be deemed severed from the remainder of this agreement and all other provisions shall remain in force.

Arbitration

46. Subject to sections 32, 41 and 42 above, and to the extent possible and keeping in mind the nature and process of class actions and the court's supervisory role in class actions, the Client hereby agrees that any dispute between the parties to this agreement, relating to this agreement, shall be determined by a single arbitrator to be mutually agreed and that the *Arbitration Act, 1991*, S.O. 1991, c. 17 shall apply.

47. In the event it is necessary or prudent to take steps in the lawsuit (e.g. filing a notice of appeal) before the arbitration has resolved the dispute, REO shall take such steps as it considers being in the best interests of the class again subject to the overarching court jurisdiction or authority in the context of class actions .

Entire Agreement

48. It is agreed there is no representation, warranty, collateral agreement, or condition affecting this agreement except as expressed in it.

Execution in Counterpart

49. This agreement may be executed in counterpart and a fax copy of an executed version will be deemed to be an original.

DATED at Toronto, in the Province of Ontario this 29 day of August, 2009.

Execution in Counterpart

49. This agreement may be executed in counterpart and a fax copy of an executed version will be deemed to be an original.

DATED at Toronto, in the Province of Ontario this 1st day of September, 2009.

Witness

Jeffrey G. Lipson

Witness

Roy Elliott O'Connor LLP

This is Exhibit "H" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

CITATION: Lipson v. Cassels Brock & Blackwell LLP, 2011 ONSC 6724
COURT FILE NO.: 09-CV-376511
DATE: November 14, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Jeffrey Lipson

Plaintiff

- and -

Cassels Brock & Blackwell LLP

Defendant

- and -

Mintz & Partners LLP, Deloitte & Touche LLP, Glenn F. Ploughman, Shelley Shifman, Prenick Langer LLP, TMK Financial Group Ltd., Gardiner Roberts LLP, the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, John Doe LLP 1-100

Third Parties

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- Peter L. Roy and J. Adam Dewar for the Plaintiff
- Peter H. Griffin and Shara N. Roy for the Defendant
- Sean Dewart and Tim Gleason for the Third Parties Gardner Roberts LLP and The Estate of Ronald Farano, deceased

HEARING DATES: November 7 and 8, 2011

PERELL, J.

REASONS FOR DECISION

A. *INTRODUCTION*

[1] Between 2000 to 2003, Jeffrey Lipson and about 900 other Canadian taxpayers participated in a Timeshare Program in which they donated both cash and also resort timeshares to Canadian athletic associations. Mr. Lipson and the donors anticipated

receiving tax credits for their charitable donations. In the marketing of the Timeshare Program, a tax opinion prepared by the law firm Cassels Brock & Blackwell LLP, was included in the promotional material. The Cassels Brock opinion was that it was unlikely that the Canada Customs and Revenue Agency could successfully deny the tax credits. Mr. Lipson says that he and the other participants would not have participated in the program but for the opinion of a reputable law firm that the charitable tax credits under the *Income Tax Act* would be available.

[2] In 2004, Canada Revenue disallowed the anticipated tax credits in their entirety.

[3] In 2004 and 2005, Mr. Lipson and other participants sought advice from Thornsteinssons LLP, a law firm that specializes in tax litigation, and in 2006, some of the participants commenced litigation against Canada Revenue as test cases to determine the availability of the tax credits for the donations.

[4] In 2008, the test case litigation settled, and Canada Revenue allowed the participants to receive a tax credit for the cash portion of the donation. Mr. Lipson and the other participants in the Timeshare Program, however, were denied the greater part of their anticipated tax credit based on the value of the donated timeshares.

[5] In 2009, to recover his losses, Mr. Lipson commenced a proposed class action against Cassels Brock for damages for negligence and negligent misrepresentation.

[6] Cassels Brock brought third party claims against Mintz & Partners LLP, Deloitte & Touche LLP, Glenn F. Ploughman, Shelley Shifman, Prenick Langer LLP, TMK Financial Group Ltd., Gardiner Roberts LLP, the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, John Doe LLP 1-100. These third parties were involved in the promotion and marketing of the Timeshare Program.

[7] Mr. Lipson now brings a motion for certification of his action as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6.

[8] Cassels Brock and the third parties Gardiner Roberts and the Farano Estate oppose the certification of Mr. Lipson's action as a class proceeding and, among other things, they submit that the claims of all the Class Members, including most particularly Mr. Lipson, are statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

[9] Cassels Brock also submits that Mr. Lipson's proposed class action does not satisfy the common issues, preferable procedure, and suitable representative plaintiff criteria of the test for certification. Further, Cassels Brock submits that Mr. Lipson's negligence claim does not disclose a reasonable cause of action or it is a disguised and defective negligent misrepresentation claim purporting to obviate the reasonable reliance and causation elements of the tort.

[10] For the Reasons for Decision that follow, it is my opinion that Mr. Lipson's proposed class action is statute-barred and, therefore, it should be dismissed.

[11] Further, it is my opinion that, but for the fatal statute bar, Mr. Lipson's action would have satisfied the criterion for certification, although I should acknowledge that:

(a) some of the proposed common issues do not meet the test for commonality and require revision; and (b) Cassels Brock had a strong, albeit ultimately unsuccessful argument that a class proceeding was not the preferable procedure for the resolution of the Class Members' claims.

[12] After this introduction, I will explain my opinions by: (a) describing the evidentiary background; (b) describing the factual background; (c) analyzing whether Mr. Lipson's action satisfies the criteria for certification ignoring Cassel Brock's, Gardiner Roberts' LLP and the Farano Estate's arguments that the action is statute-barred; (d) analyzing whether the Class Members' claims are statute-barred; and (e) concluding with some directions about the determination of costs for the certification motion and directions about the resolution of the third party claims.

B. EVIDENTIARY BACKGROUND

[13] The evidentiary record for the certification motion was as follows:

- An affidavit of Mr. Lipson, who was cross-examined for the certification motion.
- An affidavit from Alexandra Carr, an associate lawyer at Roy Elliott O'Connor LLP, proposed class counsel. She appended a transcript of a cross-examination of Harley Mintz from another action with respect to the Timeshare Program.
- Affidavits containing an opinion from law professor, Vern Krisna, who was retained by Mr. Lipson to provide an expert opinion on the nature of the Timeshare Program's tax credits and on the validity or appropriateness of the legal opinions prepared by Cassels Brock about the tax credits for charitable donations. Professor Krisna was cross-examined for the certification motion.
- An affidavit from Eric Wagner, an articling student with the law firm of Lenczner Slaght Royce Smith Griffin LLP, the lawyers of record for Cassels Brock. He collected materials associated with the Timeshare Program.
- The transcript of a cross-examination of Stephen Elliott, one of the promoters of the Timeshare Program.

C. FACTUAL BACKGROUND

1. The Timeshare Program

[14] Around 2000, Stephen Elliott and Steven Mintz approached the accounting firm, Mintz & Partners with the idea of a Timeshare Program that would provide tax benefits to participants. Steven Mintz's brother Harley was a partner of the accounting firm.

[15] Messrs. Elliot and Mintz's idea was that participants in the Timeshare Program would donate timeshares to a Canadian amateur athletic association along with sufficient cash to discharge the encumbrances against the timeshares. In return for the

donations, the athletic association would provide the participants with tax receipts for the charitable donations.

[16] The Timeshare Program was established, and Mintz & Partners established an entity known as Tuscany Marketing Services to oversee the marketing of the program.

[17] Many participated in the marketing of the Timeshare Program, including Venturedge Corporation, which was a corporation owned by Gerald Prenick and Morris Langer, the principals of Prenick Langer LLP, another accounting firm and a third-party to these proceedings.

[18] More precisely, the structure of the Timeshare Program and of the associated marketing campaign was as follows:

- Mr. Adrian Crosbie-Jones, a resident of the Bahamas, purchased timeshares in a Caribbean resort, which he settled (conveyed) to a trust known as the Athletic Trust of Canada.
- The Athletic Trust had two classes of beneficiaries. One class was the capital property beneficiaries, who at the discretion of the trustee would be assigned timeshares for which they had to agree to pay ongoing expenses and to assume the obligation to pay the encumbrance or lien against the timeshare.
- Canadian residents could apply to become beneficiaries of the trust if they demonstrated past charitable giving and a desire to assist amateur athletics in Canada. The trustee had the discretion to allocate timeshares to the beneficiaries who then would be in a position to donate them.
- A capital property beneficiary with a timeshare could, but was not obliged to, donate it to a Canadian amateur athletic association along with sufficient cash to have the timeshare conveyed free and clear of encumbrances.
- In return for a donation, the athletic association would issue two donation tax receipts.
- One tax receipt was for the donor's cash contribution to discharge the encumbrance, which ranged from $4,600 to $9,700 per timeshare.
- The other tax receipt was for the then fair market value of the donated timeshare less the amount of the encumbrance. The second receipt ranged from between $8,765 and $18,900.
- Thus, the two charitable donation receipts issued to donor participants in the Timeshare Program ranged from between $13,275 to $28,000 per timeshare.
- It should be noted that from an economic perspective, under these arrangements and assuming that tax receipts were operative, a donor would earn an approximately 35% return on his or her cash contribution to the athletic association, since it was the settlor of the trust who had paid for the timeshare settled on the Athletic Trust of Canada that was being conveyed to the athletic association.

- Canadian Athletic Advisors Ltd. was retained to sell or to re-sell the timeshares that were being donated to the athletic associations. Canadian Athletic Advisors received a 5% commission of the revenue from the sale of the timeshares, net of expenses.
- The athletic associations that received donations agreed to pool their donated timeshares into a common marketing pool to facilitate the re-sales by Canadian Athletic Advisors.
- The athletic associations agreed that if the resort developers repurchased 100 or more timeshares, the associations would sell a one bedroom timeshare for $1,000 (USD) and a two bedroom timeshare for $1,100 ($USD).
- It may be noted that under these arrangements, although the athletic association would have issued tax receipts for between $13,275 and $28,600 per timeshare, its own financial resources would ultimately have increased only by around a $1,300.
- The promotional materials for the Timeshare Program promised attractive income tax benefits. The marketing package included a Beneficiary Guide and a FAQ (frequently asked questions) sheet.
- Potential participants in the Timeshare Program could and did contact the promoters of the Timeshare Program, and many of the potential participants could and did obtain independent financial and legal advice from lawyers and accountants.
- The promotional material referred to the fact that Canadian Athletic Advisors had retained Cassels Brock to provide legal opinions with respect to the tax consequences of the Timeshare Program.
- The sales force was provided with the promotional material and with a due diligence information package. The sales force was provided with the legal opinions obtained from Cassel Brocks.

2. The Cassels Brock Legal Opinions

[19] In 2000, Messrs. Elliot and Mintz retained Cassels Brock to provide Canadian Athletic Advisors with a legal opinion about the tax consequences under the *Income Tax Act* of participating in the Timeshare Program.

[20] Cassels Brock is a full service law firm carrying on business in Toronto as a limited liability partnership. Lorne Saltman, a tax lawyer and a partner of the firm, prepared the opinion for Canadian Athletic Advisors.

[21] In the following years, Cassels Brock prepared more legal opinions for Canadian Athletic Advisors about the Timeshare Program. There are six opinions. The opinions are substantially the same.

[22] Using the October 8, 2003 opinion as an example, it is a 26-page, single-spaced, legal opinion divided into nine parts after an introduction. The parts are: (1) Facts; (2)

Relevant Provisions of the Tax Act; (3) Meaning of "Gift"; (4) Transfer of Timeshare Weeks to Class A Beneficiaries; (5) Capital Gains; (6) Valuation; (7) General Anti-Avoidance Rule ("GAAR"); (8) Tax Shelter Identification Number; and (9) General Comments.

[23] For present purposes, the following excerpts from the Cassels Brock opinions are pertinent, with emphasis added.

> Re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks
>
> You have requested our opinion regarding the Canadian Federal Income Tax consequences relating to a donation of a 75-year leasehold Biennial Timeshare Resort Weeks at the Alexandra Resort and Spa in Providenciales, Turks and Caicos Islands, British West Indies (the "Timeshare Weeks") by individual Canadian resident taxpayers. It is contemplated that any such donation would entitle the donor to claim a tax credit under the *Income Tax Act* (Canada) (the "Tax Act").
>
> Our comments are based on the facts and assumptions expressed below. **This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property.** The Timeshare Weeks will generally be considered to be held as capital property, unless the taxpayer is a trader or dealer in timeshare weeks, has acquired the Timeshare Weeks as an adventure in the nature of trade, or does not otherwise hold the Timeshare Weeks for investment purposes. ....
>
> 3. Meaning of "Gift"
>
> In order to claim a tax credit for a donation there must be a complete gift of the property. Each of several elements must be found in order for a donation to qualify as a gift for income tax purposes. These elements are summarized by the CCRA in its Interpretation Bulletin IT-110R3 entitled, "Gifts and Official Donation Receipts" ....
>
> If a Class A Beneficiary chooses to retain the Timeshare Weeks, he or she may do so and hold, exchange, or sell the Timeshare Weeks, as well as to utilize them for his or her own vacations, or for any other lawful and permitted purposes. **If all or substantially all of the Class A Beneficiaries who receive Timeshare Weeks donate them, the CCRA may be more inclined to challenge the arrangement (but see our opinion below at page 23 as to the unlikely success of such a challenge.) ....**
>
> 7. General Anti-Avoidance Rule ("GAAR")
>
> Although the current version of GAAR has been in place since 1988, there has to date been little jurisprudence of direct relevance to charitable donations. GAAR is intended to apply to situations where a transaction or series of transactions results in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit, or unless the transaction does not result in a misuse of the provisions of the Tax Act or an abuse having regard to the provisions of the Tax Act as a whole. ....
>
> **Accordingly, we are of the opinion that a good argument can be made that it cannot reasonably be said that there is an abuse of the provisions of the Tax Act as a whole in**

these circumstances. In our opinion, and based on the foregoing, a donation of Timeshare Weeks in these circumstances would not likely be successfully attacked under GAAR. ....

9. General Comments

This opinion is based on the current provisions of the Tax Act, the regulations thereunder, and our understanding of the current administrative practices of the CCRA. .... No advance tax ruling has been sought or obtained from the CCRA to confirm the tax consequences or any of the transactions described herein.

This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion. It may not be relied upon by any other person or for any other purpose, nor may it be quoted in whole or in part or its existence or contents otherwise referred to, without our prior written consent.

Based on and subject to the foregoing review, in our opinion it is unlikely that the CCRA could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor **the tax credit claimed by, the Class A Beneficiaries** who receive a distribution of the Timeshare Weeks from the Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAA.

This opinion is based upon our understanding of the facts and circumstances surrounding the proposed arrangements. If these facts or circumstances turn out to be different from what we have understood, our opinion may be different, in which event this letter should not be relied upon.

[24] In Mr. Lipson's action, a core allegation against Cassels Brock is that it failed to consider whether Canada Revenue would consider the conveyance of timeshares a gift in accordance with the *Income Tax Act* jurisprudence.

[25] It was Professor Krisna's opinion that the Cassels Brock opinions did not address the circumstance that if a tax credit was available for the donation of a timeshare, the credit would yield a financial return to the donor that exceeded his or her cash outlays in making the donation. His opinion was that Cassels Brock failed to address the implications of the financial advantages of making a donation of timeshares in circumstances where the purported donor was gaining (being enriched) and not losing (being impoverished) by his or her donation. This circumstance ran the risk that Canada Revenue would deny that the donation was actually a gift or intended to be a gift; i.e. Canada Revenue could submit that the donor did not actually make a gift or did not have the necessary donative intent of gift giving.

[26] It was also Professor Krisna's opinion that Cassels Brock's opinion did not meet the standard of care expected of a tax lawyer.

3. Other Legal Opinions

[27] In December 2002, the law firm Aikins, McCauley & Thorvaldson provided a tax opinion to Canadian Athletic Advisors about whether the opinions set out in the

Cassels Brock opinion for the Canada *Income Tax Act* were applicable to the Manitoba Tax Act. The firm provided the perfunctory legal opinion that:

> Although we have not independently verified the strength of the arguments raised or the conclusions reached in the Cassels Brock Opinion, given the similarities between the *Federal Tax Act* and the *Manitoba Tax Act*, we know of no reason why similar arguments could not be raised and similar conclusions could not be reached, with the necessary contextual changes, with respect to the *Manitoba Tax Act*.

[28] As noted above, one of the entities marketing the Timeshare Program was Venturedge, which was a corporation established by Mr. Prenick and Mr. Langer, the principals of the third party Prenick and Langer LLP.

[29] On behalf of Venturedge, Mr. Prenick retained the late Ronald J. Farano, Q.C., a tax partner at the law firm Gardiner Roberts LLP to provide a second opinion about the Timeshare Program. The opinion written by Mr. Farano stated:

> Based upon my understanding of the law as it exists as of this date the [Cassels Brock] Opinion properly reflects the legal situation in an income tax context.

[30] It is a contested point about whether Mr. Prenick may have provided Mr. Farano's opinion to prospective participants in the Timeshare Program.

4. Mr. Lipson's Participation in the Timeshare Program

[31] In the fall of 2000, Morris Langer of Prenick Langer LLP, who was Mr. Lipson's accountant, told Mr. Lipson about the Timeshare Program.

[32] Jeffrey Lipson is a wealthy retired businessman living in Toronto, Ontario. Before his retirement, he oversaw his family's retail business and he was a real estate investor.

[33] Mr. Lipson says that he did not understand the intricacies of the Timeshare Program, and he asked Mr. Langer whether there was a legal opinion to support the tax benefits. Mr. Langer advised him that Cassels Brock had issued a supporting legal opinion. This satisfied Mr. Lipson, who says that he had a high aversion to financial risk, and he decided to participate in the program. Mr. Lipson says that he would not have participated in the Timeshare Program if there had not been a favourable tax opinion from a reputable law firm.

[34] Mr. Lipson, however, did not read the Cassels Brock opinion, and he has no recollection of ever reading it even to this date.

[35] In 2000 and in the following years, Mr. Lipson went ahead and participated in the program. After his 2000 donation, he did not put his mind to the Cassels Brock opinion before making more donations.

[36] For 2000, he claimed tax credits of $634,352. For 2001, he claimed credits of $1,261,988. For 2002, he claimed credits of $2,085,835. For 2003, he claimed credits of $1,148,879.60.

5. The Denial of the Tax Credits and Proceedings Against Canada Revenue

[37] In October and November 2004, in terse letters to the participants in the Timeshare Program, Canada Revenue disallowed the charitable donation receipts as a basis for tax credits. As an explanation for denying the charitable donations: (1) Canada Revenue denied that the Athletic Trust was a validly constituted trust and, therefore, Canada Revenue's position was that there had been no valid transfer of timeshares; (2) Canada Revenue denied that the donors had acquired legal title to timeshares and denied that the donors had transferred timeshares to the athletic associations; (3) Canada Revenue denied that the Athletic Trust was a not charitable trust; (4) Canada Revenue denied that the donation of the timeshares was a true gift and was not giving willingly without conditions or without restrictions on the charity; (5) Canada Revenue contented that the reported fair market value was significantly overstated.

[38] With the receipt of the correspondence from Canada Revenue, Mr. Lipson immediately realized that there was a problem, and he sought legal and accounting advice at some expense. During his cross-examination, he stated that he realized that the tax treatment allegedly ensured by Cassel Brock's opinion "was not going to happen."

[39] In April 2004, Mr. Lipson and many other participants retained Thornsteinssons LLP to represent them in dealing with Canada Revenue with respect to the Timeshare Program.

[40] In January 2006, several of Thornsteinssons' clients brought test cases to challenge the disallowances of the tax receipts.

[41] Also in 2006, Mr. Lipson filed notice of objection to his reassessments. He claimed that he was entitled to the full amount of the tax credits. These notices were held in abeyance pending the determination of the test cases.

[42] In 2008, CCRA settled the test cases, and it offered to settle with all of the donors. Mr. Lipson settled with CCRA at that time.

[43] In the settlement, Canada Revenue agreed that the cash paid by the donors to discharge the encumbrances against the timeshares constituted a charitable donation entitled to a tax credit. Canada Revenue, however, denied any charitable donation for the alleged fair market value of the donated timeshare.

[44] Mr. Lipson submits that the settlement with Canada Revenue crystallized his damages and the damages suffered by the other participants in the Timeshare Program caused by the negligence of Cassels Brock. He further submits that but for the Cassels Brock opinions there would not have been a Timeshare Program. He submits that with the settlement, he discovered that he had suffered damages and that he had a claim against Cassels Brock for negligence and negligent misrepresentation.

[45] Mr. Lipson submits that his heads of damages are: (a) special damages associated with the litigation with Canada Revenue; (b) the expense of interest arrears on his unpaid taxes; and (c) lost financial opportunities. The claims of the proposed Class Members are similar.

6. The Class Action

[46] After the settlement with Canada Revenue, on April 15, 2009, Mr. Lipson commenced a proposed class action.

[47] It should be noted that Mr. Lipson's action was commenced almost four and a half years from the first letters from Canada Revenue disallowing the tax credits and two and a half years after retaining a law firm to take proceedings against Canada Revenue.

[48] Mr. Lipson claims damages in the amount of $55 million for professional negligence and negligent misrepresentation. He also claims special damages for accounting, legal and other professional fees and expenses.

[49] In his Statement of Claim against Cassels Brock, Mr. Lipson advances a claim of solicitor's negligence based on the allegation that the law firm provided advice negligently.

[50] Mr. Lipson pleads that Cassels Brock breached a duty to Class Members to exercise the care and skill of a reasonably competent tax solicitor by:

> (a) concluding that it was reasonably unlikely that the Canada Revenue could successfully deny the tax credits claimed by the Class Members in connection with the Timeshare Program;
>
> (b) failing to consider or explain that Canada Revenue might deny all of the tax credits claimed by the Class Members in connection with the Timeshare Program on the grounds that they lacked the required donative intent to make a gift to the athletic associations because they had entered into a series of predetermined transactions merely to obtain a tax benefit; and
>
> (c) permitting Cassels Brock's name and reputation to be used by the Athletic Trust in promoting and legitimizing the Timeshare Program in circumstances where Cassels Brock failed to exercise the requisite reasonable care and skill in assessing the income tax consequences relating to donations under the Timeshare Program.

[51] Mr. Lipson pleads that but for Cassels Brock's negligence, the promoters of the Timeshare Program would not have created and made the Timeshare Program available to the public, and could not have successfully promoted the Timeshare Program. He pleads that Cassels Brock knew or should have known that without a favourable tax opinion, the Timeshares Program would not have been or could not have been made publicly available or successfully promoted. He pleads that Cassels Brock knew or ought to have known that potential donors, including Lipson and the other Class Members, would rely upon the Legal Opinions, including the existence and favourable nature of the Legal Opinions, in deciding whether to participate in the Timeshare Program in each Taxation Year. He pleads that but for Cassels Brock's involvement, no Class Member would have participated in the Timeshare Program and none would have suffered a loss.

[52] He pleads that the opinions were prepared by Cassels Brock knowing that a favourable tax opinion was a necessary precondition to the creation and successful promotion of the Timeshare Program and that the Class Members (including Lipson) would rely on the existence of a favourable tax opinion in deciding whether to participate in the Timeshare Program. He pleads that in reliance on the legal opinions and its express and implied representations, the Class Members decided to participate in the Timeshare Program on the understanding they could both support amateur athletics and reduce their tax liability.

[53] Mr. Lipson proposes the following class definition, which he estimates will identify approximately 900 Class Members:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "Class Members" or the "Class").

[54] Mr. Lipson proposes the following common issues:

> *Negligence*
>
> (1) Did the Defendant owe the Class a duty of care (in, among other things, negligence or negligent misrepresentation) in the preparation of the Legal Opinions?
>
> (2) If the answer to common issue 1 is "yes", what is the content of the standard(s) of care?
>
> (3) Did the Defendant breach the foregoing standard(s) of care? If so, how?
>
> (4) If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?
>
> *Damages or Other Relief*
>
> (5) If the answer to common issue 4 is "yes", what types or heads of damages, if any, are the class members entitled to?
>
> (6) If the answer to common issue 4 is "yes" what remedy or remedies, if any, are the Class Members entitled to?
>
> (7) If the Class Member is entitled to a damages award, can some or all of that award be determined commonly? If so, what is the quantum and how?

[55] On April 15, 2011, Cassels Brock issued a third party claim against: Mintz & Partners LLP; Deloitte and Touche LLP; Glenn F. Ploughman; Shelley Shifman; Prenick Langer LLP; TMK Financial Group Ltd.; Gardiner Roberts LLP; the Estate of Ronald J. Ferano, deceased; John Doe 1-100; John Doe Inc. 1-100; John Doe Partnership 1-100; and John Doe LLP 1-100. It is alleged that these third parties promoted or marketed the Timeshare Program.

[56] Mintz & Partners LLP, Gardiner Roberts LLP, and the Estate of Ronald J. Farano, deceased have defended the main action.

[57] Mintz & Partners LLP, Deloitte & Touche LLP, Prenick Langer LLP, Gardiner Roberts LLP, and the Estate of Ronald J. Farano, deceased, have defended the Third Party Claim.

[58] On July 27, 2011, I granted the third parties leave to participate on the certification motion, and Gardiner Roberts and the Farano Estate did participate and they opposed certification.

[59] Cassels Brock submits that several of the criteria for certification have not been satisfied. In any event, Cassels Brock and Gardiner Roberts LLP and the Farano Estate submit that the proposed class action is statute-barred.

D. THE CRITERIA FOR CERTIFICATION AS A CLASS ACTION

1. Introduction

[60] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[61] For an action to be certified as a class proceeding, there must be a cause of action, shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[62] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[63] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26-29; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 15 and 16.

[64] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 28-29.

[65] In the case at bar, Cassels Brock did not dispute that Mr. Lipson's Statement of Claim disclosed a cause of action in negligent misrepresentation, and it accepted that

there was a satisfactory class definition and an adequate litigation plan if the action was certified as a class action.

[66] However, Cassels Brock challenged Mr. Lipson's pleading in negligence. The law firm also challenged the commonality of the proposed common issues, and it disputed that a class action was the preferable procedure. It challenged Mr. Lipson as a suitable representative plaintiff.

[67] In any event, as noted above, Cassels Brock, Gardiner Roberts, and the Farano Estate submitted that the class action should be dismissed as statute-barred, which is a matter that I will discuss after analyzing whether the action otherwise satisfies the criteria for certification as a class action.

2. Disclosure of Cause of Action

[68] The first criterion is whether the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5 (1)(a) of the *Class Proceedings Act, 1992*. Thus, to satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[69] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25; *Cloud v. Canada (Attorney General) v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 , rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Abdool v. Anaheim Management Ltd.*, (1995), 21 O.R. (3d) 453 (Div. Ct.) at p. 469,

[70] Cassels Brock concedes that Mr. Lipson has disclosed a cause of action for negligent misrepresentation, the constituent elements of which are: (1) a duty of care relationship; (2) a misrepresentation by the defendant; (3) the defendant having been negligent in making the misrepresentation; (4) the plaintiff having reasonably relied on the misrepresentation; and (5) the plaintiff having suffered damages as a consequence of relying on the misrepresentation. See *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87.

[71] However, Cassels Brock challenges Mr. Lipson's negligence claim as not showing a reasonable cause of action or as a disguised and defective negligent misrepresentation action that attempts to circumvent the constituent elements of reasonable reliance and causation of damages.

[72] Cassels Brock states that there was no lawyer and client relationship between it and the Class Members, and Cassels Brock submits that the Class Members claims are for pure economic losses for which the only available tort claim would be the tort of negligent misrepresentation. is As I understand it, the point of this argument is that if Mr. Lipson's action is to proceed as a class action, it can proceed only as a negligent misrepresentation claim, in which case each of the class members must prove reasonable reliance.

[73] Cassels Brock's arguments are similar to those made by the defendants in *Robinson v. Rochester Financial Ltd.*, [2010] O.J. No. 187 (S.C.J.), leave to appeal ref'd 2010 ONSC 1899 (Div. Ct.) , which was a class action that was certified by Justice Lax, who allowed a general negligence claim to proceed. Cassels Brock submits that *Robinson* is distinguishable or wrongly decided.

[74] In *Robinson*, the defendants were the promoters of a donation program in which the participants anticipating receiving tax credits under the *Income Tax Act*. The law firm Fraser Milner Casgrain LLP had prepared tax opinions for the promoters supporting the availability of tax credits. Canada Revenue, however, denied the tax credits, and the participants sued the promoters for breach of contract and for negligence. The participants sued Fraser Milner Casgrain for negligence.

[75] The participants alleged that the law firm's legal opinions were a necessary precondition to the marketing of the donation program and that they had relied on the existence of the opinions as a factor in deciding whether to participate in the program. The participants alleged that Fraser Milner Casgrain was liable for negligence in preparing the opinions. The participants alleged that the opinions prepared for the promoters were prepared to be relied on by the promoters as fundamentally necessary to promote the donation program.

[76] On the certification motion, Fraser Milner Casgrain moved to have the action against it dismissed. It argued that in the pleaded circumstances it could not have a duty of care and there could not be a negligence claim based on an allegedly negligent opinion that was never read or relied upon by the participants and that had been prepared just for the promoters.

[77] Justice Lax disagreed with Fraser Milner Casgrain's argument that the participants' claim was a disguised and deficient negligent misrepresentation claim; rather, she viewed it as a discrete negligence claim pleading duty of care, standard of care, breach of the standard of care, causation, and damages. Justice Lax concluded that it was at least arguable that Fraser Milner Casgrain ought to have foreseen that its tax opinion would be used to market the program and that the participants would suffer damages if the opinion was negligently prepared. It was arguable that the law firm had a duty of care to the participants in the donation program. In paragraph 31 of her judgment, Justice Lax stated:

> In my view, FMC placed itself in a relationship of sufficient proximity to owe a *prima facie* duty of care to the plaintiffs and proposed class members and I would leave to trial the question of whether policy considerations ought to negative that duty.

[78] I take Justice Lax to be saying that it was not plain and obvious that the participants did not have a claim in negligence against the law firm. She appreciated that the negligence claim was a novel cause of action given that the participants were not the clients of the firm and that the opinion had been prepared only for the promoter clients. Justice Lax appreciated that the participants' claim against the law firm might not succeed and that it was still open for Fraser Milner Casgrain to argue that it had no duty of care to the participants of the program. These matters, however, were for trial and did not stand against the certification of the action as a class action.

[79] I agree with Justice Lax's analysis. The *Robinson* case is not distinguishable from the case at bar, and, indeed, the case at bar is a stronger case for her analysis, which posits that it is arguable that the law firm had a duty of care and that the other constituent elements of negligence claim might be established; i.e. it is not plain and obvious that Mr. Lipson and the Class Member's do not have a free-standing claim for negligence that is discrete from a claim for negligent misrepresentation. See also: *Yorkshire Trust Co. v. Empire Acceptance Corp. Ltd.* [1986] B.C.J. No. 3254 (B.C.S.C.); *Collette v. Great Pacific Management Co.*, [2004] B.C.J. No. 381 (B.C.C.A.); *McCann v. C.P. Ships*, [2009] O.J. No. 5182 (S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25.

[80] On the duty of care point of a negligence analysis, the case at bar is stronger than in the *Robinson* case because Cassels Brock wrote its opinions so that they might be relied on "by potential donors, their agents and professional advisors for the purpose of the transactions contemplated by this opinion" while in *Robinson* the opinion was for the promoters although it was foreseeable that they would use to market the donation program to potential donors.

[81] I conclude that Mr. Lipson has satisfied the cause of action criterion for the certification of his action as a class action.

[82] I will discuss below whether his negligent misrepresentation action and his negligence action generate common issues suitable to be certified for a class action and whether a class action would be the preferable procedure for the determination of Mr. Lipson and the Class Members' claims.

3. Identifiable Class

[83] As already noted above, there is no challenge to the proposed class definition.

[84] I find that the proposed definition satisfies the identifiable class criterion of the test for certification as a class action.

4. Common Issues

[85] For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 18.

[86] The focus of the analysis of whether there is a common issue is not on how many individual issues there might be but whether there are issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 55, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.).

[87] The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39.

[88] For an issue to be common, it is not essential that the class members be identically situated vis-à-vis the opposing party or benefit from the successful prosecution of the action to the same extent: *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 at paras. 39-40.

[89] The comparative extent of individual issues is not a consideration in the commonality inquiry, although it is a factor in the preferability assessment: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 65, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Rumley v. British Columbia (sub. Nom. L.R. v. British Columbia)*, [2001] 2 S.C.R. 184 at para. 33.

[90] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6.

[91] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries: *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C.S.C.) at para. 51, var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.).

[92] While only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common; otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one: *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 61, aff'd 2010 ONSC 4724.

[93] Cassels Brock submits that Mr. Lipson's proposed common issues, which are set out earlier in these Reasons for Decision, want for commonality and are unfair. It submits that the certification of the list of proposed common issues would deny it the right and the ability to defend itself from the Class Members' claims. Thus, it states in paragraph 126 of its factum:

> 126. These proposed common issues raise significant individual issues. Grouping them together as common issues would severely limit Cassels Brock's ability to defend itself. It

> would unable to raise, for instance, the individual circumstances of a plaintiff's actual knowledge of (including whether they read) the Opinion Letters, representations made by any third party agents or advisors (many of whom are third parties in the action), what reliance a plaintiff placed on the Opinion Letters, the results of any additional due diligence performed by the participant or their agents or advisors (such as the Farano Opinion), and the actual loss suffered by any individual plaintiff. All of these issues are raised squarely on the face of the pleading and the common issues as proposed.

[94] Cassels Brock argues that reliance and causation are inherently idiosyncratic and individual issues that make Mr. Lipson's action unsuitable for a class action and that Mr. Lipson has unfairly designed the common issues to relieve the Class Members of the requirement of proving reliance and causation as elements of their claims of negligent misrepresentation and negligence respectively.

[95] Notwithstanding Cassels Brock's arguments, in my opinion, questions 1, 2, and 3 of the list of proposed questions are suitable for certification as common issues. These issues have sufficient commonality and are not unfair to Cassels Brook.

[96] Further, questions 5 and 6 would be suitable for certification if they were revised to state:

> (5) If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence, what types or heads of damages, if any, would the Class Members be entitled to?
>
> (6) If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence what remedy or remedies, if any, would the Class Members be entitled to?

[97] However, in my opinion, questions 4 and 7are problematic, and these questions should not be certified for the class action.

[98] Question 4 is:

> (4) If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?

[99] Question 4 either assumes that causation is a common issue or it makes determining whether causation is a common issue a common issue, which is not permissible. The commonality of an issue must have some basis in fact and cannot be simply assumed, and a common issue cannot be the determination of whether the purported common issue has commonality.

[100] In my opinion, the commonality factors relied on by Mr. Lipson establishes some basis in fact that Cassels Brock's role was sufficient to cause individual Class Members, like Mr. Lipson, to incur a loss, but these factors are not sufficient to show some basis in fact that Cassels Brock's role was the necessary cause of all of the Class Members suffering a loss.

[101] It seems to me that for Mr. Lipson's "but for causation argument" to work on a class-wide basis, there would have to be some basis in fact that Cassels Brock had the

monopoly on the legal opinions that were the posited as a *sine qua non* for the Timeshare Program, but the evidence and common sense is to the contrary. The Timeshare Program was in fact supported by other opinions.

[102] By way of illustration and comparison and contrast, the commonality of question 1, whether Cassels Brock owed the class a duty of care, has some basis in fact because Cassels Brock wrote its opinions so that they might be relied on "by potential donors, their agents and professional advisors for the purpose of the transactions contemplated by this opinion." The legal opinions were communicated or made available to the whole class.

[103] In contrast, the submission that but for the Cassels Brock opinion, the Class Members would not have suffered damages because there would not have been a Timeshare Program does not show some basis in fact for the commonality of causation because: (a) in so far as the negligent misrepresentation claim is concerned, the Class Members would still have to establish that they reasonably relied on Cassels Brock's opinion, which is an inherently individualistic inquiry; and (b) insofar as the negligent misrepresentation and negligence claims are concerned it should not be assumed and it does not necessarily follow that if Cassels Brock had a duty of care and breached the standard of care, it necessarily caused damages to all class members, including those who did not read or perhaps did not even put their mind to the existence of a tax opinion or who actually relied on the advice of persons who expressed their own independent opinion about the availability of tax receipts to participants in the Timeshare Program.

[104] In *Yorkshire Trust Co. v. Empire Acceptance Corp. Ltd., supra* at para. 15. Justice McLachlin, as she then was, pointed out that reliance was considered an essential element of a cause of action for negligent misrepresentation for two reasons; namely, (1) it confines the class of persons who may sue; and (2) it constitutes the causal link between the misrepresentation and the loss; it is because the plaintiff relied on the statement that he or she suffered a loss.

[105] Later, in her judgment at para. 18, Justice McLachlin notes that in cases where a causal link independent of reliance can be found, courts have been prepared to find a cause of action despite the absence of reliance. Earlier, in this judgment, I accepted that it was not plain and obvious that the Class Members did not have a reasonable cause of action in negligence, in which case the Class Members would not have to prove reasonable reliance, which is not a constituent element of a general negligence claim. (Proof of reasonable reliance would remain a constituent element in the Class Members' negligent misrepresentation claim). However, it does not follow from the absence of the requirement to show reliance in a general negligence claim that causation is to be assumed or that causation is no longer a constituent element of the general negligence claim.

[106] While it may be provable for some Class Members, particularly those that put their minds to what the tax opinions actually stated, that Cassels Brock's alleged negligence caused them to participate in the Timeshare Program with attendant losses, and while it may be provable for some more Class Members, who were ignorant of Cassels Brock's opinions, that they have Cassels Brock to blame for their being a

Timeshare Program, it does not follow that Cassels Brock should not be able to argue that there were some Class Members that have only themselves or others to blame for participating in the Timeshare Program.

[107] Causation is an element of culpability for the torts of negligent misrepresentation and negligence, and this is a matter of fairness and justice. In *Resurface Corp. v. Hanke*, [2007] 1 S.C.R. 333, Chief Justice McLachlin stated at para. 23:

> 23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at para. 26 per Sopinka J.

[108] In *Snell v. Farrell*, [1990] 2 S.C.R. 311, Justice Sopinka also stated at para. 26 that "causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former."

[109] Assuming that Cassels Brock opinion was the *sine qua non* or indispensable precondition to the Timeshare Program for all Class Members is unfair to the defendant Cassels Brock and ignores the evidence that there were other supportive legal opinions available and some of the marketers were accountants or professional advisors capable of evaluating the merits, or lack thereof, of the Cassels Brock opinions and of providing their own advice and opinions.

[110] Moreover, it is at least arguable that the Timeshare Program would have gone forward regardless of Cassels Brock's opinion for those who would have been satisfied with a tax credit for the cash portion of their donation to the Athletic Association or for those with a higher tolerance for risk than Mr. Lipson or for those aware of the weaknesses of the Cassels Brock opinion but still prepared to take their chances. Put shortly, in the circumstances of this case, reasonable reliance and causation are individual not common issues and Cassels Brock should be able to show that individual Class Members have not proven all of the constituent elements of their respective tort claims.

[111] This conclusion means that assuming that Mr. Lipson was successful at a common issues trial of questions 1, 2, and 3, Class Members would have to establish on an individual basis that they actually reasonably relied on the Cassels Brock opinion in making their decision to participate in the Timeshare Program or that the existence of the Cassels Brock opinion was a causal factor in their decision to participate in the Timeshare Program.

[112] With causation as an individual issue, the Class Members would not have to prove that the Cassels Brock opinion was the *sine qua non* of the Timeshare Program for all Class Members and Cassels Brock would have the burden of proving that its opinion was not a factor or a contributing factor in the particular Class Members'

decision to participate in the program. Treating reliance and causation as individual issues is fair to both parties.

[113] As for question 7, it states:

> (7) If the Class is entitled to a damages award, can some or all of that award be determined commonly? If so, what is the quantum and how?

[114] There is no basis in fact and no theory advanced as to how the identified class - as a class - would be entitled to a damages award as a class. The class members would have individual claims for damages, which would depend on their individual tax situations. In this regard, I understand that there are limits to the availability of tax credits, and thus it is conceivable that there may have been other reasons for Canada Revenue to deny or limit the charitable tax credits in whole or in part from the Timeshare Program. In other words, the assessment of damages is an individual issue for each Class Member.

[115] Based on the above analysis, I conclude that questions 1, 2, 3, 5 and 6 as revised are suitable common issues and that Mr. Lipson's action satisfies the third criterion for certification as a class action.

5. Preferable Procedure

[116] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[117] Preferability captures the ideas of whether a class proceeding would be an appropriate method of advancing the claim and whether it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[118] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, rev'g (2005), 78 O.R. (3d) 39 (Div. Ct.), which aff'd (2004), 71 O.R. (3d) 741 (S.C.J.), leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.).

[119] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative

procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106.

[120] A class proceeding will not satisfy the requirement that it be the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at paras. 134, 135; *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.); *Moyes v. Fortune Financial Corp.* (2002), 61 O.R. (3d) 770 (S.C.J.); *Garlepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (S.C.J.), aff'd [2004] O.J. No. 5309 (Div. Ct.).

[121] In the case at bar, there is little to commend Mr. Lipson's action as class action as the preferable procedure based on access to justice or behaviour modification. There was no suggestion that the class members could not afford to litigate their substantial individual claims, and there was no suggestion that Cassels Brock or law firms in general need behaviour modification and that a class action is required to encourage Cassels Brock or law firms in general to meet the standard of care of a tax lawyer when offering tax opinions about charitable donation programs.

[122] Turning to the preferability factor of judicial economy, in the case at bar, the common issues that have been certified would be followed by individual issues trials to determine the issues of reliance, reasonable reliance, causation, and quantification of damages, and, thus, Cassels Brock submits that the common issues are overwhelmed by the individual issues and a class action is not the preferable procedure.

[123] While there is considerable strength in this submission, in my opinion, it understates the judicial resource economies to be achieved by the common issues trial. If, for instance, Cassels Brock were to succeed in showing that its opinion met the standard of care, then all 900 claims would have been resolved. Conversely, if Mr. Lipson were successful at the common issues trial, the Class Members would have gone a long distance in advancing their claims against Cassels Brock. Cassels Brock's third party claims are manageable within the context of the individual issues trials, which is where they appear to properly belong.

[124] Practically speaking, the common issues trial would be about Cassels Brock's role in providing its opinions and the individual issues trial would be about the conduct of the class members and the third parties, if any. This is a manageable and preferable procedure to having the common issues repeatedly litigated. Thus, I conclude that the fourth criterion for certification is satisfied in the case at bar.

6. Representative Plaintiff and Litigation Plan

[125] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[126] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.), at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[127] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 41.

[128] The representative plaintiff must: (a) have knowledge of the overall factual situation; (b) assist in gathering evidence; (c) and decide whether to pursue the claim. However, because he or she will have the advice of competent counsel, one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff: *Frey v. BCE Inc.*, [2007] S.J. No. 476 (Q.B.) at para. 7.

[129] If the access to justice concerns of the *Class Proceedings Act, 1992,* are to be accomplished, the court should not subject the proposed representative plaintiff to the LSAT or some sort of Class Action Aptitude Test and should be skeptical of the defendant's arguments based on the personality of the candidate: *Coulson v. Citigroup Global Markets Canada Inc.*, [2010] O.J. No. 1109 (S.C.J.) at para. 158.

[130] Cassels Brock submits that Mr. Lipson does not have the attributes to qualify as a representative plaintiff. It points out that although he ultimately abandoned the attempt, he sought to purchase interests in the actions of fellow class members. It points out that he never read the Cassels Brock opinions and has shown little interest in understanding his own allegations about the alleged deficiencies in the opinions.

[131] Putting aside the problem discussed next of whether his claim is statute-barred, in my opinion, Mr. Lipson is a suitable representative plaintiff. With the assistance of competent counsel he has brought this action forward to a certification motion. There is no reason to think that he would not move the action forward to the common issues stage, which as noted above, focuses on Cassels Brock's role. He has prepared an

unchallenged litigation plan and he has selected competent counsel with considerable experience in class action litigation.

[132] I, therefore, conclude that the fifth criterion for certification has been satisfied.

7. Conclusion about the Certification of Mr. Lipson's Action as a Class Action

[133] Assuming that the action is not statute-barred, which is the topic next to be considered, for the above Reasons and subject to the qualifications noted above, Mr. Lipson's action satisfies the criteria for certification as a class action.

E. ARE THE CLASS MEMBERS CLAIMS STATUTE-BARRED?

[134] Cassels Brock, Gardiner Roberts LLP, and the Farano Estate submit that Mr. Lipson's claims and the claims of all the Class Members in negligence and in negligent misrepresentation are statute-barred. They submit that when it can be shown that the proposed representative plaintiff's claim is statute-barred, he or she cannot be a member of the proposed class and he or she cannot act as the representative plaintiff: *Stone v. Wellington Country Board of Education*, [1999] O.J. No. 1298 (C.A.); *Graham v. Impark*, 2010 ONSC 4982.

[135] Under the *Limitations Act, 2002*, actions are subject to a two-year limitation period from the date a claim is discovered. The discoverability rule is codified and particularized by s.5 (1) of the *Limitations Act, 2002*, which states:

> 5 (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage occurred;
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (iii) that the act or omission was that of the person against whom the claim is made; and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[136] The discoverability principle governs the commencement of a limitation period and stipulates that a limitation period begins to run only after the plaintiff has the knowledge, or the means of acquiring the knowledge, of the existence of the facts that would support a claim for relief: *Kamloops v. Nielson* (1984), 10 DLR (4th) 641 (S.C.C.); *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. Thus, a limitation period commences when the plaintiff discovers

the underlying material facts or, alternatively, when the plaintiff ought to have discovered those facts by the exercise of reasonable diligence.

[137] The circumstance that a potential claimant may not appreciate the legal significance of the facts does not postpone the commencement of the limitation period if he or she knows or ought to know the existence of the material facts, which is to say, the constitute factual elements of his or her cause of action. Error or ignorance of the law or legal consequences of the facts does not postpone the running of the limitation period: *Nicholas v. McCarthy Tétrault*, [2008] O.J. No. 4258 (S.C.J.), aff'd [2009] O.J. No. 686 (C.A.), leave to appeal to S.C.C. ref'd [2009] S.C.C.A. 476.

[138] In my opinion, the Supreme Court of Canada's decision in *Central Trust Co. v. Rafuse*, *supra*, is dispositive of the question of whether the Class Members' claims are statute-barred. In my opinion, the *Central Trust* case demonstrates that Mr. Lipson's and the other Class Members' claims are barred by the operation of the *Limitations Act, 2002*, which came into force in 2004 and which imposes a two-year limitation period for the claims in negligence and negligent misrepresentation.

[139] In *Central Trust Company v. Rafuse*, Jack Rafuse and Frankly Cordon were the lawyers acting for Central Trust in a mortgage loan transaction. Central Trust had granted a mortgage loan to the purchasers of the shares of a motel and restaurant business. In breach of the standard of care, the lawyers, who were also acting for the purchasers, were negligent and in breach of contract for failing to advise Central Trust that the mortgage might, if challenged, be held to be void, which is what occurred when, after the mortgage went into default, the Supreme Court of declared the mortgage to be illegal as contravening a statute making it unlawful for a company to give financial assistance in connection with a purchase of its own shares.

[140] Following the judgment of the Supreme Court declaring the mortgage to be void, Central Trust sued the lawyers for breach of contract and negligence. The Nova Scotia Court of Appeal held that the lawyers had been negligent, but the appellate court dismissed the action on the grounds that it was statute-barred. Central Trust appealed to the Supreme Court of Canada, which reversed the decision and held that the claim in negligence was not statute-barred.

[141] In *Central Trust*, in the Supreme Court, the major issues included whether a lawyer could be concurrently liable in contract and in tort. For present purposes, the important issue to consider was whether Central Trust's action was statute-barred. In this regard, it was conceded that Central Trust's claim in contract was statute-barred. That being the case, after the Supreme Court decided that concurrent liability was possible, it addressed the questions of whether the claim in negligence was also statute-barred. The precise questions were whether the doctrine of discoverability applied to the claim in negligence and, if so, when had Central Trust discovered the solicitor's negligence claim.

[142] Justice Le Dain decided that a doctrine of discoverability applied to the running of limitation periods. In paragraph 77 of his judgment, he stated:

> I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts

> on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*, R.S.N.S. 1967, c. 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence, ...

[143] Having decided that the doctrine of discoverability applied, this meant that the limitation period, which was six years for Central Trust's negligence claim, started to run not when the claim in negligence occurred but from the date that the claim was discovered or from the date that it ought to have been discovered.

[144] To apply the doctrine of discoverability, the relevant dates for Central Trust's claim were as follows: (a) the mortgage was granted as security on December 31, 1968; (b) the lawyer's certificate of title stating that the mortgage formed a first charge on the property was given to Central Trust on January 17, 1969; (c) the validity of the mortgage was challenged on April 21, 1977; (d) the mortgage was held to be void by the Supreme Court on April 22, 1980; and (e) Central Trust's action for negligence was instituted on October 22, 1980.

[145] Justice Le Dain held that although the 1968 mortgage was not declared by final judgment to be void until 1980, it was void *ab initio* and actual damage occurred when Central Trust took the mortgage on December 31, 1968, because it acquired no enforceable security for its loan. However, as of the date of the mortgage loan, Central Trust did not know that it had suffered damage, and thus the question was when ought Central Trust to have discovered it had been damaged. The answer was April 1977, when the validity of the mortgage was challenged during foreclosure proceedings.

[146] Justice Le Dain's succinct analysis of discoverability is found in paragraph 77 where he stated:

> Since the [lawyers] gave the [Central Trust] a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, the earliest that it can be said that [Central Trust] discovered or should have discovered the respondents' negligence by the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure. Accordingly [Central Trust's] cause of action in tort did not arise before that date and its action for negligence against the [lawyers] is not statute-barred.

[147] It should be noted that the damage suffered by Central Trust occurred when it accepted a mortgage that could be challenged as illegal. It later transpired that the mortgage was challenged, and Justice Le Dain held that the limitation period for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage, even though the actual declaration of the invalidity of the mortgage would occur still later.

[148] The same analysis can be applied to the case at bar. The Class Members, including Mr. Lipson, discovered or should have discovered their tort claims against Cassels Brock when the validity of the tax credits was denied by Canada Revenue in

2004. At that time and certainly not later than 2006, when Thornsteinssons LLP was retained to sue Canada Revenue, the Class Members knew or ought to have known the material facts on which the negligence claim or negligent misrepresentation claim against Cassels Brock was based.

[149] Like Central Trust, which took the security of a mortgage that turned out to be illegal based on its lawyers' title opinion, in the case at bar, the Class Members made donations that turned out to be ineligible for tax credits. It is alleged that the Class Members relied on Cassels Brock's opinions or but for Cassels Brock's opinions they would not have participated in the Timeshare Program. In both situations, albeit with hindsight, the damage to the participants occurred at the time when Cassels Brock was negligent but their awareness of the material facts of their claim against Cassels Brock came later when Central Trust or the participants in the Timeshare Program respectively learned that there was a potential problem with the tax credits.

[150] In the case at bar, as soon as the letters from Canada Revenue started to arrive, Mr. Lipson and the Class Members knew or ought to have known that Cassels Brock's opinion had caused them damage because they had actually relied on the opinions, or, but for those opinions they would not or could not have participated in the Timeshare Program and suffered damages. Given that Canada Revenue was challenging the validity of the trust, the validity of the gift, the donative intent of the participants, and the value of the donation, the donors knew that Canada Revenue could successfully deny the tax credit.

[151] The Class Members had all of the material facts necessary to determine that they had grounds for understanding that they had a tort claim against Cassels Brock. The Class Members may not have known the full extent of what it was going to cost them for having participated in the Timeshare Program but they did know that there had been harm caused because of Cassels Brock's opinions.

[152] Mr. Lipson relies on *Beuthling v. Hayes*, [2011] O.J. No. 858 (S.C.J.) to argue that the limitation period did not start running until a settlement was reached with Canada Revenue. *Beuthling v. Hayes* was an action for solicitors' negligence by Mr. Beuthling, who alleged that because of his lawyer's incompetence, he had been wrongfully convicted for sexual assault. Justice Grey dismissed the defendant lawyer's motion for summary judgment based on a limitation period defence. Justice Grey concluded that the limitation period did not begin to run until Mr. Beuthling's conviction had been set aside because that would have been the earliest that he would have known that he had a chance to succeed in recovering a judgment for damages against his lawyer.

[153] The *Beuthling* case does not assist Mr. Lipson. In the circumstances of a wrongful conviction because of a lawyer's failure to meet the standard of care of a competent defence lawyer, the client might know that the lawyer was incompetent at the time of the conviction and the client would have suffered damages as at the time of the conviction, however, the client could not know that he or she had a claim for solicitor's negligence until the conviction was set aside. The setting aside of the conviction is not a crystallization of damages, which would have already incurred, nor is it the perfection

or completion of the constituent elements of the negligence action, which would also have occurred; rather, the setting aside of the conviction is the discovery that this claim exists. In this regard, the client's situation in *Beuthling* is analogous to Central Trust in *Central Trust* v. *Rafuse*, where Central Trust suffered damages at the moment when the lawyers provided negligent services but Central Trust did not discover it had a claim for solicitor's negligence until the validity and enforceability of the mortgage was challenged.

[154] For the reasons, expressed above, in so far as the timeliness of the action is concerned, Mr. Lipson's and the Class Members' situation is different from Central Trust in the *Central Trust* case and of Mr. Beuthling, both of whom brought actions after the discovery of the already constituted negligence claims against their lawyers. In the case at bar, Mr. Lipson and the Class Members discovered that they had a claim against Cassels Brock in 2004 or in 2006. Mr. Lipson, however, did not commence his negligence and negligent misrepresentation actions until 2009.

[155] By way of counterargument, Mr. Lipson submits that Cassel Brock's and the Third Parties' argument that the limitation period had run its course mistakenly uses knowledge of a potential loss to establish discoverability instead of knowledge that the loss was attributable to a breach of duty by Cassels Brock which was not ascertainable until there was a settlement or adjudication with Canada Revenue.

[156] I think this counterargument means that although the Class Members knew they had a potential loss when they received the letters from Canada Revenue, they did not know whether to blame Cassels Brock for their potential loss. Thus, the Class Members submit an action against Cassels Brock would have been premature and that they had not discovered their claims against Cassels Brock. This argument is wrong.

[157] At the time of the letters from Revenue Canada, the Class Members' loss was actual not potential and they knew who to blame for that actual loss. The Class Members had been denied the tax credits in their entirety, and they allegedly had been lured into a transaction or not properly warned about a transaction that they allege they would have avoided but for the role played by Cassels Brock. The Class Members incurred expenses, i.e. special damages, in an attempt to fix their problems by retaining another law firm and bringing proceedings against Canada Revenue.

[158] In the case at bar, no independent inquiry of the facts is necessary to determine whether or not the Class Members claims are statute-barred. Indeed, this is apparent from the statement of claim that sets out that the material facts for the discovery of the negligence and negligent misrepresentation claims that occurred when the letters from Canada Revenue arrived denying the tax credits to the Class Members.

E. CONCLUSION

[159] For the above Reasons, I dismiss Mr. Lipson's action. It follows that the third party claims should be discontinued because they are moot.

[160] If the parties, including the third parties, cannot agree about the resolution of the third party claims and the matter of costs, a case conference should be arranged to address the manner in which these matters will be determined.

Perell, J.

Released: November 14, 2011

CITATION: Lipson v. Cassels Brock & Blackwell LLP, 2011 ONSC 6724
COURT FILE NO.: 09-CV-376511
DATE: November 14, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Jeffrey Lipson

Plaintiff

- and -

Cassels Brock & Blackwell LLP

Defendants

- and -

Mintz & Partners LLP, Deloitte & Touche LLP, Glenn F. Ploughman, Shelley Shifman, Prenick Langer LLP, TMK Financial Group Ltd., Gardiner Roberts LLP, the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, John Doe LLP 1-100

Third Parties

REASONS FOR DECISION

Perell, J.

Released: November 14, 2011

This is Exhibit "I" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

COURT OF APPEAL FOR ONTARIO

CITATION: Lipson v. Cassels Brock & Blackwell LLP, 2013 ONCA 165
DATE: 20130319
DOCKET: C54702

Goudge, Simmons and Gillese JJ.A.

BETWEEN

Jeffrey Lipson

Plaintiff (Appellant/
Respondent by way of Cross-Appeal)

and

Cassels Brock & Blackwell LLP

Defendant (Respondent/
Appellant by way of Cross-Appeal)

David F. O'Connor and J. Adam Dewar, for the appellant

Peter H. Griffin, Ian MacLeod and Shara N. Roy, for Cassels Brock & Blackwell LLP

Tim Gleason and Sean Dewart, for Gardner Roberts LLP and the Estate of Ronald Farano

Alexandra Urbanski, for Deloitte & Touche LLP

Heard: September 17 and 18, 2012

On appeal from the order of Justice Paul Perell of the Superior Court of Justice, dated November 14, 2011.

Goudge and Simmons JJ.A.:

A. OVERVIEW

[1] The main issue before us is whether, on a motion for certification, the motion judge erred in holding that a proposed class action for solicitor negligence and negligent misrepresentation is statute-barred, but that the action otherwise qualifies for certification.

[2] The appellant, Jeffrey Lipson, is one of about 900 Canadian taxpayers who donated cash and resort timeshare weeks to registered Canadian athletic associations during the four-year period between 2000 and 2003. He and the other donors made their donations through a program (the "Timeshare Tax Reduction Program" or "the Program") operated by the Canadian Athletic Trust (the "Athletic Trust").

[3] Under the terms of the Timeshare Tax Reduction Program, donors anticipated receiving tax credits worth more than the donor's actual financial outlay. In support of the viability of the Program, the promotional material included an opinion prepared by Cassels Brock & Blackwell LLP indicating that it was unlikely that the Canada Customs and Revenue Agency could successfully deny the anticipated tax credits.

[4] In 2004, the CCRA notified Mr. Lipson that it intended to disallow his claims for tax credits under the Timeshare Tax Reduction Program in their entirety. On

receiving this information, he and other donors who had received similar notices sought legal and accounting advice.

[5] In 2006, two of the other donors launched proceedings with the assistance of counsel as a test case to challenge the CCRA's denial of the tax credits.

[6] In 2008, the CCRA settled the test case on the basis that the donors would receive tax credits for their actual cash donations, but not for their donations of timeshare weeks (which had been paid for by a third party). Mr. Lipson and other members of the proposed class entered into similar arrangements with the CCRA.

[7] In April 2009, almost five years after he had received the initial notice of disallowance from the CCRA, Mr. Lipson commenced a proposed class action in which he sued Cassels Brock for negligence and negligent misrepresentation relating to their opinion about the Timeshare Tax Reduction Program. Mr. Lipson claimed damages in the form of interest arrears, lost opportunities to make other donations, and special damages consisting of professional fees for challenging the CCRA's position.

[8] On a motion for certification of the action as a class proceeding, Perell J. found that, apart from the limitations issue (and with the exception of certain proposed common issues including causation), the proposed class action satisfied the criteria for certification. Nonetheless, in an order dated November

14, 2011 (the "Order"), he dismissed the action, holding that it is statute-barred by the two-year limitation period set out in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

[9] Mr. Lipson raises two issues on appeal:

1. Did the motion judge err in dismissing his action as statute-barred?
2. Did the motion judge err in not certifying the action, including his proposed common issue relating to causation, as a class proceeding?

[10] In the event Mr. Lipson succeeds on the first issue, Cassels Brock cross-appeals from aspects of the motion judge's finding that the proposed class action otherwise satisfies the criteria for certification.

[11] For the reasons that follow, we allow the appeal, set aside those portions of the Order holding that the action is statute-barred and dismissing it, and substitute an order certifying the action as a class proceeding. The cross-appeal is dismissed.

B. BACKGROUND

(1) The Timeshare Tax Reduction Program

[12] The motion judge provided a full summary of the origin and structure of the Timeshare Tax Reduction Program at paras. 14 to 18 of his reasons.

[13] In brief, after establishing the Athletic Trust in Ontario, a Bahamian resident purchased timeshare weeks in a Caribbean resort and transferred them to the Trust.

[14] Under the terms of the Timeshare Tax Reduction Program, potential donors could apply to become beneficiaries of the Athletic Trust and, once accepted, the trustee of the Athletic Trust had discretion to distribute timeshare weeks to them. Beneficiaries could, but were not required to, donate their timeshare weeks to a registered Canadian amateur athletic association, along with sufficient cash to discharge encumbrances on the timeshare weeks.

[15] In return for each donation, the registered Canadian amateur athletic association that received the donation would issue two charitable tax receipts: one for the donor's cash contribution to discharge the encumbrances on the timeshare weeks (ranging from $4,600 to $9,700 per donated timeshare week); and one for the then fair market value of the donated timeshare week, less the amount of the encumbrance (ranging from $8,765-$18,900).

[16] The Program also included arrangements for pooling the donated timeshare units and facilitating their resale to the original developer at a significantly discounted price, subject to a 5% commission on net revenue to one of the promoters of the Program.

[17] Without getting into all the details, in general, the net result of these arrangements was:

- assuming receipt of the anticipated tax credits, participants in the Program would realize a net return on their cash donations of about 35% (this is because it was the Bahamian resident who settled the Athletic Trust and actually paid for the timeshare weeks); and
- although they issued charitable receipts to each participant totalling between $13,275 and $28,600, the registered Canadian amateur athletic associations that received donations ultimately benefited by about $1,300 per donated timeshare week.

(2) The Cassels Brock Legal Opinions

[18] Commencing in 2000, on each occasion that timeshare weeks were made available for distribution to beneficiaries, Cassels Brock was retained to provide the promoters of the Timeshare Tax Reduction Program with a legal opinion about the tax consequences of participating in the Program as a beneficiary and donor.

[19] In all, Cassels Brock provided six opinions between October 2000 and April 2003. The six opinions are substantially the same. The motion judge excerpted the relevant passages of the opinions at para. 23 of his reasons.

[20] For the purposes of this appeal, two aspects of the opinions are key. First, the opinions are directed not just to the promoters of the Athletic Trust, but also to potential donors. In fact, all but the final opinion specifically state that the opinion "may be relied upon ... by ... potential donors".

[21] Second, although the opinions acknowledge the prospect of a challenge by the CCRA to the tax benefits available under the Program, the opinions state that "it is unlikely that the CCRA could successfully deny ... the [anticipated] tax credit[s]."

[22] As we have said, a copy of the pertinent Cassels Brock opinion was included in the promotional material marketing the Timeshare Tax Reduction Program on each occasion that timeshare weeks were offered for distribution.

[23] Because the opinions are central to the issues on appeal, we set out here the text of the key passages. The remainder of the excerpts quoted by the motion judge together with certain other passages we consider important are set out in Appendix 'A':

> **Re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks**
>
> You have requested our opinion regarding the Canadian Federal Income Tax consequences relating to a donation of ... Timeshare Resort Weeks ... by individual Canadian resident taxpayers. It is contemplated that any such donation would entitle the donor to claim a tax credit under the *Income Tax Act* (Canada) (the "Tax Act").

...This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property.

...

3. Meaning of "Gift"

In order to claim a tax credit for a donation there must be a complete gift of the property.

...

If all or substantially all of the Class A Beneficiaries who receive Timeshare Weeks donate them, the CCRA may be more inclined to challenge the arrangement (but see our opinion below at page 23 as to the unlikely success of such a challenge.)

....

7. General Anti-Avoidance Rule ("GAAR")

...

In our opinion, and based on the foregoing, a donation of Timeshare Weeks in these circumstances would not likely be successfully attacked under GAAR.

....

9. General Comments

...

This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion. ...

Based on and subject to the foregoing review, in our opinion it is unlikely that the CCRA could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A

> *Beneficiaries* who receive a distribution of the Timeshare Weeks from the Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to a [registered Canadian amateur athletic association].

(3) Other Legal Opinions Obtained by Promoters and Marketers

[24] In addition to the Cassels Brock opinion, in December 2002, the promoters of the Timeshare Tax Reduction Program obtained an opinion from a Manitoba law firm confirming the applicability of the Cassels Brock opinion to the *Manitoba Tax Act*.

[25] Further, one of the entities marketing the Timeshare Tax Reduction Program obtained a second opinion confirming the Cassels Brock opinion from Ronald J. Farano, Q.C., a tax partner at Gardner Roberts LLP.

(4) Mr. Lipson's Participation in the Timeshare Tax Reduction Program

[26] In an affidavit filed on the certification motion, Mr. Lipson deposed that his accountant spoke to him about the Timeshare Tax Reduction Program in the fall of 2000. Although he understood "the gist" of the Program, he says he did not understand the intricacies of how it worked. He asked his accountant whether there was a legal opinion to support the tax benefits of the program. On being told that Cassels Brock had issued a supporting legal opinion, Mr. Lipson was satisfied that the Program offered legitimate tax benefits and decided to

participate. He states: "I would not have participated in the Program absent a favourable tax opinion from a reputable law firm."

[27] On his cross-examination, Mr. Lipson indicated he has no recollection of reading the Cassels Brock opinion. He understood from his accountant that the Cassels Brock opinion provided an assurance that the Program was "legal" and thus that there would be "nothing for the [CCRA] to complain about." According to Mr Lipson, had there been an 80% chance he would not receive the tax credits, he would not have participated.

[28] Mr. Lipson confirmed that, for the years 2000 to 2003, he claimed the following tax credits for donations under the Timeshare Tax Reduction Program:

2000 – $634,352

2001 – $1,261,988

2002 – $2,085,835

2003 – $1,148,879.60.

(5) Mr. Lipson's Dealings with the CCRA

[29] In a series of letters to Mr. Lipson dated October 19 through to November 9, 2004, the CCRA indicated it would be denying the full amount of the tax credits Mr. Lipson had claimed arising from the Program. Among other things, in their

correspondence, the CCRA challenged (i) the validity of the Athletic Trust; (ii) the validity of the gifts of timeshare weeks; and (iii) the valuation of timeshare weeks

[30] Both in the statement of claim and in his affidavit, Mr. Lipson indicates that in response to the reassessments, he "sought legal and accounting advice at significant personal expense". In his affidavit, Mr. Lipson also states that he retained Thorsteinssons LLP in April 2004 to act for him in his dealings with the CCRA and that it is his understanding that Thorsteinssons acted for most of the class members in this regard.

[31] On his cross-examination, Mr. Lipson confirmed that the promoters of the Program had created a fund to look after any challenge to the tax structure that might occur and that he understood that Thorsteinssons' legal fees were paid from that fund. This evidence was confirmed by evidence from one of the creators of the Program.

[32] According to Mr. Lipson, the dispute with the CCRA proceeded by way of test cases launched in 2006 by two of the participants in the Timeshare Tax Reduction Program on behalf of all of the donors who participated in the Program and who were reassessed.

[33] On March 24, 2008, Mr. Lipson accepted an offer to settle made by the CCRA restricting his tax credits for participation in the Timeshare Tax Reduction Program to the amount of his cash donations to Canadian athletic associations.

[34] Although Thorsteinssons conducted the test case litigation, on his cross-examination, Mr. Lipson testified that he retained Davies Ward Phillips & Vineberg LLP "to interface" with Thorsteinssons. Further, he says he settled with the CCRA as a result of advice received from Davies Ward, and not Thorsteinssons.

[35] During his cross-examination, Mr. Lipson agreed with suggestions that he realized there was a problem as soon as he received the first disallowance letter and that he knew then that the result Cassels Brock had said would occur was not going to happen.

(6) The Proposed Class-Action

[36] On April 15, 2009, Mr. Lipson commenced the proposed class action in which he sued Cassels Brock for negligence and negligent misrepresentation.

[37] At para. 35 of his Fresh As Amended Statement of Claim, Mr. Lipson characterizes the Cassels Brock opinions as follows:

> 35. In each of the Legal Opinions, Cassels Brock stated that Lipson and the other Class Members would obtain the tax benefits described in the promotional materials. Cassels Brock's ultimate conclusion, as set out in each of the Legal Opinions, was that:
>
> > [I]t is unlikely that the [CCRA] could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A beneficiaries who receive a distribution of the Timeshare Weeks from the [Athletic]

> Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAAA.

[38] In essence, Mr. Lipson alleges that Cassels Brock (i) fell below the standard of care of a reasonably competent tax solicitor in preparing its opinion, resulting in an opinion that contains material misrepresentations; (ii) knew that a favourable tax opinion was a necessary precondition to the creation and successful promotion of the Timeshare Tax Reduction Program; and (iii) knew that potential donors would rely on the existence of a favourable tax opinion in deciding whether to participate in the Program.

[39] Mr. Lipson claims that, but for the Cassels Brock opinion, the Timeshare Tax Reduction Program could not have been made publicly available or successfully promoted. In addition, he claims that he and the other class members decided to participate in the Program in reliance on the Cassels Brock opinion and the representations, both express and implied, which it contained.

[40] Finally, Mr. Lipson claims that, as a result of the negligence and negligent misrepresentations of Cassels Brock, he and the other class members suffered damages in the form of substantial interest arrears under federal and provincial income tax legislation, loss of the opportunity to make other donations or participate in other tax shelters, and special damages in the form of accounting and other professional fees to respond to the CCRA's reassessments.

[41] In his Fresh As Amended Statement of Claim, Mr. Lipson defines the proposed class as:

> [A]ll individuals who applied and were accepted to be beneficiaries of the Athletic Trust 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of [certain registered Canadian amateur athletic associations].

[42] According to the Fresh As Amended Statement of Claim, Mr. Lipson and the other class members settled with the CCRA when it became "at least likely, if not certain" that the CCRA would be successful in challenging the tax credits claimed by Mr. Lipson and the other class members.[1]

(7) Cassels Brock's Third-Party Claim and Statement of Defence

[43] On April 15, 2011, Cassels Brock issued a third party claim against a number of individuals and entities, alleging that they provided tax, financial or

---

[1] Paragraphs 54 and 55 of the Fresh As Amended Statement of Claim provide as follows:

> 54. In or about January 2008, [the CCRA] agreed to settle the test case litigation on the basis that [the two donors] would be entitled to a tax credit for the cash portion of their donations to the [registered Canadian amateur athletic associations] under the [Timeshare Tax Reduction Program], but would not receive any tax credits for their donations of Timeshare Weeks. [The CCRA] extended this settlement offered to Lipson and the other Class Members.
>
> 55. Faced with the prospect that it was at least likely, if not certain – and not "unlikely" as Cassels Brock had represented in each of the Legal Opinions – that [the CCRA] would be successful in challenging the tax credits claimed by Lipson and the other Class Members in respect of at least their donation of Timeshare Weeks to the [registered Canadian amateur athletic associations], Lipson accepted [the CCRA's] settlement offers.

legal advice to putative class members with respect to the Timeshare Tax Reduction Program. Gardiner Roberts LLP and the Estate of former Gardiner Roberts senior tax partner Ronald J. Farano, deceased, are among the named third parties.

[44] In accordance with a direction from the motion judge, prior to the certification motion, Cassels Brock delivered its statement of defence and the third parties delivered statements of defence to the main action and to the third party action.

[45] The statements of defence to the main action included an assertion that, by pleading that the CCRA denied his claims for tax credits in 2004, Mr. Lipson had acknowledged that the proposed class action is statute-barred.

(8) Mr. Lipson's Reply

[46] In his reply, Mr Lipson pleaded that "[u]ntil January 2008 during the test case litigation … it was not known or reasonably discoverable that it was at least likely … that [the CCRA] would be successful in challenging the tax credits claimed by Lipson and the other Class Members." He also pleaded that it was not until at least January 2008, when the test case appeal litigation had significantly progressed, that a proceeding against Cassels Brock became an appropriate avenue for the donors to seek redress.

(9) The Proposed Common Issues

[47] On the certification motion, the Mr. Lipson proposed the following common issues:

> Negligence
>
> 1. Did the Defendant owe the Class a duty of care (in among other things, negligence or negligent misrepresentation) in the preparation of the Legal Opinions?
>
> 2. If the answer to common issue 1 is "yes", what is the content of the standard(s) of care?
>
> 3. Did the Defendant breach the foregoing standard(s) of care? If so, how?
>
> 4. If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?
>
> Damages or Other Relief
>
> 5. If the answer to common issue 4 is "yes", what types or heads of damages, if any, are the class members entitled to?
>
> 6. If the answer to common issue 4 is "yes", what remedy or remedies, if any, are the Class Members entitled to?
>
> 7. If the Class Member is entitled to a damages award, can some or all of that award be determined commonly? If so, what is the quantum and how?

(10) Expert Opinion from Professor Vern Krishna

[48] Mr. Lipson's material on the certification motion included affidavits and letters of opinion from Professor Vern Krishna concerning the validity and appropriateness of the Cassels Brock legal opinions supporting the Timeshare Tax Reduction Program.

[49] Professor Krishna's letters of opinion address two main issues: i) Cassels Brock's opinions concerning whether the donation of timeshare weeks constitutes a valid gift; and ii) Cassels Brock's opinions concerning the general anti-avoidance rule.

[50] In relation to the first issue, Professor Krishna concludes that the Cassels Brock opinions failed to address issues relevant to the validity of the gift in circumstances where the anticipated tax credit substantially exceeds the donor's financial outlay. On that issue, he opines that the Cassels Brock legal opinions do not meet the standard of care expected of a tax lawyer.

[51] In relation to the second issue, Professor Krishna states that while "existing jurisprudence suggests that the [Timeshare Tax Reduction Program] would violate the general anti-avoidance provisions of the *Income Tax Act* ... the jurisprudence in the Supreme Court of Canada did not emerge until 2005." Moreover, "even after the three Supreme Court of Canada's decisions, there remains considerable uncertainty as to the scope and reach of GAAR." On that

issue, he opines that the Cassels Brock legal opinions reasonably address the anti-avoidance aspects of the Timeshare Tax Reduction Program in light of the available jurisprudence at the relevant time.

(11) The Positions of the Parties on the Certification Motion

[52] Cassels Brock and the third parties opposed certification of the proposed class action on the grounds that the claims of all class members, including Mr. Lipson, are statute-barred under the *Limitations Act*. In particular, they argued that the class members' claims were discoverable when the CCRA disallowed their claims for tax credits. In addition, they claimed that, when it can be shown that a proposed representative plaintiff's claim is statute-barred, he or she cannot be a member of the proposed class and he or she cannot act as the representative plaintiff.

[53] Cassels Brock also submitted that the proposed class action failed to satisfy three of the five criteria for certification under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6:

i) The claims of the class members must raise a common issue (s. 5 (1)(c));

ii) A class proceeding must be the preferable procedure for the resolution of the common issues (s. 5 (1)(d)); and

iii) There must be a suitable representative plaintiff (s. 5 (1)(e)).

[54] Finally, although Cassels Brock conceded that the proposed class action disclosed a cause of action for negligent misrepresentation, it argued that the negligence claim failed to disclose a reasonable cause of action (s. 5 (1)(a)) because none of the class members were clients of Cassels Brock.

C. THE MOTION JUDGE'S DECISION

[55] In the analysis section of his reasons, the motion judge dealt first with the question of whether, leaving aside the limitation issue, the proposed class action meets the criteria for certification. He held as follows:

- It was not plain and obvious that either the negligent misrepresentation claim or the negligence claim failed to disclose a reasonable cause of action (s. 5(1)(a) of the *Class Proceedings Act*). Although the negligence claim may be novel, the question of whether Cassels Brock owed class members a duty of care should be left for trial.
- The proposed class definition satisfies the identifiable class criterion (s. 5 (1)(b) of the *Class Proceedings Act*).
- The claims of the proposed class raise common issues. Proposed questions one, two and three are suitable for certification as common

issues. Proposed questions five and six would be suitable for certification if revised.[2] Proposed questions four and seven, relating to causation and damages, are not suitable common issues. (Section 5 (1)(c) of the *Class Proceedings Act*).

- A class proceeding would be the preferable procedural for resolution of the common issues. Although there is little to suggest that the class proceeding is necessary to ensure access to justice or to modify behaviour, the judicial economy factor justifies a class proceeding in which the common issues at trial will focus essentially on the opinions of Cassels Brock. (Section 5 (1)(d) of the *Class Proceedings Act*).
- As Mr. Lipson had selected competent and experienced counsel and, as his litigation plan was unchallenged, there was no reason to believe he would not move the action forward to the common issues stage. Leaving aside the limitations issue, he is a suitable representative plaintiff (Section 5 (1)(e) of the *Class Proceedings Act*).

---

[2] The motion judge stated the revised questions as follows:

5. If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence, what types or heads of damages, if any, would the Class Members be entitled to?

6. If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence what remedy or remedies, if any, would the Class Members be entitled to?

[56] As for the limitations issue, the motion judge concluded that no independent factual inquiry was necessary to dispose of it. Based on the Supreme Court of Canada's decision in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, and a review of the facts alleged in the statement of claim, the claims for negligence and negligent misrepresentation should have been discovered in 2004 when the CCRA denied the validity of the tax credits or, at the very latest, in 2006, when Thornsteinssons was retained to sue the CCRA. The claims of Mr. Lipson and the other class members were therefore statute-barred.

D. THE APPEAL

(1) Did the motion judge err in dismissing the appellant's claim as statute-barred?

(a) The Positions of the Parties on Appeal

[57] On appeal, Mr. Lipson submits that the motion judge acted without jurisdiction or authority in dismissing the action as statute-barred on a certification motion. He argues that the purpose of a certification motion is purely procedural. Such a motion is intended to determine whether the proposed claims are suitable as a class proceeding and there is to be no preliminary review of the merits of any proposed defence.

[58] Further, Mr. Lipson says that, in the absence of a Rule 21 motion or a summary judgment motion, he had no proper notice of the limitation issue. The record he placed before the court was intended to address only the certification

issue. It was not intended to address a merits defence. It was particularly not intended to address a merits defence for the class that had never been certified as a common issue – and one which, by its very nature, is not a common issue in any event.

[59] In the alternative, if the motion judge was entitled to address the limitation issue under s. 5(1)(a) of the *Class Proceedings Act* – as relating to whether the statement of claim disclosed a reasonable cause of action – Mr. Lipson submits that the motion judge erred by failing to accept the facts as pleaded in the statement of claim and in the reply as true. In both documents, Mr. Lipson pleaded facts indicating the claim was not discovered until approximately January 2008 when the test case had significantly progressed and it became apparent that the CCRA would likely be successful in denying a substantial portion of the tax credits claimed.

[60] Further, whether the motion judge proceeded under s. 5(1)(a) or 5(1)(e) (proper plaintiff) of the *Class Proceedings Act*, Mr. Lipson submits that he erred by misinterpreting *Central Trust Co. v. Rafuse* as standing for the proposition that, in a claim for negligence arising from a solicitor's opinion, the limitation period begins to run when the validity of the opinion is challenged.

[61] Cassels Brock asserts that a motion judge on a certification hearing is required to perform a gatekeeping function – accordingly, where it is apparent on

the certification motion that an action is bound to fail, the certification judge has the authority both to decline to certify the action and to dismiss it without the need for a cross-motion. The motion judge's decision in this regard is entitled to deference.

[62] In this case, Mr. Lipson had notice of the limitations issue by virtue of the statements of defence that were delivered. Further, on Mr Lipson's own evidence, it was clear – and the motion judge concluded – that the limitation period had expired. Mr. Lipson did not read the Cassels Brock opinions. Moreover, he testified that he understood the opinions to mean that the Timeshare Tax Reduction Program was legal and that there was no risk that the CCRA would reassess him. He learned in 2004 that that was not the case – he also began incurring damages in the form of legal and accounting fees at that time.

[63] Further, all members of the class were aware of the reassessments and had begun incurring legal and accounting fees by no later than 2006 when the test case litigation was commenced.

[64] Except for acknowledging that it may have been preferable for Cassels Brock to have brought a formal motion to dismiss the action, the third parties, take the same position as Cassels Brock. They assert that the motion judge had

authority to decline to certify the action because it was clear on the evidence that the limitation period had expired and Mr. Lipson was fully aware of this issue.

(b) The Discoverability Principle

[65] As the motion judge observed, in this case, the application of the two-year limitation period turns on the discoverability principle, now codified in s. 5 of the *Limitations Act*. That section provides as follows:

> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

(c) Discussion

[66] In our view, it is unnecessary that we resolve the question of whether it is open to a certification judge to dismiss a proposed class action based on a

finding that the action is statute-barred, and in particular, in the absence of a cross-motion under either Rule 20 or Rule 21.

[67] Based on our review of the motion judge's reasons, his decision to dismiss the proposed class action as statute-barred turned on his interpretation of the Supreme Court of Canada's decision in *Central Trust Co. v. Rafuse* and his application of that decision to the facts of this case.

[68] In our respectful view, the motion judge erred in interpreting and applying *Central Trust Co. v. Rafuse*. Moreover, when that decision is interpreted properly, it is apparent that the record before the motion judge did not disclose whether Mr. Lipson's claim was statute-barred. Nor did it support the conclusion that the limitation period applicable to Mr. Lipson's claim also applied to the entire class.

[69] The motion judge's findings concerning *Central Trust Co. v. Rafuse* begin at para. 138 of his reasons where he said that, in his view, the Supreme Court of Canada's decision in that case is dispositive of the question of whether the class members' claims in this case are statute-barred.

[70] The motion judge correctly described the issues in *Central Trust Co. v. Rafuse*. In that case, the defendant solicitors had acted for Central Trust on a mortgage transaction in 1969 and had certified that Central Trust had a valid mortgage against the title to the property on which it was registered. However, in a subsequent action by Central Trust against the mortgagor, the mortgage was

held to be void *ab initio* because it contravened a statutory prohibition against a certain form of lending.

[71] In 1980, Central Trust sued the solicitors who acted for it on the mortgage transaction. A major issue was whether the solicitors could be held liable both in contract and in negligence. If the solicitors could be found concurrently liable in negligence, further issues arose concerning whether the doctrine of discoverability applied in determining the limitation period, and, if so, when the limitation period began to run.

[72] However, the motion judge had this to say at paras. 146-147 of his reasons about the Supreme Court of Canada's conclusions about discoverability:

> [146] Justice Le Dain's succinct analysis of discoverability is found in paragraph 77 where he stated:
>
> > Since the [lawyers] gave the [Central Trust] a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, *the earliest that it can be said that [Central Trust] discovered or should have discovered the respondents' negligence by the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure.* Accordingly [Central Trust's] cause of action in tort did not arise before that date and its action for negligence against the [lawyers] is not statute-barred.

> [147] It should be noted that the damage suffered by Central Trust occurred when it accepted a mortgage that could be challenged as illegal. It later transpired that the mortgage was challenged, and *Justice Le Dain held that the limitation period for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage*, even though the actual declaration of invalidity of the mortgage would occur still later. [Emphasis added.]

[73] In our respectful view, the motion judge's conclusion about Justice Le Dain's holding in *Central Trust Co. v. Rafuse* is incorrect. Justice Le Dain did not hold that "the limitation period for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage". Rather, he concluded that the *earliest* date on which the claim for solicitor's negligence could have commenced running was the date on which the validity of the mortgage (and therefore the validity of the solicitors' opinion) was challenged.

[74] Because the applicable limitation period for solicitor negligence was six years when *Central Trust Co. v. Rafuse* was decided, it was unnecessary that Justice Le Dain go further and determine the actual date on which the limitation period commenced – the action for solicitor negligence had been started well within six years after the earliest date on which Justice Le Dain found the cause of action was discoverable.

[75] In *Kenderry – Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger* (2001), 53 O.R. (3d) 208, at para. 19, Molloy J. recognized that *Central Trust Co. v. Rafuse* is not binding authority for the proposition that the limitation

period in an action for solicitor negligence begins to run on the date of a manifest challenge to the solicitor's opinion.

[76] Instead, Molloy J. held that, in an action for solicitor negligence arising from a solicitor's opinion, "[t]he date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence to run will depend on the circumstances of the particular case."

[77] We agree with that conclusion and note that it was adopted by the majority in this court's decision in *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851, at para. 71.

[78] The motion judge in this case applied his understanding of *Central Trust Co. v. Rafuse* to the facts pleaded in the Fresh As Amended Statement of Claim at paras. 148 to 158 of his reasons. We excerpt the most relevant portions of these paragraphs below:

> [148] The same analysis can be applied to the case at bar. The Class Members, including Mr. Lipson … should have discovered their tort claims against Cassels Brock when the validity of the tax credits was denied by Canada Revenue in 2004. At that time and certainly not later than 2006, when Thornsteinssons LLP was retained to sue Canada Revenue, the Class Members knew or ought to have known the material facts on which the negligence claim or negligent misrepresentation claim against Cassels Brock was based.
>
> [149] Like Central Trust, … *the Class Members made donations that turned out to be ineligible for tax credits.*

It is alleged that the Class Members relied on Cassels Brock's opinions or but for Cassels Brock's opinions they would have not participated in the Timeshare Program. *In both situations … their awareness of the material facts of their claim against Cassels Brock came … when Central Trust or the participants in the Timeshare Program respectively learned that there was a* ***potential*** *problem with the tax credits.*

[150] In the case at bar, as soon as the letters from Canada Revenue started to arrive, Mr. Lipson and the Class Members knew or ought to have known that Cassels Brock's opinion had caused damage because they had actually relied on the opinions, or, but for those opinions they would not or could not have participated in the Timeshare Program and suffered damages. Given that Canada Revenue was challenging the validity of the trust, the validity of the gift, the donative intent of the participants, and the value of the donation, **the donors knew that Canada Revenue could successfully deny the tax credit**.

…

[157] At the time of the letters from Revenue Canada, the Class Members' loss was actual not potential and they knew who to blame for that actual loss. The Class Members had been denied the tax credits in their entirety, and they allegedly had been lured into a transaction or not properly warned about a transaction that they allege they would have avoided but for the role played by Cassels Brock. The Class Members incurred expenses, i.e. special damages, in an attempt to fix their problems by retaining another law firm in bringing proceedings against Canada Revenue.

[158] In the case at bar, no independent inquiry of the facts is necessary to determine whether or not the Class Members' claims are statute-barred. Indeed, this is apparent from the statement of claim that sets out the material facts for the discovery of the negligence and negligent misrepresentation claims that occurred when

> the letters of from Canada Revenue arrived denying the tax credits to the Class Members. [Emphasis added.]

[79] In our respectful view, the motion judge's reasons concerning this issue are not entirely clear.

[80] On the one hand, although the motion judge seems to acknowledge that the notices of disallowance were not a final disposition of the tax credit issue – and therefore at best provided notice of a *potential* claim – he appears to have concluded that all class members should have known when they received the notices of disallowance that the CCRA could successfully challenge their claims for tax credits and that the action therefore became statute-barred at that time (for example, see paras. 150 and 158).

[81] Further, the motion judge appears to have treated the class members' knowledge that they were incurring professional fees to challenge the CCRA's denial of the claimed tax credits as a relevant factor affecting the commencement of the limitation period (for example, see paras. 148, 157).

[82] In our view, neither the fact that the CCRA was challenging the claimed tax credits nor the fact that the class members may have been incurring professional fees to challenge the CCRA's denial of the tax credits is determinative of when the class members reasonably ought to have known they had suffered a loss as a result of a breach of the standard of care on the part of Cassels Brock.

[83] As pleaded in the Fresh As Amended Statement of Claim, the Cassels Brock opinion was that it was unlikely that the CCRA could successfully deny the claimed tax credits. Accordingly, the fact of a CCRA challenge to the tax credits did not, in itself, mean the challenge would likely be successful or make the Cassels Brock opinion invalid. Further, even accepting that receipt of the notices of disallowance prompted class members to obtain professional advice and to launch test case litigation to challenge the denial of the tax credits, that conduct does not demonstrate when class members knew, or ought reasonably to have known, that the test case litigation would not likely be entirely successful.

[84] The test case litigation did not settle until 2008. The answer to when the limitation period began to run for each Class Member may very well depend on several factors, including what position, if any, Cassels Brock took in response to the CCRA challenge; what notice, if any, Cassels Brock gave to class members of their position, if any, on the CCRA challenge; and what each class member was told by his or her professional advisor(s) and when: see *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*. Importantly, this may be an issue that must be determined individually for each class member, depending on what individual class members were told and when.

[85] In the Fresh As Amended Statement of Claim, Mr. Lipson pleaded that he and the other class members settled with the CCRA when it became "at least likely, if not certain" that the CCRA would be successful in challenging the tax

credits claimed by Mr. Lipson and the other class members. In his Reply, he pleaded that "[u]ntil January 2008, during the test case litigation ... it was not known or reasonably discoverable that it was at least likely ... that [the CCRA] would be successful in challenging the tax credits claimed by Lipson and the other Class Members."

[86] Although perhaps not express, these pleadings at least imply that Mr. Lipson and the other class members were not advised until January 2008 of the likelihood that the CCRA's disallowance of the tax credits would succeed, at least in part.

[87] For the purposes of s. 5(1)(a) of the *Class Proceedings Act* (the reasonable cause of action prong of the certification test), no evidence is admissible. Unless patently ridiculous or incapable of proof, a plaintiff's pleadings must be accepted as true. On their face, Mr. Lipson's pleadings do not demonstrate that, prior to January 2008, he knew that the CCRA's challenge to his claimed tax credits would likely be successful. Accordingly, his pleadings do not demonstrate that his claim was statute-barred when he commenced his action in April 2009.

[88] Further, under ss. 5(1)(b)-(e) of the *Class Proceedings Act* (the remaining prongs of the certification test), a plaintiff need only show some evidence that the proposed claim satisfies each of the relevant criteria. Because the limitation issue is a defence, in the absence of evidence tending to demonstrate that the

limitation period had expired, the limitation issue did not undermine Mr. Lipson's request for certification.

[89] Cassels Brock argues that Mr. Lipson's own evidence demonstrates that, at least for him, the relevant limitation period had expired. They rely, for example, on the fact that he testified that he did not read the Cassels Brock opinion; that he interpreted the existence of the opinion as meaning the Timeshare Tax Reduction was legal and not subject to challenge; and that, when the CCRA challenged the tax credits, he knew he had a problem and that he would not obtain what Cassels Brock had promised.

[90] We do not accept this argument. Whatever Mr. Lipson's interpretation of the Cassels Brock opinion, their opinion remains the same. Their opinion did not promise that the CCRA would not challenge the anticipated tax credits under the Timeshare Tax Reduction Program. Rather, it stated that it was unlikely that the CCRA could *successfully* challenge tax credits claimed under the Program. Mr. Lipson is not entitled to, and did not, sue Cassels Brock for an opinion they did not give. To the extent that his interpretation of the opinion may weaken his claim for reliance in relation to his negligent misrepresentation claim, in our view, that will be an issue for the trial judge.

[91] Based on the foregoing reasons, we allow the appeal on this ground.

(2) Did the motion judge err in finding that causation in simple negligence is not a proper common issue?

[92] The motion judge found that Mr. Lipson's pleading disclosed a cause of action in negligent misrepresentation and also in simple negligence, and that it was not plain and obvious that these claims would fail. He also found that, for both causes of action, whether Cassels Brock owed the class a duty of care and whether it had breached that duty were proper common issues.

[93] However, the motion judge found that, for both causes of action, the question of whether Cassels Brock's breach caused the class damage was not a proper common issue but instead had to be answered on an individual basis for each class member.

[94] Mr. Lipson contests this finding as it applies to his claim in simple negligence. He says that, for that cause of action, causation should be certified as a common issue.

[95] For the following reasons, we agree.

[96] In finding that Mr. Lipson's claim in simple negligence was properly disclosed by his pleading, the motion judge looked to Mr. Lipson's allegations that the Cassels Brock legal opinion was a necessary precondition for the marketing of the program, that Cassels Brock ought to have foreseen that for the promoters the opinion was fundamentally necessary for the presentation of the

program, and that those who then bought into the program would suffer damage if the opinion had been negligently prepared.

[97] Thus, the claim in simple negligence is distinct from Mr. Lipson's claim in negligent misrepresentation, which required proof of reliance on the opinion by individual class members in deciding to participate in the program.

[98] Framed in this way, the cause of action in simple negligence does not require a showing of reliance on the Cassels Brock opinion by individual class members. The allegation is that class members suffered damage because they participated in the program, which, but for Cassels Brock's negligent opinion, would not have been marketed by the promoters and thus not available to class members. In our view, this issue is common to the claims of all class members.

[99] It may be that, at the trial of this common issue, evidence will emerge that the Cassels Brock legal opinion was not a necessary precondition for the promoters to market the program. For example, there may be evidence that the promoters were satisfied to go to market without any legal opinion, or because of legal opinions other than those of Cassels Brock. However, that determination is for the trial. At this stage, there need only be some basis in fact supporting Mr. Lipson's simple negligence claim. That requirement was met here. In addition to Mr. Lipson's pleading that the legal opinion was a necessary precondition, there was evidence of the promoters' accountant who said as much.

[100] In summary, as it is pleaded, Mr. Lipson's claim in simple negligence raises the issue of whether, but for the Cassels Brock opinion, the program would have been marketed and therefore available to cause harm to all members of the class. This issue is properly resolved in a common trial.

E. THE CROSS-APPEAL

[101] Cassels Brock raises three issues by way of cross-appeal.

[102] First, it says that the motion judge erred in finding that Mr. Lipson properly pleaded the elements of negligence, in particular: duty of care, causation and damages.

[103] We do not agree. The claim pleads that Cassels Brock owed a duty of care to those who it could reasonably foresee would read and rely on its opinion and to those who would participate in the program marketed by the promoters based on the opinion. The claim pleads causation and damages insofar as those participating in the program on either basis suffered losses as a consequence.

[104] Second, Cassels Brock says that the motion judge erred in certifying as common issues whether it owed the class a duty of care, what types of heads of damage class members may have suffered, and what remedies they might therefore be entitled to.

[105] Again, we do not agree. Cassels Brock is mistaken in arguing that reliance on its opinion (which is an individual issue) is a key element in determining

whether it owed a duty of care to any class members. Whether or not any class member in fact relied on the Cassels Brock opinion is irrelevant to whether Cassels Brock owed a duty of care to those who Cassels Brock could reasonably foresee might do so. Cassels Brock is also in error in saying that the quantum of damage each class member in fact suffered (an individual issue) is integral to determining what types or heads of damage to which class members could be entitled, and what remedies flow from that determination. The former is not relevant to the latter.

[106] Third, Cassels Brock argues that the motion judge erred in finding that Mr. Lipson's action met the preferred procedure requirement for certification. It says that, in this case, the individual issues overwhelm the common issues and that the third party claims make a common trial unmanageable.

[107] Here too we reject Cassels Brock's argument. The motion judge's conclusion about preferable procedure requires the balancing of a number of considerations. This exercise of judicial discretion will attract appellate scrutiny only if it reflects an error in principle or an unreasonable finding of fact. Neither argument raised by Cassels Brock permits such a conclusion. The motion judge was well-aware of the individual issues that would remain after adjudication of the common issues. He weighed the relative importance of each in fully resolving the action, and determined that the latter were not overwhelmed by the former. We see no basis to interfere with his conclusion.

[108] Mr. Lipson's litigation plan effectively addresses the manageability question in light of the third party claims. The motion judge approved that plan, and Cassels Brock did not challenge the plan in this court. Here too, we see no basis to interfere with the motion judge's determination.

F. DISPOSITION

[109] For these reasons, we allow the appeal, set aside paras. 1, 2 and 3 of the Order and dismiss the cross-appeal. Further, the action is ordered certified as proposed by the motion judge, with the addition of the common issue of causation in simple negligence. The Order should be amended to that effect.

[110] The parties shall file submissions of no more than ten pages addressing the issues of costs here and below. These are to be filed within 30 days of the release of these reasons.

Released: MAR 19 2013

I agree. J.A.

I agree. R.G. Gillese J.A.

Appendix 'A'

Re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks

You have requested our opinion regarding the Canadian Federal Income Tax consequences relating to a donation of 75-year leasehold Biennial Timeshare Resort Weeks at the Alexandra Resort and Spa in Providenciales, Turks and Caicos Islands, British West Indies (the "Timeshare Weeks") by individual Canadian resident taxpayers. It is contemplated that any such donation would entitle the donor to claim a tax credit under the *Income Tax Act* (Canada) (the "Tax Act").

This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property. The Timeshare Weeks will generally be considered to be held as capital property, unless...

...

1.Meaning of "Gift"

In order to claim a tax credit for a donation there must be a complete gift of the property. Each of several elements must be found in order for a donation to qualify as a gift for income tax purposes. These elements are summarized by the CCCRA in its Interpretation Bulletin IT-110R3 entitled, "Gifts and Official Donation Receipts", at para 3 as follows:

> A gift, for purposes of sections 110.1 and 118.1, is a voluntary transfer of property without valuable consideration. Generally, a gift is made if all three of the conditions listed below are satisfied:
>
> ...
>
> (c) the transfer is made without expectation of return. No benefit of any kind may be

> provided to the donor or to anyone designated by the donor, except where the benefit is of nominal value.

...

The courts have held that a tax advantage (that is a tax credit for an individual) is not considered to be a benefit within this test (see *Friedberg (A.D.) v. Canada* 92 DTC 6031 (F.C.A.)).

...

If a Class A Beneficiary chooses to retain the Timeshare Weeks, he or she may do so and hold, exchange, or sell the Timeshare Weeks, as well as to utilize them for his or her own vacations, or for any other lawful and permitted purposes. **If all or substantially all of the Class A Beneficiaries who receive Timeshare Weeks donate them, the CCCRA may be more inclined to challenge the arrangement (but see our opinion below at page 23 as to the unlikely success of such a challenge.)**

....

7. General Anti-Avoidance Rule ("GAAR")

Although the current version of GAAR has been in place since 1988, there has to date been little jurisprudence of direct relevance to charitable donations. GAAR is intended to apply to situations where a transaction or series of transactions results in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit, or unless the transaction does not result in a misuse of the provisions of the Tax Act or an abuse having regard to the provisions of the Tax Act as a whole.

....

Accordingly, we are of the opinion that a good argument can be made that it cannot reasonably be said that

there is an abuse of the provisions of the Tax Act as a whole in these circumstances.

In our opinion, and based on the foregoing, a donation of Timeshare Weeks in these circumstances would not likely be successfully attacked under GAAR.

....

9. General Comments

This opinion is based on the current provisions of the Tax Act, the regulations thereunder, and our understanding of the current administrative practices of the CCCRA. .... No advance tax ruling has been sought or obtained from the CCCRA to confirm the tax consequences or any of the transactions described herein.

This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion. It may not be relied upon by any other person or for any other purpose, nor may it be quoted in whole or in part or its existence or contents otherwise referred to, without our prior written consent.

Based on and subject to the foregoing review, in our opinion it is unlikely that the CCCRA could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries who receive a distribution of the Timeshare Weeks from the Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAA.

This is Exhibit "J" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

CITATION: Lipson v. Cassels Brock & Blackwell, 2013 ONSC 6450
COURT FILE NO.: 09-CV-376511CP
DATE: October 16, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JEFFREY LIPSON Plaintiff	*David F. O'Connor* and *J. Adam Dewar* for the Plaintiff
– and –	
CASSELS BROCK & BLACKWELL Defendant	*Peter H. Griffin, Shara N. Roy*, and *Ian McLeod* for the Defendant
– and –	*Sean Dewart* for the Third Parties Gardiner Roberts LLP and the Estate of Ronald J. Farano
MINTZ & PARTNERS LLP, DELOITEE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, TMK FINANCIAL GROUP LTD. GARDINER ROBERS LLP, THE ESTATE OF RONALD J. FARANO, deceased, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTERSHIP 1-100 and JOHN DOE LLP 1-100 Third Parties	
Proceeding under the *Class Proceedings Act, 1992*	**HEARD:** In writing

PERELL, J.

REASONS FOR DECISION - COSTS

[1] This is a costs decision in an action that has been certified as a class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The background is as follows.

[2] Between 2000 to 2003, Jeffrey Lipson and about 900 other Canadian taxpayers participated in a Timeshare Program in which they donated both cash and also resort timeshares

to Canadian athletic associations. Mr. Lipson and the donors anticipated receiving tax credits for their charitable donations. In the marketing of the Timeshare Program, a tax opinion prepared by the law firm Cassels Brock & Blackwell LLP, was included in the promotional material. The Cassels Brock opinion was that it was unlikely that the Canada Customs and Revenue Agency could successfully deny the tax credits. Mr. Lipson says that he and the other participants would not have participated in the program but for the opinion of a reputable law firm that the charitable tax credits under the *Income Tax Act* would be available. In 2004, Canada Revenue disallowed the anticipated tax credits in their entirety.

[3] In 2004 and 2005, Mr. Lipson and other participants sought advice from a law firm that specializes in tax litigation, and in 2006, some of the participants commenced litigation against Canada Revenue as test cases to determine the availability of the tax credits for the donations. In 2008, the test case litigation settled, and Canada Revenue allowed the participants to receive a tax credit for the cash portion of the donation. Mr. Lipson and the other participants in the Timeshare Program, however, were denied the greater part of their anticipated tax credit based on the value of the donated timeshares.

[4] In 2009, to recover his losses, Mr. Lipson commenced a proposed class action against Cassels Brock for damages for negligence and negligent misrepresentation. Cassels Brock brought third party claims against Mintz & Partners LLP, Deloitte & Touche LLP, Glenn F. Ploughman, Shelley Shifman, Prenick Langer LLP, TMK Financial Group Ltd., Gardiner Roberts LLP, the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, John Doe LLP 1-100. These third parties were involved in the promotion and marketing of the Timeshare Program.

[5] Cassels Brock and the Third Parties Gardiner Roberts LLP and the Estate of Ronald J. Farano opposed the certification of Mr. Lipson's action as a class proceeding and, among other things, they submitted that the claims of all the Class Members, including most particularly Mr. Lipson, were statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. At the certification hearing, Cassels Brock conceded three of the five criterion for certification and the parties crossed swords on the issues of common issues, preferable procedure, and the limitation period defence.

[6] After the two-day hearing, it was my opinion that Mr. Lipson's proposed class action was statute-barred and, therefore, the action should be dismissed. However, it was also my opinion that but for the fatal statute bar, Mr. Lipson's action would have satisfied the criterion for certification. I would have certified five common issues and would have refused to certify two common issues. See *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724.

[7] There was an appeal and a cross-appeal, which was dismissed. After a two-day hearing, my judgment was reversed by the Court of Appeal. See *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165. The Court of Appeal substituted an order certifying the action as a class proceeding and added the common issue of causation, which originally I would not have certified. The Court of Appeal did not preclude the Defendants and the Third Parties from raising a limitation period defence as the action proceeded.

[8] The Court of Appeal made the following order as to costs: (1) no costs of the appeal against the third party [Gardner Roberts LLP]; (2) costs of the certification motion remitted to the motion judge to be dealt with in light of this Court's reasons; and (3) costs of the appeal payable by the respondent [Cassels Brock] to the appellant [Mr. Lipson] on a partial indemnity basis in the amount of $50,000.00 for fees, $10,000.00 for disbursements, and in addition the amount of the applicable taxes.

[9] Mr. Lipson now seeks his costs of the certification motion.

[10] Based on the fact that he served an unaccepted Offer to Settle the certification motion, he seeks a costs award of combined partial and substantial indemnity costs of $243,307 plus taxes of $31,629.91 plus disbursements of $80,145.80 for a total of $355,082.71. The disbursements include $59,299.70 for expert fees.

[11] In the alternative, Mr. Lipson sees costs on a partial indemnity basis of $298,582.71. He also requests $2,500.00 for the cost of preparing the costs submissions.

[12] Mr. Lipson submits that the foregoing amounts should be payable by the Defendants as of November 14, 2011, the date of the release of this Court's initial decision on certification. Mr. Lipson also asks that the costs be made payable by both Cassels Brock and by the Third Parties Gardiner Roberts, LLP and the Ferano Estate.

[13] Cassels Brock opposes the costs requests. It submits that in the circumstances, Mr. Lipson should receive costs of $100,000.00 for the certification motion on a partial indemnity basis plus a reasonable amount for disbursements. It submits, however, that a substantial portion of these costs and the disbursement expense of Mr. Lipson's expert report should be payable in the cause and their disposition left to the common issues judge to decide.

[14] By way of contrast, Cassels Brock says that its own actual costs ($169,788.79) were half of those being claimed by Mr. Lipson and that his costs claim is unreasonable and beyond the reasonable expectations of a defendant to a certification motion. Cassels Brock makes a plethora or submissions that $355,082.71 or $298,582.71 award for a two-day motion is unfair and unreasonable.

[15] Cassels Brock submits that the costs claimed are excessive when compared to other awards and to its own expenditure of costs for the motion.

[16] It submits that an analysis of the claim shows that Class Counsel was inefficient in involving five lawyers and no students save for some outsourced legal costs. It submits that some of the costs involve services outside the certification motion and should, if anything, be in the cause. It submits that $29,165.77 for internal communications is excessive. It says that 327.6 hours for legal and factual research is excessive. It submits that 134.7 hours for preparation for the certification motion is excessive and 156.55 hours for factums is neither reasonable nor within reasonable expectations. It submits that the expert's report did not play any significant role in the certification motion and this expense should be a disbursement in the cause. It submits that it has a $10,000.00 offset for a preliminary motion that it won at the start of the certification hearing.

[17] There may be some traction to Cassels Brocks arguments, but, frankly, it is impossible to determine how much traction.

[18] The Third Parties Gardiner Roberts LLP and the Estate of Ronald J. Farano adopt Cassels Brocks submissions as to the quantum of the costs award. They submit that no order as to costs should be made against them because they were joined as third parties well after the certification motion was underway, did not deliver any evidence for the record, and limited their participation to a short factum and argument about the limitation period defence.

[19] Not surprisingly, Mr. Lipson responds with the case law that holds that class actions have precarious risks and Class Counsel should be handsomely rewarded in order to make the class actions regime work.

[20] Thus, I was told that class actions are high stakes litigation and that given the significance of certification, parties generally expend significant effort or resources in the certification process. I was told that many decisions have recognized this reality with significant costs awards. I was told that access to justice will be compromised if plaintiffs are not fairly compensated for their costs in prosecuting a certification motion.

[21] I also was told, not for the first time in costs submissions, that the party claiming costs had reduced the amount of costs sought in an effort to avoid debates regarding duplication of efforts or quibbling regarding specific cost items.

[22] Having considered the costs submissions of the parties, in my opinion, Mr. Lipson should be awarded costs on a partial indemnity basis.

[23] Mr. Lipson's Offer to Settle should be ignored. It was a hollow tactical device to have a basis to claim costs on a substantial indemnity basis. Mr. Lipson must or should have known that the offer would not or could not be accepted because Cassels Brock was advancing a serious limitation period defence. Ordering substantial indemnity costs is uncalled for and would be unfairly punitive.

[24] It is two years since I heard the certification motion, and I have no useful recollection that might help me decide whether the costs being claimed are reasonable or within the range of what fairly might be expected.

[25] Frankly, it has become impossible to know whether Class Counsel did an appropriate amount of work for an important motion or indulged itself in running up costs in expectation of financing the rest of the litigation and thereby reducing the risk of its involvement in precariously risky litigation.

[26] Unfortunately, given the ever-upward spiral in costs awards, which would appear to be an impediment to the viability of the class action regime, there is little incentive to do only what is necessary for certification and little to curb the tendency to use the certification motion as a road test for the merits of the litigation, notwithstanding that the focus on the certification motion is whether the certification criteria are satisfied and notwithstanding that the some-basis-in-fact evidentiary standard in this regard is very low.

[27] That said, in the immediate case, on the one hand, I do recall that this case was a hard fought certification motion and given the limitation period defence and the challenge to two of the five certification criteria, it called for a vigilant and concerted effort from Class Counsel. But on the other hand, it does appear to me that a $300,000.00 costs award for a certification motion for this case is excessive and there appears to be some substance to the various arguments advanced by Cassels Brock to the effect that a $300,000.00 to $350,000.00 costs award for the certification of a class action about an allegedly unreliable tax opinion is unreasonable.

[28] I, therefore, agree with Cassels Brock that the claim for costs as requested is unacceptable. I, however, disagree with Cassels Brock's proposal that the counsel fee be reduced to $100,000.00 plus some disbursements with most of the award being made payable in the cause.

[29] I think the appropriate exercise of discretion is award Mr. Lipson the $298,582.71 that he seeks but to make $150,000.00 payable to him by Cassels Brock in the cause and the balance of $148,582.71 payable forthwith. I would not backdate the costs award. I make no order as to costs with respect to the costs submissions.

[30] I make this award because it provides fair compensation for the successful certification hearing and preserves to the prosecution of the litigation the work effort of Class Counsel, much of which can be carried forward into the action. It is fair because a certification motion remains just a procedural motion and the merits of the litigation remain to be determined. It provides some sustenance to Class Counsel without impeding access to justice.

[31] I would not order any costs against the Third Parties Gardiner Roberts and the Farano Estate, which have been brought into this action by Cassels Brock with the proviso that this no costs order is without prejudice to Cassels Brock later seeking a *Sanderson* or similar order in the cause of the main action or in the third party proceeding.

[32] I leave open Cassels Brock claim for a set-off. I do not know whether a formal order was made on the preliminary motion, and Mr. Lipson has had no opportunity to respond to this claim.

[33] Order accordingly.

Perell, J.

Released: October 16, 2013

CITATION: Lipson v. Cassels Brock & Blackwell, 2013 ONSC 6450
COURT FILE NO.: 09-CV-376511CP
DATE: October 16, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL

Defendant

- and -

MINTZ & PARTNERS LLP, DELOITEE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, TMK FINANCIAL GROUP LTD. GARDINER ROBERS LLP, THE ESTATE OF RONALD J. FARANO, deceased, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

REASONS FOR DECISION - COSTS

Perell, J.

Released: October 16, 2013.

This is Exhibit "K" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Court File No.: CV-09-376511 OOCP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. JUSTICE PERELL	) TUESDAY THE 22nd) DAY OF JULY, 2014)

BETWEEN:

JEFFREY LIPSON

Plaintiff/Moving Party

-and-

CASSELS BROCK & BLACKWELL LLP

Defendant/Responding Party

Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATION ORDER – NOTICE OF CERTIFICATION

THIS MOTION, heard in writing, made by the Representative Plaintiff, for an Order notifying the Class of the certification of this action as a class proceeding was heard this day at 180 Queen Street West in the City of Toronto, Ontario.

ON READING all material filed, on being advised that Thorsteinssons LLP was provided with advance notice of this motion and has taken no position, and on hearing the submissions of counsel for all parties:

Notice of Certification

1. **THIS COURT ORDERS** that within 14 days of the date of this order Thorsteinssons LLP is hereby directed to, and shall, forward to Class Counsel (Roy O'Connor LLP), by electronic means, the names, addresses, email addresses and telephone numbers of the Class Members which Thorsteinssons LLP has in its possession. Pursuant to sub-sections 7(3) and (2) of the *Protection of Personal Information and Electronic Documents Act*, and sections 64(1) and (2) of the *Freedom of Information and Protection of Privacy Act,* disclosure of the aforesaid contact information by Thorsteinssons LLP is hereby authorized and will provide Class counsel with the names and contact information for Class Members and will facilitate providing notice of the certification of this class proceeding to the Class Members.

2. **THIS COURT ORDERS** that within 7 days of receipt of the contact information referred to above, a notice substantially in the form attached hereto as Schedule "A" (the "Notice"), be distributed to the Class Members by the Representative Plaintiff through his counsel, by the following means:

    a. sending, via regular mail and/or email the Notice, to the last known mailing addresses and/or email addresses of the Class Members for whom Class Counsel have contact information; and,

    b. reproducing the Notice on the website royoconnor.ca.

Opting Out

3. **THIS COURT ORDERS** that a Class member may opt out of this class proceeding by delivering to Class Counsel the Opt-Out Coupon contained in the Notice or some other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon on or before the expiry of the 45th day after the date the first notice is distributed under paragraph 2 above. Class Members may not opt out after the expiry of the 45h day after the date the first notice is distributed under paragraph 2 above.

4. **THIS COURT ORDERS** that Class Counsel serve on the Defendant, within 14 days after the close of the opt-out period referred to above, an affidavit exhibiting a list of persons who have opted out of the class proceeding, if any.

5. **THIS COURT ORDERS** that there be no costs of this motion.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:
JUL 23 2014
AS DOCUMENT NO.:
A TITRE DE DOCUMENT NO.:
PER / PAR:

Perell J.

Schedule A –Notice

ATHLETIC TRUST OF CANADA TIMESHARE PROGRAM CLASS ACTION

NOTICE OF CLASS ACTION CERTIFICATION

TO: ALL INDIVIDUALS WHO PARTICIPATED IN THE ATHLETIC TRUST OF CANADA TIMESHARE PROGRAM IN 2000, 2001, 2002 AND/OR 2003

This Notice is directed to anyone who participated in the Timeshare Program promoted by the Athletic Trust of Canada (the "Athletic Trust") in 2000, 2001, 2002 and/or 2003. Anyone who participated in that Program and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more registered Canadian Amateur Athletic Associations are members of the Class (the "Class Members").

On March 19, 2013 the Court of Appeal for Ontario certified the action *Jeffrey Lipson* v *Cassels Brock & Blackwell LLP,* court file number CV-09-376511 (the "Class Proceeding") as a class proceeding and appointed Jeffery Lipson as representative Plaintiff.

The law firm of **Roy O'Connor LLP** has been approved by Court of Justice to act for Class Members. Please contact Roy O'Connor LLP with any questions about this class action at: (416) 362-1989 or info@royoconnor.ca.

This Notice is published by Order of the Ontario Superior Court of Justice and explains:

1. The claims in the Class Proceeding;
2. Who might benefit from the lawsuit;
3. Your right to choose whether or not to be part of the lawsuit;
4. Financial consequences for you;
5. Other matters.

1. The Claims in the Class Proceeding

The Plaintiff alleges that Cassels Brock LLP were negligent in the preparation of various legal opinions relating to the Athletic Trust Timeshare Program. Mr. Lipson also alleges that the Cassels Brock's legal opinions contained misrepresentations that were negligently made by Cassels Brock and relied upon by Class Members.

Certification is a preliminary procedural determination. The certification order means that the Class Proceeding may proceed to trial on the certified common issues. The merits of the claims in the Class Proceeding and the allegations of fact on which the claims are based have not been proved before a court. The Defendant denies that the claims have any merit.

The common issues in the Class Proceeding will, among other things, generally determine whether Cassels Brock owed duties of care to the Class Members and whether those duties were breached. For a complete list of the common issues please see royoconnor.ca.

The lawsuit claims $55 million in general compensatory damages and special damages for accounting, legal and other professional fees as well as expenses that have been or will be incurred prosecuting this action.

2. Who might benefit from the case – Class Definition

Pursuant to the Order of the Court of Appeal for Ontario, Mr. Lipson has been appointed to act as the Representative Plaintiff for the following Class:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "Class Members").

3. Your right to choose whether or not to be part of the lawsuit

(a) *How to be included in the Class:*

DO NOTHING IF YOU WISH TO BE A CLASS MEMBER IN THIS ACTION

If you are a person falling within the Class definition described above, you will automatically be included in the Class unless you opt-out of this proceeding.

(b) *How to be excluded from the Class:*

To opt-out of the Class (that is to exclude yourself form the class action) you must fill out the accompanying opt-out coupon (or a letter setting out the same information) and send it to Roy O'Connor LLP at the address specified below.

The deadline for opting out is [DATE] 2013. If your written request to opt out is not received by that date you will remain a member of the Class.

By opting out of this Class, you are confirming that you do not wish to participate in this class action. If you decide to opt-out of this class action, you will be excluded from any settlement or award of damages awarded by the Court. Once you opt-out of this class action, you will receive no further communications regarding this Class Proceeding.

PLEASE NOTE: ONLY COMPLETE AND SUBMIT THE OPT-OUT COUPON BELOW IF YOU DO NOT WISH TO REMAIN A CLASS MEMBER IN THIS CLASS PROCEEDING.

4. Financial consequences for you

If the Class Proceeding is successful at the common issues trial, or any subsequent appeal, the Court may award compensation to the Class as a whole. The Court may also establish a process, including individual hearings, to review the amount of damages each individual Class Member may claim and to assess the amount of damages each individual Class Member is to receive.

As of the date of this notice, a trial date has not been set by the Court.

Jeffrey Lipson has retained the law firm of Roy O'Connor LLP to represent him and the Class in the lawsuit. Roy O'Connor LLP will be paid legal fees only if the lawsuit is successful. If the class proceeding lawsuit is successful at the common issues trial, legal costs and disbursements incurred by Roy O'Connor LLP will be deducted from the amounts recovered for the Class Members. The amount of such legal fees and disbursements deducted must be approved by the Court. In this case, the Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through class actions in Ontario. The Fund has agreed to reimburse the Plaintiff for some disbursements incurred in pursuing this action.

Whether or not the Class Proceeding is successful, all members of the class who do not opt out of the class action will be bound by the judgment of the Court.

5. Other matters

If you wish to participate personally in the lawsuit other than as a class member, you may apply to the Court for permission to do so.

The Court papers in this lawsuit are available for inspection at the office of the Superior Court of Justice, Courthouse, 393 University Ave., Toronto, Ontario, Court file no. CV-09-376511

For further information about the class proceeding lawsuit you may contact:

ROY O'CONNOR LLP
Barristers
200 Front Street West, 23rd Floor
Toronto, Ontario
M5V 3K2

Attn: ***INSERT NAME***
Tel: (416) 362-1989
Fax: (416) 362-6204
Email: ***INSERT ADDRESS***
Web: www.royoconnor.ca

PLEASE DO NOT CALL CASSELS BROCK, THE COURTHOUSE, OR THE REGISTRAR OF THE COURT ABOUT THIS ACTION. THEY WILL NOT BE ABLE TO ANSWER YOUR QUESTIONS ABOUT THE LAWSUIT.

This notice is published pursuant to the section 17 of the Ontario Class Proceedings Act and was approved by the Court.

Dated _____, 2014

OPT-OUT COUPON
LIPSON v CASSELS BROCK & BLACKWELL LLP

NOTE! ONLY COMPLETE AND SUBMIT THIS FORM IF YOU DO NOT WISH TO BE A CLASS MEMBER IN THIS CLASS ACTION. DO NOTHING IF YOU WISH TO REMAIN A CLASS MEMBER IN THIS PROCEEDING.

To:

Roy O'Connor LLP
200 Front Street West
23rd Floor
P.O. Box #45
Toronto, ON M5V 3K2

Attention: INSERT NAME

Tel: (416) 362-1989
Fax: (416) 362-6204
Email: INSERT ADDRESS@royoconnor.ca

I confirm that I **do not** wish be Class Member in the class action lawsuit *Lipson v Cassels Brock & Blackwell et al* and that if I subsequently decide to rejoin this class action, I may only do so with the permission of the Court.

Name [please print]:_____

Mailing Address_____

City_____ Province_____

Postal code:_____ Telephone:_____

Email:_____

_____ _____
DATE **SIGNATURE**

Note! To opt-out of this class action, this coupon, or a signed and dated letter, must be completed and received at the above address before *[INSERT OPT-OUT DATE]*.

JEFFREY LIPSON

Plaintiff

- and -

CASSELS BROCK BLACKWELL LLP

Defendant

Court File No. CV-09-376511

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATION ORDER – NOTICE OF CERTIFICATION

ROY O'CONNOR LLP
Barristers
200 Front Street West
Suite 2300
Toronto, Ontario
M5V 3K2

Peter L. Roy (LSUC No. 16132O)
David F. O'Connor (LSUC No. 33411E)
J. Adam Dewar (LSUC No. 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204

Lawyers for the Plaintiff

This is Exhibit "L" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

CITATION: Lipson v. Cassels Brock & Blackwell, LLP, 2014 ONSC 6106
COURT FILE NO.: CV-09-376511CP
DATE: 20141021

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JEFFREY LIPSON Plaintiff	*David F. O'Connor* and *J. Adam Dewar* for the Plaintiff
– and –	
CASSELS BROCK & BLACKWELL, LLP Defendant	*Shara N. Roy* and *Ian MacLeod* for the Defendant
– and –	
MINTZ & PARTNERS, DELOITTE & TOUCHE, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER, TMK FINANCIAL GROUP LTD., GARDINER ROBERTS, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE 1-100 Third Parties	*Tim Gleason* and *Chris Donovan* for the Third Parties, Gardiner Roberts and The Estate of Ronald J. Farano, Deceased *Deepshikha Dutt* for the Third Party, Mintz & Partners
	HEARD: October 3, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] In this certified class action under the *Class Proceedings Act, 1992*, S.O. 1992, the Plaintiff Jeffrey Lipson sues Cassels Brock & Blackwell, LLP for negligence and negligent misrepresentation with respect to a tax-driven investment scheme for which the law firm provided a tax opinion.

[2] Cassels Brock defends the main action, and it has brought Third Party Proceedings against Mintz & Partners, Deloitte & Touche, Glenn F. Ploughman, Shelley Shifman, Prenick Langer, TMK Financial Group Ltd., Gardiner Roberts, the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, and John Doe 1-100.

[3] The Third Party, Mintz & Partners, and the Third Parties Gardiner Roberts and the Estate of Ronald J. Farano, deceased, have defended the Third Party Claim and also the main action.

[4] Here, it should be noted that there is the oddity that, as it happens, the Third Party Mr. Farano's Estate, is a Class Member of the action it is defending. This happens because Mr. Farano was an investor in the tax-driven scheme just like Mr. Lipson was but has been joined to the action as a Third Party.

[5] There are two motions before the court. First, Cassels Brock brings a motion that Mr. Lipson and Mintz & Partners respectively deliver further and better Affidavits of Documents.

[6] The motion as it affects Mintz & Partners has been settled.

[7] In its motion, Cassels Brock seeks an order that Mr. Lipson disclose and produce communications between Class Members and two law firms; namely, Thorsteinssons LLP and Davies Ward Phillips & Vineberg LLP.

[8] Pursuant to rule 30.04(6), I was provided, in a sealed envelope, with copies of the communications from Thorsteinssons LLP and from Davies Ward Phillips & Vineberg, respectively, to Class Members, including correspondence to the late Mr. Farano.

[9] Mr. Lipson, however, resists Cassels Brock's motion for a further and better Affidavit of Documents. He submits that the documents sought to be disclosed are irrelevant and privileged solicitor and client communications. Mr. Lipson denies that he has waived or that he even can waive privilege on behalf of the Class Members.

[10] Second, Gardiner Roberts and the Estate of Ronald J. Farano bring a motion that Mr. Lipson deliver a further and better Affidavit of Documents. Mr. Lipson, once again, resists the motion. He once again asserts that he did not and could not waive the Class Members' privilege, and he adds that neither can Mr. Farano's Estate.

[11] Both motions raise the issue whether the communications of legal advice by Thorsteinssons and by Davies Ward Phillips & Vineberg are relevant to the common issues that have been certified for a trial and, if relevant, whether those communications are privileged from production in the class action.

[12] Both motions question how, if at all, the privilege of Class Members can be waived in the context of a class action.

[13] For the reasons that follow, I grant both motions, in part. I order the delivery of a further and better affidavit from Mr. Lipson. The affidavit should include the production of Thorsteinssons' file but not the communications of Davies Ward Phillips & Vineberg.

B. OVERVIEW AND METHODOLOGY

[14] The parties agree that the communications between Mr. Lipson and the other Class Members with Thorsteinssons and with Davies Ward Phillips & Vineberg are privileged solicitor and client communications. The difference between the parties is that Mr. Lipson submits that

the communications with Thorsteinssons and with Davies Ward Phillips & Vineberg are not relevant to the common issues trial, and he submits that neither he nor the Estate of Mr. Farano can waive the Class Members' privilege with respect to the communications.

[15] It should immediately be noted that if Mr. Lipson is correct that the communications with Thorsteinssons and with Davies Ward Phillips & Vineberg are not relevant to the common issues trial, then it is moot whether any privilege associated with the documents has been waived because the documents need not be produced at all because they are irrelevant.

[16] I have reviewed the documents. As I will explain below, in my opinion, the Class Members' communications with Thorsteinssons are relevant but the communications with Davies Ward Phillips & Vineberg are not relevant.

[17] Thus, the live issues are whether Mr. Lipson or whether Mr. Farano's Estate have waived the Class Members' privilege associated with the Thorsteinssons' communications to Class Members. More precisely, the issue is whether either Mr. Lipson waived the Class Members' privilege by implication or whether Mr. Farano's Estate waived the privilege because he was among those with a joint retainer with Thorsteinssons.

[18] As I will explain below, in my opinion, neither Mr. Lipson nor Mr. Farano's Estate could waive the Class Members' privilege. Nevertheless, the investors who did not opt out of the class action and who thus became Class Members have impliedly waived the privilege associated with the Thorsteinssons' communications. Therefore, Mr. Lipson, who is their Representative Plaintiff, should include the Thorsteinssons' communications in his Affidavit of Documents.

[19] To explain these conclusions, after the Introduction and Overview sections of these Reasons, I will outline the factual and procedural background to the motions. Then, in the Discussion and Analysis, I will explain why the Thorsteinssons' communications are relevant and why privilege aside, they should be produced at this juncture of the class action.

[20] Next, I will discuss the law about waiver of privilege in the context of a class proceeding. This is still a developing territory of the law, but in the context of the immediate case, it is my opinion that the Class Members waived the privilege associated with the Thorsteinssons communications by not opting out of the class action, and, therefore, their Representative Plaintiff, Mr. Lipson, must produce the Thorsteinssons' communications in his Affidavit of Documents.

[21] I will explain that by not opting out of the class action, the Class Members have adopted Mr. Lipson's pleadings, and, in the circumstances of this case, they have as a matter of fairness impliedly waived any privilege associated with their communications with Thorsteinssons.

C. FACTUAL AND PROCEDURAL BACKGROUND

1. The Timeshare Program and the Legal Opinions

[22] Around 2000, Stephen Elliot and Steven Mintz approached the accounting firm Mintz & Partners with the idea of a Timeshare Program that would provide tax benefits to participants. Steven's brother Harley was a partner of the firm.

[23] Messrs. Elliot and Mintzs' idea was that participants in the Timeshare Program would donate encumbered timeshares to a Canadian amateur athletic association along with sufficient

cash to discharge the encumbrances against the timeshares. In return for the donations, the athletic association would provide the participants with tax receipts for the charitable donations.

[24] In 2000, Messrs. Elliot and Mintz retained Cassels Brock to provide Canadian Athletic Advisors with a legal opinion about the tax consequences under the *Income Tax Act* of participating in the Timeshare Program. Cassels Brock is a full service law firm carrying on business in Toronto as a limited liability partnership. Lorne Saltman, a tax lawyer and a partner of the firm, prepared the opinion for Canadian Athletic Advisors.

[25] In the following years, Cassels Brock prepared more legal opinions for Canadian Athletic Advisors about the Timeshare Program. There are six opinions dated October 6, 2000, May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002, and April 8, 2003. The opinions are substantially the same.

[26] After the Timeshare Program was established, Mintz & Partners established an entity known as Tuscany Marketing Services to oversee the marketing of the program. Others participated in the marketing of the Timeshare Program, including Venturedge Corporation, which was a corporation owned by Gerald Prenick and Morris Langer, the principals of Prenick Langer, an accounting firm. Prenick Langer is a Third Party to these proceedings.

[27] In the fall of 2000, Morris Langer of Prenick Langer, who was Mr. Lipson's accountant, told him about the Timeshare Program. Mr. Lipson is a wealthy retired businessman living in Toronto, Ontario. Before his retirement, he oversaw his family's retail business and he was a real estate investor.

[28] Mr. Lipson says that he did not understand the intricacies of the Timeshare Program, and he asked Mr. Langer whether there was a legal opinion to support the tax benefits. Mr. Langer advised him that Cassels Brock had issued a supporting legal opinion.

[29] In 2000, and in the following years, Mr. Lipson went ahead and participated in the Program. He never read the Cassels Brock opinion.

[30] As noted above, one of the entities marketing the Timeshare Program was Venturedge, and on behalf of Venturedge, Mr. Prenick retained the late Ronald J. Farano, Q.C., a tax partner at the law firm Gardiner Roberts to provide a second opinion about the Timeshare Program. Mr. Farano provided an opinion and, he also made a personal investment in the Timeshare Program.

[31] Pausing here, it may be noted here that Mr. Farano's Estate is a Class Member in Mr. Lipson's class action. There is, thus, the very odd situation that Mr. Farano's Estate is a Third Party defending the main action in which it is a member of the plaintiff class.

[32] The Timeshare Program investment did not go well. In October and November 2004, in letters to the participants in the Timeshare Program, Canada Revenue disallowed the charitable donation receipts as a basis for tax credits.

[33] With the receipt of the correspondence from Canada Revenue, Mr. Lipson sought legal advice. In April 2004, he and many other participants retained Thorsteinssons to represent them in dealing with Canada Revenue with respect to the Timeshare Program.

[34] Thorsteinssons provided its clients (now Class Members) with opinions and reports with respect to the litigation in the Tax Court of Canada. Mr. Lipson claims that these opinions are not relevant to the common issues trial and are privileged communications.

[35] Amongst those retaining Thorsteinssons was Mr. Farano. Mr. Farano's Estate has copies of the communications from Thorsteinssons.

[36] Among those retaining Thorsteinssons was also Harley Mintz of Mintz & Partners. Mr. Mintz shared the Thorsteinssons' opinions with Lorne Saltman of Cassels Brock.

[37] In January 2006, two of Thorsteinssons' clients brought test cases to challenge the disallowances of the tax receipts. Cassels Brock was kept informed about the status of the litigation in the Tax Court of Canada.

[38] Also in 2006, Mr. Lipson filed notice of objection to his reassessments. He claimed that he was entitled to the full amount of the tax credits. These notices were held in abeyance pending the determination of the test cases.

[39] In 2008, Canada Revenue settled the test cases, and it offered to settle with all of the donors. Mr. Lipson settled with Canada Revenue at that time.

[40] In the settlement, Canada Revenue agreed that the cash paid by the donors to discharge the encumbrances against the timeshares constituted a charitable donation entitled to a tax credit. Canada Revenue, however, denied any charitable donation for the alleged fair market value of the donated timeshare.

[41] After the settlement with Canada Revenue, Mr. Lipson retained Davies Ward Phillips & Vineberg with respect to bringing a claim against Cassels Brock. Mr. Lipson circulated Davies' reports to other investors including Mr. Farano.

[42] Mr. Lipson then changed counsel and commenced this class action.

2. The Class Action against Cassels Brock & Blackwell

[43] After the settlement with Canada Revenue, on April 15, 2009, Mr. Lipson commenced a proposed class action. He claimed damages in the amount of $55 million for professional negligence and negligent misrepresentation. He also claimed special damages for accounting, legal, and other professional fees and expenses.

[44] Mr. Lipson pleads that but for Cassels Brock's negligence, the promoters of the Timeshare Program would not have created and made the Timeshare Program available to the public, and could not have successfully promoted the Timeshare Program. He pleads that Cassels Brock knew or should have known that absent a favourable tax opinion, the Timeshare Program would not have been or could not have been made publicly available or successfully promoted. He pleads that Cassels Brock knew or ought to have known that potential donors, including Mr. Lipson and the other Class Members, would rely upon the Legal Opinions, including the existence and favourable nature of the Legal Opinions, in deciding whether to participate in the Timeshare Program in each Taxation Year. He pleads that but for Cassels Brock's involvement, no Class Member would have participated in the Timeshare Program and none would have suffered a loss.

[45] In his Statement of Claim, Mr. Lipson pleads that he obtained legal and accounting advice following the denial of tax credits.

[46] On September 1, 2011, Cassels Brock delivered its Statement of Defence.

[47] On September 12, 2011, Mr. Lipson delivered his Reply to the Cassels Brock Defence.

[48] On April 15, 2011, Cassels Brock commenced Third Party Proceedings against Mintz & Partners, Deloitte & Touche, Glenn F. Ploughman, Shelley Shifman, Prenick Langer, TMK Financial Group Ltd., Gardiner Roberts, and the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, and John Doe 1-100.

[49] On August 31, 2011, Mintz & Partners delivered a Defence and Crossclaim to the Third Party Claim, and on September 7, 2011, it delivered a defence to the main action.

[50] On October 11, 2011, Gardiner Roberts and Mr. Farano's Estate delivered a Defence and Crossclaim to the Third Party Claim and it delivered a defence to the main action.

[51] On October 12, 2011, Prenick Langer delivered a Defence to the Third Party Claim.

[52] Cassels Brock and Third Parties, including Gardiner Roberts and Mr. Farano's Estate, have pleaded that the action is statute-barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. and that Mr. Lipson knew or ought to have known of all claims more than two years before the issuance of the Statement of Claim.

[53] In his Reply to the allegation that his claim is statute-barred, Mr. Lipson pleads as follows:

> 4. The Plaintiff denies the allegation of the Defendant Cassels Brock that the Plaintiff knew or ought to have known of all claims asserted against Cassels Brock more than two years prior to commencing the within action. Until January 2008 during the test litigation in the Tax Court of Canada, it was not known or reasonably discoverable that it was at least likely – and not "unlikely" as Cassels Brock had represented in each of the Legal Opinions – that CRA would be successful in challenging the tax credits claimed by Lipson and the other Class Members.
>
> 5. At material all times following the CRA reassessments beginning in or around October 2004, Mr. Lipson and other Class Members diligently advanced their rights and interests in respect of the Timeshare Program. Following the CRA reassessments, Mr. Lipson and other Class Members retained the tax law firm Thorsteinssons and filed Notices of Objection to the CRA reassessments.
>
> ...
>
> 8. The Plaintiff denies the allegation of the Defendant Cassels Brock that his loss is the result of accepting the CRA's settlement offer. Mr. Lipson and other Class Members diligently mitigated their losses by accepting the CRA's settlement offer that allowed tax deductions for the cash portion of their charitable donations under the Timeshare Program.

[54] Mr. Lipson moved for certification of his proposed class action. I decided that the action satisfied the certification criterion, and I would have certified it but for my opinion that the Class Members' action was statute-barred. See *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724.

[55] My decision was reversed by the Court of Appeal, which certified the action as a class proceeding. See *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165.

[56] On the matter of the limitations period, the Court of Appeal stated at para. 84:

> 84. The test case litigation did not settle until 2008. The answer to when the limitation period began to run for each class member may very well depend on several factors, including what position, if any, Cassels Brock took in response to the CCRA challenge; what notice, if any, Cassels Brock gave to class members of their position, if any, on the CCRA challenge; and what each class member was told by his or her professional advisor(s) and when: see *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*. Importantly, this may be an issue that must be

determined individually for each class member, depending on what individual class members were told and when.

[57] The following common issues were certified:

Negligence / Negligent Misrepresentation

1. Did the Defendant owe the Class a duty of care (in, among other things, negligence or negligent misrepresentation) in the preparation of the Legal Opinions?

2. If the answer to common issue 1 is "yes", what is the content of the standard(s) of care?

3. Did the Defendant breach the foregoing standard(s) of care? If so, how?

4. If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?

Damages or Other Relief

5. If after an individual issues trial, the Defendant were found liable to a Class Member for negligent misrepresentation or negligence, what types or heads of damages, if any, would the Class Members be entitled to?

6. If after an individual issues trial, the defendant were found liable to a Class member for negligent misrepresentation or negligence what remedy or remedies, if any, would the Class Members be entitled to?

[58] At the certification motion, I had not certified causation as a common issue. The Court of Appeal held, however, that the issue was a common issue. The Court stated at paras. 94 to 100 of its decision:

94. Mr. Lipson contests this finding as it applies to his claim in simple negligence. He says that, for that cause of action, causation should be certified as a common issue.

95. For the following reasons, we agree.

96. In finding that Mr. Lipson's claim in simple negligence was properly disclosed by his pleading, the motion judge looked to Mr. Lipson's allegations that the Cassels Brock legal opinion was a necessary precondition for the marketing of the program, that Cassels Brock ought to have foreseen that for the promoters the opinion was fundamentally necessary for the presentation of the program, and that those who then bought into the program would suffer damage if the opinion had been negligently prepared.

97. Thus, the claim in simple negligence is distinct from Mr. Lipson's claim in negligent misrepresentation, which required proof of reliance on the opinion by individual class members in deciding to participate in the program.

98. Framed in this way, the cause of action in simple negligence does not require a showing of reliance on the Cassels Brock opinion by individual class members. The allegation is that class members suffered damage because they participated in the program, which, but for Cassels Brock's negligent opinion, would not have been marketed by the promoters and thus not available to class members. In our view, this issue is common to the claims of all class members.

99. It may be that, at the trial of this common issue, evidence will emerge that the Cassels Brock legal opinion was not a necessary precondition for the promoters to market the program. For example, there may be evidence that the promoters were satisfied to go to market without any legal opinion, or because of legal opinions other than those of Cassels Brock. However, that determination is for the trial. At this stage, there need only be some basis in fact supporting Mr.

> Lipson's simple negligence claim. That requirement was met here. In addition to Mr. Lipson's pleading that the legal opinion was a necessary precondition, there was evidence of the promoters' accountant who said as much.
>
> 100. In summary, as it is pleaded, Mr. Lipson's claim in simple negligence raises the issue of whether, but for the Cassels Brock opinion, the program would have been marketed and therefore available to cause harm to all members of the class. This issue is properly resolved in a common trial.

3. Documentary Production

[59] On November 5, 2013, I directed the parties to complete documentary discovery by January 31, 2014. The parties subsequently agreed to extend this deadline until February 14, 2014.

[60] On February 14, 2014, Mr. Lipson delivered an electronic copy of his unsworn Affidavit of Documents, which lists only 10 documents in Schedule A. No documents are listed in Schedule B.

[61] On March 3, 2014, Mr. Lipson delivered a hard copy of his unsworn Affidavit of Documents along with the 10 documents listed in Schedule A. These documents consist solely of correspondence with the tax authorities. Mr. Lipson's disclosures do not include documents that were exhibits to his affidavit for the certification motion.

[62] Mr. Lipson's unsworn Affidavit of Documents does not include any documents related to legal advice.

[63] On February 28, 2014, counsel for Mintz delivered a draft Affidavit of Documents which lists only seven opinion letters from Cassels Brock in Schedule A. No documents are listed in either Schedules B or C.

[64] In early 2014, Cassels Brock and some of the Third Parties disclosed in their Affidavits of Documents and produced the correspondence from Thorsteinssons and Davies Ward Phillips & Vineberg in their possession and control.

[65] When it came to the attention of Class Counsel that some of the parties had included legal opinions or letters from legal counsel in Schedule A to their respective Affidavits of Documents Class Counsel immediately wrote to all counsel requesting that the material in question be immediately returned or destroyed.

[66] The motions now before the court eventually followed.

4. Formation of the Class

[67] Notice of the class action was delivered in in August, 2014.

[68] The opt-out period ended on September 26, 2014 and the class formed. There were no opt-outs.

D. DISCUSSION AND ANALYSIS

1. The Relevance of the Thorsteinssons and Davies Ward Phillips & Vineberg Communications

[69] The first issue to address is whether the Thorsteinssons and the Davies Ward Phillips & Vineberg communications are relevant and whether privilege aside these communications with Class Members should be disclosed and produced for the common issues trial.

[70] It is important to note that there are two discrete aspects to the first issue. The first aspect is whether the communications between Class Members with Thorsteinssons and with Davies Ward Phillips & Vineberg are relevant, and the second aspect of the issue is: if the communications are relevant, then are they relevant for the purposes of the common issues trial or are the communications relevant to an issue that will be decided at an individual issues trial if the action proceeds that far.

[71] It is, of course, also possible that an issue might be relevant to both the common issues trial and an individual issues trial, but the immediate problem is whether the communications are relevant and should be disclosed and produced at this juncture of the bifurcated proceeding; i.e. should the documents be disclosed and produced for the common issues trial.

[72] I can deal with the Davies Ward Phillips & Vineberg communications quickly. I have read the communications, and they are not relevant to the class action.

[73] Davies Ward Phillips & Vineberg were retained to advise Mr. Lipson about suing Cassels Brock, and its advice is not a part of the factual narrative of this class action. Davies Ward Phillips & Vineberg was not a party or a witness to the events giving rise to what turned out to be a class action.

[74] Thorsteinssons situation, however, is different than that of Davies Ward Phillips & Vineberg because Thorsteinssons was involved in the events that ultimately led Mr. Lipson and others to bring a class action against Cassels Brock. In contrast, Davies Ward Phillips & Vineberg's involvement comes after the fact of the events giving rise to the class action.

[75] Cassels Brock, Gardiner Roberts, and Mr. Farano's Estate submit that the communications between Class Members and Thorsteinssons are relevant to a variety of issues in the lawsuit.

[76] First, Cassels Brock, Gardiner Roberts, and Mr. Farano's Estate submit that the Class Members' communications with Thorsteinssons are relevant to the matter of the running of the limitation period for the Class Members' claims against Cassels Brock; i.e., the communications are relevant to when the Class Members knew or ought to have discovered their claims against Cassels Brock. See *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851; *Lipson v. Cassels Brock & Blackwell LLP*, *supra*.

[77] The Court of Appeal has already held that whether the Class Members' claims are statute-barred is a matter for the individual issues trial and, thus, I would not order the Thorsteinssons' communications to be produced at this juncture of the proceeding because of the limitation period issue.

[78] Moving on, relying on authorities that hold that when a party places his or her state of mind at issue and when legal advice helped form that state of mind, then the party impliedly waives any privilege associated with the legal communications, Cassels Brock, Gardiner Roberts, and Mr. Farano's Estate submit that Thorsteinssons' communications are relevant and ought to be disclosed at the common issues trial because the Class Members have put their state of mind in issue.

[79] See: *Bank Leu AG v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 at para. 5 (S.C.J.), affd. [2000] O.J. No. 1137 (Div. Ct.); *Leadbeater v. Ontario*, [2004] O.J. No. 1228 at paras. 48-51 (S.C.J.); *Pryden v. Swiss Reinsurance Co.*, 2010 ONSC 6679 at para. 87 (Master); *Froese v. Montreal Trust Co. of Canada*, [1993] B.C.J. No. 1529 at para. 32 (Master); *Rogers v. Bank of Montreal*, [1985] B.C.J. No. 2116 (C.A.).

[80] For present purposes, this submission is problematic. As I understand Mr. Lipson's submission and his Statement of Claim, he submits that he never puts his or the Class Members' state of mind in issue in advancing a negligence claim.

[81] Typically, a plaintiff's state of mind is not relevant to a negligence claim. If anybody's state of mind is relevant to a negligence action, it is more typically the state of mind of the defendant, where his or her mental state may be relevant to determining whether he or she was acting with a duty of care and whether he or she breached that duty of care by carelessness of thought, act, or omission.

[82] In the case at bar, I, agree with Mr. Lipson's submission, and I do not see how Thorsteinssons' communications are relevant to the Class Members' state of mind with respect to the negligence claim.

[83] A plaintiff's state of mind, however, is a relevant issue for every negligent misrepresentation claim, because the plaintiff's reasonable reliance is a constituent element of the tort. I, therefore, conclude that Mr. Lipson has put his and the Class Members' state of mind in issue for the negligent misrepresentation claim by advancing such a claim.

[84] However, reasonable reliance is an individual issue, and therefore for the present purposes of the common issues trial, I do not see any need to have Thorsteinssons' communications produced for the purposes of addressing the reasonable reliance component of the tort of negligent misrepresentation.

[85] Moving on again, Cassels Brock, Gardiner Roberts, and Mr. Farano's Estate submit that the Class Members' communications with Thorsteinssons are relevant to the Class Members' claim for damages, which include the expenses that the Class Members incurred in retaining Thorsteinssons to salvage the situation by test cases and eventually by negotiating a settlement with the tax authorities. Connected to the damages assessment is the matter of whether the Class Members' damages should be reduced because the Class Members ought to have mitigated.

[86] In my opinion, Cassels Brock, Gardiner Roberts, and Mr. Farano's Estate are correct that Thorsteinssons' communications are relevant to the issues of damages and mitigation. However, once again, the quantification of damages and the matter of mitigation are individual issues that should not muddle the common issues trial.

[87] Pausing here, to be clear, my opinion is that the Thorsteinssons' communications are relevant to the limitation period defence, to the issue of reasonable reliance, to the issue of

damages, and to the issue of mitigation; however, all these issues are for the individual issues trials.

[88] Next, Cassels Brock, Gardiner Roberts, and Mr. Farano's Estate submit that Thorsteinssons' communications with Class Members are relevant to any and all of the first four certified common issues about duty of care, standard of care, breach of standard of care, and causation.

[89] Mr. Lipson's counterargument is that Thorsteinssons' views on these matters could, at best, be opinion evidence about the standard of care that is not relevant and that is not admissible in any event. He submits that Thorsteinssons' thoughts and deeds in acting for the Class Members cannot inform the issues of whether Cassels Brock had a duty of care, whether it breached the standard of care, and whether that breach caused the Class Members to suffer a loss.

[90] I am not convinced, however, by Mr. Lipson's counterargument that Thorsteinssons' communications are inevitably irrelevant and inadmissible to the common issues trial.

[91] It is not plain and obvious that Thorsteinssons' communications are irrelevant to any of the common issues. In particular, Mr. Lipson is claiming $55 million for general damages for professional negligence and negligent misrepresentation and advancing the causation argument that but for there being an opinion from Cassels Brock the investment scheme would not have happened and the Class Members would not have suffered their $55 million misfortune. Mr. Lipson's causation argument, which may be a clever way to make causation a common issue, has, in my opinion, made relevant to the common issues trial Thorsteinssons' communications, which were made while attempting to salvage something from the consequences of Cassels Brock's alleged misconduct.

[92] It may be recalled that the Court of Appeal in certifying causation as a common issue for the negligence claim stated: "It may be that, at the trial of this common issue, evidence will emerge that the Cassels Brock legal opinion was not a necessary precondition for the promoters to market the program." It may be that Thorsteinssons' communications provides that evidence or provides the evidence from which Cassels Brock can fashion an argument that it met the standard of care required of it in the circumstances.

[93] Put somewhat differently, at this still early stage of the litigation, it cannot be said that what Thorsteinssons communicated to Class Members would not tend to prove or disprove the common issues, and, perhaps, more to the point, Cassels Brock should not be foreclosed from obtaining information that may provide the basis of a proof to disprove the first four common issues.

[94] A trial judge or a judge on a motion for summary judgment should be provided with the opportunity to decide what weight, if any, to give the opposing proofs.

[95] I, therefore, conclude that the Thorsteinssons' communications are relevant to the common issues, and I turn to the question of whether the privilege associated with these relevant communications has been waived in the circumstances of the case at bar.

2. Could Mr. Farano's Estate Waive the Class Members' Privilege?

[96] In considering the matter of privilege, the first matter to consider is the significance of Mr. Farano's Estate having copies of Thorsteinssons' communications. Mr. Farano was one of the group of investors that retained Thorsteinssons.

[97] Gardiner Roberts and Mr. Farano's Estate submit that Thorsteinssons' communications are not privileged as between Mr. Lipson and Mr. Farano's Estate and thus Mr. Lipson must disclose and produce the communications for the purposes of this class action.

[98] From the perspective of Thorsteinssons and Davies Ward Phillips & Vineberg, they had joint retainers with the groups of investors and thus the communications between the law firms with their clients are confidential and privileged communications as against third parties. The law, however, is that the communications are neither confidential nor privileged as between the clients of a joint retainer.

[99] Where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although not confidential and known to each other, are privileged against the outside world. However, as between themselves, each client is expected to share in and be privy to all communications passing between each of them and should any dispute arise between the clients, the privilege is inapplicable, and either client may demand disclosure of the communication. See *R. v. Dunbar*, [1982] O.J. No. 581 at para. 57 (C.A.); *Pritchard v. Ontario*, 2004 SCC 31.

[100] In the case at bar, Mr. Lipson and Mr. Farano were joint clients of Thorsteinssons. There is now a dispute between Mr. Lipson, the Representative Plaintiff, and Mr. Farano's Estate, which has defended the main action. In the main action, Mr. Farano's Estate has disclosed or wishes to disclose Mr. Farano's communications with Thorsteinssons, which the Estate submits it is entitled to do because there is no privilege as between the clients of a joint retainer.

[101] In my opinion, Gardiner Roberts and Mr. Farano's Estates' argument might have some traction, if Mr. Farano's Estate was a genuine defendant as opposed to a notional defendant.

[102] Mr. Farano's Estate is only a notional defendant because a third party has a right to plead a defence in the main action. Under rule 29.05(1), a third party has the right to plead in the main action to advance a defence that a defendant might advance: *Van Patter v. Tillsonburg District Memorial Hospital* (1999), 45 O.R. (3d) 223 (C.A.); *Hi-Grade Welding Co. v. Lytle Engineering Specialties Ltd.*, [1965] 1 O.R. 697 (Ont. Master), affd [1965] O.R. 700n (H.C.J.).

[103] A third party, however, cannot raise a defence against the plaintiff's claim that the defendant could not have raised. Thus, in *Schreiber v. Lavoie* (2002), 59 O.R. (3d) 130 (S.C.J.), a third party could not plead a limitation defence when the defendant had agreed to waive the limitation period.

[104] In other words, Mr. Farano's Estate can only plead a defence that Cassels Brock could have pleaded, and Cassels Brock was not a privy of the joint retainer with Thorsteinssons.

[105] Put somewhat differently, Thorsteinssons' communications are privileged from disclosure to outsiders like Cassels Brock. Mr. Farano's Estate's position cannot be in better position than Cassels Brock, whose defence it is asserting, and, therefore, its argument that there is no privilege as between members of a joint retainer avails it naught.

[106] Thus, Mr. Farano's Estate as a notional defendant to the main action cannot waive the Class Members' privilege with respect to the communications with Thorsteinssons.

[107] It is true that Mr. Lipson and the late Mr. Farano were part of a joint retainer, but Mr. Lipson did not sue Mr. Farano, and he rather sues on behalf of Mr. Farano's Estate, which bizarrely has not opted out from being a Class Member in a class action in which it has filed a defence on behalf of Cassels Brock, with which it has a genuine dispute over contribution and indemnity.

[108] It may be that the Class Definition should be amended in these unusual circumstances of this case, but regardless of whether or not Mr. Farano's Estate remains a Class Member, it has not been sued by Mr. Lipson, and acting notionally on behalf of Cassels Brock in the main action, Mr. Farano's Estate has no right to waive or ignore the privilege.

3. **Waiver of Privilege in the Context of Class Actions**

[109] The last issue to discuss is whether the Class Members have waived the privilege associated with Thorsteinssons' communications.

[110] As noted above, there was no dispute that the Class Members' communications with Thorsteinssons are privileged communications.

[111] Having also determined above that the Thorsteinssons' communications with the Class Members are relevant and that Mr. Farano's Estate cannot waive the Class Members' privilege, the ultimate issue is whether the Class Members' privilege has been waived in the circumstances of this case.

[112] Privilege may be waived expressly or implicitly: *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291 at paras. 23 and 91 (C.A.); *Davies v. American Home Assurance Co.*, [2002] O.J .No. 2696 at para. 31 (Div. Ct.).

[113] In the case at bar, it is contended that there has been an express waiver of privilege because Cassels Brock was kept informed about what was happening in Thorsteinssons' attempt to salvage the situation and because Harley Mintz shared Thorsteinssons' reports with Lorne Saltman at Cassels Brock.

[114] Express waiver is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily manifests an intention to waive that privilege: *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C.S.C.). I do not think that either attribute of express waiver has been established in the case at bar, and, therefore, I conclude that there was no express waiver of privilege.

[115] The precise issue then is whether there has been an implied waiver of privilege.

[116] Privilege may be waived intentionally or inferentially or as a matter of fairness: *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd., supra*; *Browne (Litigation Guardian of) v. Lavery* (2002), 58 O.R. (3d) 49 (S.C.J.); *Peach v. Nova Scotia (Department of Transportation & Infrastructure Renewal)*, 2010 NSSC 91, aff'd 2011 NSCA 27; *Guelph (City) v. Super Blue Box Recycling Corp.*, [2004] O.J. No. 4468 (S.C.J.).

[117] In *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, *supra* at p. 148, Justice McLachlin, as she then was, stated:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege. However, waiver may also occur in the absence of the intention to waive, where fairness and consistency so require. Thus, waiver of privilege as to part of a communication will be held to be a waiver as to the entire communication.

[118] An implied waiver is inferred from actions inconsistent with the intent to maintain the privilege: *Glegg v. Smith & Nephew Inc.*, [2005] 1 S.C.R. 724 at para. 19; W. Matheson & J. Necpal, "Implied Waiver of Solicitor-Client Privilege in Civil Litigation" [2010] Annual Review of Civil Litigation 494; J. de Vries, "Privilege and Limitations: The Impact of Raising the Discoverability of Claims on Solicitor-Client Privilege" (2014), 43 *Adv. Q.* 219.

[119] Where a client makes allegations of misconduct or professional negligence against his or her lawyer, the client waives lawyer-and-client privilege to the extent necessary for the lawyer to defend himself or herself: *Newman v. Nemes*, [1978] O.J. No. 3101 (H.C.J.); *Harich v. Stamp* (1979), 27 O.R. (2d) 395 (C.A.); *R. v. Dunbar*, [1982] O.J. No. 581 (C.A.); *Bentley v. Stone* (1998), 42 O.R. (3d) 149 (Gen. Div.); *Froates v. Spears*, [1999] O.J. No. 77 (Gen. Div.); *Bank Leu AG v Gaming Lottery Corp, supra*; *Norhal Quarries & Holding Ltd. v. Ross & McBride*, [2000] O.J. No. 1082 (S.C.J.); *R. v. Youvarajah,* 2011 ONCA 654.

[120] When a class action is certified the putative class members are given notice of what are the common issues that have been certified. They are told that they will be bound by the outcome of the common issues trial, unless they opt out of the class proceeding. In the case at bar, the common issues taken from Mr. Lipson's Statement of Claim are allegations made on behalf of the class. By not opting out, the Class Members may be taken to have adopted Mr. Lipson's pleading that alleges misconduct or professional negligence, and by their adopting the pleading, it follows that fairness demands that the Class Members be regarded as having impliedly waived solicitor and client privilege to the extent necessary for Cassels Brock to defend itself.

[121] In the case at bar, I agree with Mr. Lipson that neither he nor the Estate of Mr. Farano can waive the privilege of the Class Members. My opinion, however, is that the Class Members, comprising all of the investors (since none have opted out) themselves waived privilege.

[122] Recently, in *Hodge v. Neinstein*, 2014 ONSC 4503, in the context of a certification motion in a proposed class action against a law firm for alleged breaches of the *Solicitors Act*, R.S.O. 1990, c. S.15 and its regulations, I held that not opting out of a class action does not necessarily entail that the Class Member has waived his or her privilege. However, I held that there might be cases of which *Hodge v. Neinstein* was an example where not opting out would amount to an implied waiver of privilege.

[123] At first blush, *Hodge v. Neinstein* appears to be a somewhat stronger case for implied waiver by the Class Members than the case at bar because in that case it was the defendant law firm's communication with the plaintiff that were in issue, while in the immediate case, it is a non-party's solicitor and client communications with the plaintiff that are the subject of the implied waiver. However, the common rationale of the immediate case with *Hodge v. Neinstein* is that Mr. Lipson and the Class Members make allegations of professional negligence or misconduct and by doing so, the Class Members waive any solicitor and client privilege to the extent necessary for the lawyer to defend himself or herself.

[124] To summarize, the communications between Thorsteinssons and Class Members are relevant to several individual issues, but the communications are also relevant to the common issues of a $55 million dollar professional negligence and negligent misrepresentation claim. Mr. Lipson and the Class Members who have adopted Mr. Lipson's pleadings and the common issues by not opting out of the class action have impliedly waived the privilege associated with Thorsteinssons' communications. The nature of the allegations is such that fairness requires that the privilege be treated as waived. Therefore, Mr. Lipson should include the Thorsteinssons' communications in his Affidavit of Documents for the purposes of the common issues trial.

E. CONCLUSION

[125] For the above reasons, I grant the motions, in part, as provided above.

[126] With respect to costs, my inclination is to make no order as to costs or to simply order the costs of these motions be in the cause.

[127] Mr. Lipson and Class Counsel understandably had to protect the Class Members' solicitor and client privilege and it was appropriate for them to resist the motions especially because the case law is nascent about solicitor and client privilege in the context of a class action.

[128] If the parties, however, cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of Cassels Brock, Gardiner Roberts, and Mr. Farano's Estate within 20 days of the release of these Reasons for Decision followed by Mr. Lipson's submissions within a further 20 days.

Perell, J.

Perell, J.

Released: October 21, 2014

CITATION: Lipson v. Cassels Brock & Blackwell, LLP, 2014 ONSC 6106
COURT FILE NO.: CV-09-376511CP
DATE: 20141021

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY LIPSON

Plaintiff

– and –

CASSELS BROCK & BLACKWELL, LLP

Defendant

– and –

MINTZ & PARTNERS, DELOITTE & TOUCHE, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER, TMK FINANCIAL GROUP LTD., GARDINER ROBERTS, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE 1-100

Third Parties

REASONS FOR DECISION

PERELL J.

Released: October 21, 2014

CITATION: Lipson v. Cassels Brock & Blackwell, LLP, 2014 ONSC 6163
COURT FILE NO.: CV-09-376511CP
DATE: 20141022

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JEFFREY LIPSON Plaintiff	*David F. O'Connor* and *J. Adam Dewar* for the Plaintiff
– and –	
CASSELS BROCK & BLACKWELL, LLP Defendant	*Shara N. Roy* and *Ian MacLeod* for the Defendant
– and –	
MINTZ & PARTNERS, DELOITTE & TOUCHE, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER, TMK FINANCIAL GROUP LTD., GARDINER ROBERTS, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE 1-100 Third Parties	*Tim Gleason* and *Chris Donovan* for the Third Parties, Gardiner Roberts and The Estate of Ronald J. Farano, Deceased *Deepshikha Dutt* for the Third Party, Mintz & Partners
	HEARD: October 3, 2014

PERELL, J.

REASONS FOR DECISION – ADDENDUM

A. INTRODUCTION

[1] I released my Reasons for Decision in this matter on October 21, 2014. See *Lipson v. Cassels Brock & Blackwell, LLP*, 2014 ONSC 6106.

[2] Earlier today, October 22, 2014, I received a letter from Mr. Lipson's counsel. The contents were approved by all parties to the motion.

[3] I was advised of two factual inaccuracies. First, it was Davies Ward and Beck LLP that commenced this class action. Paragraph 42 of the Reasons for Decision should be amended accordingly.

[4] Second, I was incorrect in paragraphs 68 and 121 of the decision in stating that there were no opt-outs. In fact, 25 putative class members opted out. Once again, the decision should be amended accordingly.

[5] There is no change in my conclusion that the Class Members; i.e., the investors that did not opt out, themselves waived privilege.

Perell, J.

Released: October 22, 2014

CITATION: Lipson v. Cassels Brock & Blackwell, LLP, 2014 ONSC 6163
COURT FILE NO.: CV-09-376511CP
DATE: 20141022

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFREY LIPSON

Plaintiff

– and –

CASSELS BROCK & BLACKWELL, LLP

Defendant

– and –

MINTZ & PARTNERS, DELOITTE & TOUCHE, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER, TMK FINANCIAL GROUP LTD., GARDINER ROBERTS, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE 1-100

Third Parties

REASONS FOR DECISION

PERELL J.

Released: October 22, 2014

Court File No. CV-09-376511CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	WEDNESDAY, THE 21st DAY OF
	)	
MR. JUSTICE PERELL	)	OCTOBER, 2014

B E T W E E N:

JEFFREY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

- and -

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

ORDER

THIS MOTION, made by the defendant, Cassels Brock & Blackwell LLP (the "Defendant"), and the third parties, Gardiner Roberts LLP and the Estate of Ronald J. Farano (the "Third Parties"), for an Order that the plaintiff, Jeffrey Lipson (the "Plaintiff"), produce certain documents over which privilege was claimed as well as a further and better Affidavit of Documents was heard on October 3, 2014, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the Defendant's Motion Record, the Defendant's Supplementary Motion Record, the Third Parties' Motion Record, the Third Parties' Supplementary Motion Record, the Third Parties' Second Supplementary Motion Record, and the Facta and Briefs of Authorities of the Defendant, Third Parties and the Plaintiff,

AND ON READING copies of certain communications sent to Class Members from Thorsteinssons LLP and Davies Ward Phillips & Vineberg LLP which were provided to the Court pursuant to Rule 30.04(6) of the *Rules of Civil Procedure*,

AND ON HEARING the submissions of the lawyers for the Defendant, Third Parties and the Plaintiff,

1. **THIS COURT ORDERS** that the Plaintiff shall produce all relevant communications in the Plaintiff's possession, power or control between and involving Thorsteinssons LLP and Class Members relating to the Timeshare Program (as defined in the Fresh as Amended Statement of Claim), including but not limited to the file of Thorsteinssons LLP.

2. **THIS COURT ORDERS AND DIRECTS** that any communications between Davies Ward Phillips & Vineberg LLP and the Class Members are subject to solicitor and client privilege, are not relevant to this class action and shall not be produced by any party to this proceeding.

3. **THIS COURT ORDERS** that the Plaintiff shall deliver a further and better Affidavit of Documents.

4. **THIS COURT ORDERS** that the costs of this motion be fixed at $20,000, payable by the Plaintiff in the cause, the sum of $10,000 to the Defendant and the sum of $10,000 to the Third Parties.

Powell J

JEFFREY LIPSON Plaintiff	-and-	CASSELS BROCK & BLACKWELL LLP Defendant	-and-	MINTZ & PARTNERS et al. Third Parties

Court File No. CV-09-376511CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ORDER

LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Shara N. Roy (49950H)
Tel: (416) 865-2942
Fax (416) 865-3973
Email: sroy@litigate.com
Ian MacLeod (60511F)
Tel: (416) 865-2895
Fax: (416) 865-3701
Email: imacloed@lititgate.com

Lawyers for the Defendant

This is Exhibit "M" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Court File No.: CV-09-376511

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. JUSTICE PERELL	)))	FRIDAY THE 1ST DAY OF MAY, 2015.

BETWEEN:

JEFFREY LIPSON

Plaintiff/Moving Party

-and-

CASSELS BROCK & BLACKWELL LLP

Defendant/Responding Party

Proceeding under the *Class Proceedings Act, 1992*

VARIATION ORDER – NOTICE OF CERTIFICATION

THIS MOTION, heard by case conference, made by the Representative Plaintiff, for an Order varying the Order of the Honourable Justice Perell dated July 22, 2014 ("Notice Order") was heard this day at 180 Queen Street West in the City of Toronto, Ontario.

ON READING all material filed and on hearing the submissions of counsel for all parties:

1. **THIS COURT ORDERS** that within 7 days of the date of this Order, a notice, substantially in the form attached hereto as Schedule A ("Revised Notice"), be

distributed by Class Counsel to the approximately 144 Class Members ("Un-Notified Class Members") who were not mailed a copy of the court-approved notice of certification (schedule A to the Notice Order) in or around August 2014 by the following means:

a. sending, via regular mail and/or email the Revised Notice, to the last known mailing addresses and/or email addresses of the Un-Notified Class Members for whom Class Counsel have contact information; and,

b. reproducing the Revised Notice on the website royoconnor.ca.

2. **THIS COURT ORDERS** paragraph 3 of the Notice Order is hereby varied to extend the date by which the aforesaid Un-Notified Class Members may opt out of this class proceeding by delivering to Class Counsel the Opt-Out Coupon contained in the Revised Notice or some other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon on or before the expiry of the 45th day after the date the Revised Notice is distributed under paragraph 2 above. Un-Notified Class Members may not opt out after the expiry of the 45h day after the date the Revised Notice is distributed under paragraph 1 above.

3. **THIS COURT ORDERS** that Class Counsel serve on the Defendant, within 7 days after the close of the opt-out period referred to above, an affidavit exhibiting a list of any additional persons who have opted out of the class proceeding, if any.

4. **THIS COURT ORDERS** that there be no costs of this motion.

Perell J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY 04 2015

PER / PAR:

Schedule A – Revised Notice

ATHLETIC TRUST OF CANADA TIMESHARE PROGRAM CLASS ACTION

NOTICE OF CLASS ACTION CERTIFICATION

TO: ALL INDIVIDUALS WHO PARTICIPATED IN THE ATHLETIC TRUST OF CANADA TIMESHARE PROGRAM IN 2000, 2001, 2002 AND/OR 2003

This Notice is directed to anyone who participated in the Timeshare Program promoted by the Athletic Trust of Canada (the "Athletic Trust") in 2000, 2001, 2002 and/or 2003. Anyone who participated in that Program and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more registered Canadian Amateur Athletic Associations are members of the Class (the "Class Members").

[DIRECT MAIL/EMAIL TEXT] *This Notice was first distributed in August 2014. It recently came to the attention of the Representative Plaintiff that you, and a number of additional Class Members, were not provided with a copy of this Notice in August 2014. This Notice is being provided so that you may be informed of your rights to either participate in or be excluded from this class proceeding. Please read this notice carefully as it may affect your legal rights.*

[WEBSITE TEXT] *This Notice was first distributed in August 2014. It recently came to the attention of the Representative Plaintiff that a number of additional Class Members were not provided with a copy of this Notice in August 2014. This Notice has been provided to those Class Members to inform them of their rights to either participate in or be excluded from this class proceeding. Please disregard this notice if you received a copy of this Notice in August 2014.*

On March 19, 2013 the Court of Appeal for Ontario certified the action *Jeffrey Lipson* v *Cassels Brock & Blackwell LLP,* court file number CV-09-376511 (the "Class Proceeding") as a class proceeding and appointed Jeffery Lipson as representative Plaintiff.

The law firm of **Roy O'Connor LLP** has been approved by Court of Justice to act for Class Members. Please contact Roy O'Connor LLP with any questions about this class action at: (416) 362-1989 or info@royoconnor.ca.

This Notice is published by Order of the Ontario Superior Court of Justice and explains:

1. The claims in the Class Proceeding;
2. Who might benefit from the lawsuit;
3. Your right to choose whether or not to be part of the lawsuit;
4. Financial consequences for you;
5. Other matters.

1. The Claims in the Class Proceeding

The Plaintiff alleges that Cassels Brock LLP were negligent in the preparation of various legal opinions relating to the Athletic Trust Timeshare Program. Mr. Lipson also alleges that the Cassels Brock's legal opinions contained misrepresentations that were negligently made by Cassels Brock and relied upon by Class Members.

Certification is a preliminary procedural determination. The certification order means that the Class Proceeding may proceed to trial on the certified common issues. The merits of the claims in the Class Proceeding and the allegations of fact on which the claims are based have not been proved before a court. The Defendant denies that the claims have any merit.

The common issues in the Class Proceeding will, among other things, generally determine whether Cassels Brock owed duties of care to the Class Members and whether those duties were breached. For a complete list of the common issues please see royoconnor.ca.

The lawsuit claims $55 million in general compensatory damages and special damages for accounting, legal and other professional fees as well as expenses that have been or will be incurred prosecuting this action.

2. Who might benefit from the case – Class Definition

Pursuant to the Order of the Court of Appeal for Ontario, Mr. Lipson has been appointed to act as the Representative Plaintiff for the following Class:

> All individuals who applied and were accepted to be beneficiaries of the Athletic Trust in 2000, 2001, 2002 and/or 2003 and received Timeshare Weeks from the Athletic Trust and donated them, together with a cash donation, to one or more of the RCAAAs (the "Class Members").

3. Your right to choose whether or not to be part of the lawsuit

(a) *How to be included in the Class:*

DO NOTHING IF YOU WISH TO BE A CLASS MEMBER IN THIS ACTION

If you are a person falling within the Class definition described above, you will automatically be included in the Class unless you opt-out of this proceeding.

(b) *How to be excluded from the Class:*

To opt-out of the Class (that is to exclude yourself from the class action) you must fill out the accompanying opt-out coupon (or a letter setting out the same information) and send it to Roy O'Connor LLP at the address specified below.

The deadline for opting out is [DATE] 2015. If your written request to opt out is not received by that date you will remain a member of the Class.

By opting out of this Class, you are confirming that you do not wish to participate in this class action. If you decide to opt-out of this class action, you will be excluded from any settlement or award of damages awarded by the Court. Once you opt-out of this class action, you will receive no further communications regarding this Class Proceeding.

PLEASE NOTE: ONLY COMPLETE AND SUBMIT THE OPT-OUT COUPON BELOW IF YOU DO NOT WISH TO REMAIN A CLASS MEMBER IN THIS CLASS PROCEEDING.

4. Financial consequences for you

If the Class Proceeding is successful at the common issues trial, or any subsequent appeal, the Court may award compensation to the Class as a whole. The Court may also establish a process, including individual hearings, to review the amount of damages each individual Class Member may claim and to assess the amount of damages each individual Class Member is to receive.

As of the date of this notice, a trial date has not been set by the Court.

Jeffrey Lipson has retained the law firm of Roy O'Connor LLP to represent him and the Class in the lawsuit. Roy O'Connor LLP will be paid legal fees only if the lawsuit is successful. If the class proceeding lawsuit is successful at the common issues trial, legal costs and disbursements incurred by Roy O'Connor LLP will be deducted from the amounts recovered for the Class Members. The amount of such legal fees and disbursements deducted must be approved by the Court. In this case, the Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through class actions in Ontario. The Fund has agreed to reimburse the Plaintiff for some disbursements incurred in pursuing this action.

Whether or not the Class Proceeding is successful, all members of the class who do not opt out of the class action will be bound by the judgment of the Court.

5. Other matters

If you wish to participate personally in the lawsuit other than as a class member, you may apply to the Court for permission to do so.

The Court papers in this lawsuit are available for inspection at the office of the Superior Court of Justice, Courthouse, 393 University Ave., Toronto, Ontario, Court file no. CV-09-376511

For further information about the class proceeding lawsuit you may contact:

ROY O'CONNOR LLP
Barristers
200 Front Street West, 23rd Floor
Toronto, Ontario
M5V 3K2

Attn: **Carolyn Filgiano**
Tel: (416) 362-1989
Fax: (416) 362-6204
Email: cf@royoconnor.ca
Web: www.royoconnor.ca

PLEASE DO NOT CALL CASSELS BROCK, THE COURTHOUSE, OR THE REGISTRAR OF THE COURT ABOUT THIS ACTION. THEY WILL NOT BE ABLE TO ANSWER YOUR QUESTIONS ABOUT THE LAWSUIT.

This notice is published pursuant to the section 17 of the Ontario Class Proceedings Act and was approved by the Court.

Dated _____, 2015

OPT-OUT COUPON
LIPSON v CASSELS BROCK & BLACKWELL LLP

NOTE! ONLY COMPLETE AND SUBMIT THIS FORM IF YOU DO NOT WISH TO BE A CLASS MEMBER IN THIS CLASS ACTION. DO NOTHING IF YOU WISH TO REMAIN A CLASS MEMBER IN THIS PROCEEDING.

To:

Roy O'Connor LLP
200 Front Street West
23rd Floor
P.O. Box #45
Toronto, ON M5V 3K2

Attention: Carolyn Filgiano

Tel: (416) 362-1989
Fax: (416) 362-6204
Email: cf@royoconnor.ca

I confirm that I **do not** wish be Class Member in the class action lawsuit *Lipson v Cassels Brock & Blackwell et al* and that if I subsequently decide to rejoin this class action, I may only do so with the permission of the Court.

Name [please print]:_____

Mailing Address_____

City_____ Province_____

Postal code:_____ Telephone:_____

Email:_____

_____ _____
DATE **SIGNATURE**

Note! To opt-out of this class action, this coupon, or a signed and dated letter, must be completed and received at the above address before *[INSERT OPT-OUT DATE]*.

JEFFREY LIPSON
Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP
Defendant

Court File No.: CV-09-376511

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

VARIATION ORDER – NOTICE OF CERTIFICATION

ROY O'CONNOR LLP
Barristers

200 Front St. West, 23rd Floor
Toronto, Ontario
M5V 3K2

Peter L. Roy (LSUC No. 16132O)
David F O'Connor (LSUC No. 33411E)
J. Adam Dewar (LSUC No. 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204

Lawyers for the Plaintiff

This is Exhibit "N" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

CITATION: Lipson v. Cassels Brock & Blackwell, LLP, 2019 ONSC 5483
COURT FILE NO.: CV-09-376511CP
DATE: 20190924

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JEFFERY LIPSON	)	*David O'Connor* and *Adam Dewar,* for the Plaintiff
Plaintiff	)	
	)	
- and -	)	
	)	
CASSELS BROCK & BLACKWELL LLP	)	*Shara N. Roy* and *Ian MacLeod,* for the Defendant
Defendant	)	
	)	
	)	
Proceeding under *Class Proceedings Act, 1992*	)	**HEARD**: September 9, 2019

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a refusals motion in a lawyer-professional negligence class action under the *Class Proceedings Act, 1992*.[1] The motion raises the important question about the extent to which a Defendant law firm can claim privilege for the legal advice it gives - to itself - before, during, and after the acts alleged to be negligent or in breach of its professional responsibilities.

[2] Amongst other questions that the motion raises, I must answer: (a) whether following an allegation that in providing legal services, a law firm may have breached the standard of a care, can it assert a "quality assurance" privilege for its own investigations and deliberations about the matter; and, (b) can a law firm assert an "in-house" counsel privilege for the deliberations of its own general counsel or the deliberations of its conflicts, ethics, or risk management committee.

[1] S.O. 1992, c. C.6.

B. Factual Background

1. The Parties

[3] Jeffrey Lipson is a wealthy retired businessman living in Toronto, Ontario.

[4] Cassels Brock & Blackwell LLP is a full-service law firm carrying on business in Toronto as a limited liability partnership. In 2000, Lorne Saltman, a tax lawyer, was a partner of the firm. In 2013, Mr. Saltman left Cassels Brock and joined Gardiner Roberts LLP.

[5] Cassels Brock has an Ethics and Standards Committee that provides the members of the law firm with advice to resolve client conflict of interest issues, confidentiality screens, ethical issues, standards of practice and matters of professionalism. In 2008, the Ethics and Standards Committee was renamed the Risk Management Committee, and, subsequently, it was renamed the Audit & Risk Management Committee.

[6] The members of the Ethics and Standards Committee are involved in the law firm's management and provide internal legal and strategic advice with respect to issues within the professionalism mandate of the Ethics and Standards Committee.

2. The Timeshare Donation Program and Cassels Brock's Opinion

[7] Around 2000, Stephen Elliott and Steven Mintz approached the accounting firm, Mintz & Partners with the idea of a Timeshare Program that would provide tax benefits to participants. Steven Mintz's brother was a partner of the accounting firm.

[8] In 2000, Messrs. Elliot and Mintz retained Cassels Brock to provide Canadian Athletic Advisors with a legal opinion about the tax consequences under the *Income Tax Act* of participating in a Timeshare Donation Program.

[9] Mr. Saltman prepared the opinion for Canadian Athletic Advisors, and in the following years, Cassels Brock prepared more legal opinions for Canadian Athletic Advisors about the Timeshare Program. There are six opinions. The opinions are substantially the same.

[10] Thus, on October 6, 2000, May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002 and April 8, 2003, Cassels Brock provided Canadian Athletic Advisors with a legal opinion letter with respect to the Timeshare Program. The Cassels Brock opinion was that it was unlikely that the Canada Customs and Revenue Agency ("Canada Revenue") could successfully deny the tax credits.

[11] In the marketing of the Timeshare Program, the tax opinions prepared by Cassels Brock were included in the promotional material.

[12] Between 2000 to 2003, the Representative Plaintiff, Jeffrey Lipson, and about 900 other Canadian taxpayers participated in the Timeshare Program in which they donated both cash and also resort timeshares to Canadian athletic associations. Mr. Lipson and the donors anticipated receiving tax credits for their charitable donations.

[13] Mr. Lipson did not read the Cassels Brock opinion, but he participated in the Timeshare Programs. For 2000, he claimed tax credits of $634,352. For 2001, he claimed credits of

$1,261,988. For 2002, he claimed credits of $2,085,835. For 2003, he claimed credits of $1,148,879.60.

[14] Mr. Lipson says that he and the other participants would not have participated in the program but for the opinion of a reputable law firm that the charitable tax credits under the *Income Tax Act* would be available.

[15] In 2004, Canada Revenue disallowed the anticipated tax credits in their entirety.

[16] In 2004 and 2005, Mr. Lipson and other participants sought advice from Thornsteinssons LLP, a law firm that specializes in tax litigation, and in 2006, some of the participants commenced litigation against Canada Revenue as test cases to determine the availability of the tax credits for the donations.

[17] In March 2008, Mr. Mintz spoke to Mr. Saltman about the litigation in the Tax Court. Mr. Mintz said that he and other participants in the Timeshare Program had received advice from Thorsteinssons LLP. He sent Mr. Saltman Thorsteinssons LLP's letter dated November 20, 2007 which, among other things, detailed Thorsteinssons LLP's legal opinion about the Timeshare Program.

[18] In 2008, the test case litigation settled, and Canada Revenue allowed the participants to receive a tax credit for the cash portion of the donation. Mr. Lipson and the other participants in the Timeshare Program, however, were denied the greater part of their anticipated tax credit based on the value of the donated timeshares.

3. **The Class Action**

[19] In 2009, to recover his alleged losses, Mr. Lipson commenced this class action against Cassels Brock for damages for negligence and negligent misrepresentation. Mr. Lipson alleges that Cassels Brock breached the standard of care of reasonably competent tax lawyers by endorsing the Program in 2000 to 2003. The Amended Statement of Claim pleads that there was an undisclosed joint retainer and conflict issues that affected Cassel Brock's duty of care. In Mr. Lipson's action, a core allegation against Cassels Brock is that it failed to consider whether Canada Revenue would consider the conveyance of timeshares a gift in accordance with the *Income Tax Act* jurisprudence.

[20] It is worth keeping in mind that Mr. Lipson's action is not a run-of-the-mill professional negligence action because the Class Members were not clients of the law firm and rather had or could have had other professional tax advisers.

[21] Cassels Brock brought third party claims against Mintz & Partners LLP, Deloitte & Touche LLP, Glenn F. Ploughman, Shelley Shifman, Prenick Langer LLP, TMK Financial Group Ltd., Gardiner Roberts LLP, the Estate of Ronald J. Farano, deceased, John Doe 1-100, John Doe Inc. 1-100, John Doe Partnership 1-100, John Doe LLP 1-100. These third parties were involved in the promotion and marketing of the Timeshare Program.

[22] Mr. Lipson moved to certify his action as a class proceeding under the *Class Proceedings Act, 1992* , and in November 2011, I ruled that the action was certifiable but that it was statute-barred by the two-year limitation period set out in the *Limitations Act, 2002*.[2]

---

[2] *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724 var'd 2013 ONCA 165.

[23] On March 19, 2013, the Court of Appeal for Ontario reversed my decision about whether the action was statute-barred leaving that issue to be determined in the cause.[3] The Court of Appeal agreed with my decision that the action was certifiable and added additional common issues and allowed the class action to continue.

[24] In the class action, the certified common issues are:[4]

> *Negligence*
>
> (1) Did the defendant owe the class a duty of care (in among other things, negligence or negligent misrepresentation) in the preparation of the legal opinions?
>
> (2) If the answer to common issue 1 is yes, what is the content of the standard(s) of care?
>
> (3) Did the defendant breach the foregoing standard(s) of care? If so, how?
>
> (4) If the answer to common issue 3 is yes, did the defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the class members?
>
> *Damages & Other Relief*
>
> (5) If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence, what types or heads of damages, if any, would the Class Members be entitled to?
>
> (6) If after an individual issues trial, the defendant were found liable to a Class Member for negligent misrepresentation or negligence what remedy or remedies, if any, would the Class Members be entitled to?

[25] Cassels Brock and Third Parties have defended the action on numerous bases. Among other things, Cassels Brock has pleaded that: (a) it did not owe a duty of care to Mr. Lipson or other Class Members; (b) Mr. Lipson did not read or rely upon the legal opinions of Cassels Brock; (c) Mr. Lipson and other Class Members obtained independent legal and accounting advice from others before participating in the Timeshare Program; (d) the legal opinions and conduct of Cassels Brock met the standard of care; (e) neither Mr. Lipson nor other Class Members suffered any damages; (e) to the extent that Mr. Lipson suffered any damages, he failed to mitigate those damages; and (f) the action is statute-barred pursuant to the *Limitations Act, 2002* as Lipson knew or ought to have known of all claims asserted against Cassels Brock more than two years before the issuance of the Statement of Claim.

---

[3] *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165.

[4] *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724 var'd 2013 ONCA 165.

[26] The action proceeded to the discovery phase.

Schedule B to Cassel Brock's affidavit of documents lists the following three documents over which it claims "quality assurance privilege":

Docid	Docdate	Doctype	Doctitle	Author	Recipient	Privilege Claimed
CBB0000387	1/17/2001	Memorandum	Re: [No Subject]	Mercer, Cathy L. [Cassels Brock & Blackwell LLP	Ethics Committee: Guthrie, D. McKeown, J. Dickson, G.	Common Law Quality Assurance Privilege
CBB0000386	2/26/2001	Memorandum	The Athletic Trust of Canada Marketing Material	Saltman, Lorne [Cassels Brock & Blackwell LLP	Ethics Committee: Guthrie, D. McKeown, J. Dickson, G.	Common Law Quality Assurance Privilege
CBB0005146	2/26/2001	Memorandum	Re: The Athletic Trust of Canada Marketing Material	Saltman, L [Cassels Brock]	Ethics Committee (D. Guthrie, J. McKeown and G. Dickson)	Common Law Quality Assurance Privilege

[27] The three documents over which Cassels Brock asserts quality assurance privilege consist of internal communications between members of Cassels Brock's Ethics and Standards Committee, its Managing Partner (Mark I. Young) and Mr. Saltman.

a. CBB0000387 is a memorandum dated January 17, 2001 that was authored by Cathy L. Mercer and addressed to other members of Cassels Brock's Ethics and Standards Committee. The memorandum refers to a meeting involving members of the Ethics and Standards Committee the previous day and attaches external documentation provided to the Ethics and Standards Committee by the Managing Partner at Cassels Brock, Mark I. Young.

b. The external documentation referenced in the memorandum (CBB0000388 and CBB0000389) was produced by Cassels Brock in February 2014 and are listed in Schedule A of its initial affidavit of documents, which was sworn February 18, 2014.

c. CBB0000386 and CBB0005146 are copies of the same memorandum dated February 26, 2001 that Mr. Saltman authored and sent confidentially to Cassels Brock's Ethics and Standards Committee as well as Mr. Young. The memorandum attaches Ms. Mercer's earlier memorandum dated January 17, 2001 as well as other documentation (CBB0000393, CBB0005120, CBB0000396 and CBB0000395). Cassels Brock produced CBB0000393, CBB0005120, CBB0000396 and CBB0000395 in October 2015 and listed these documents in Schedule A of its supplementary affidavit of documents sworn October 19, 2015.

[28] Mr. Saltman deposed that he did not expect that the three documents over which Cassels Brock has asserted common law quality assurance privilege would ever be disclosed to a third party.

[29] Mr. Saltman was examined for discovery over six days; namely, August 18, 2015, October 27, 2015; October 28, 2015; October 29, 2015; November 5, 2015; and October 14, 2016.

[30] Cassels Brock delivered its answers to undertakings and to questions taken under advisement on January 29, 2018.

[31] For the purposes of the refusals motion, Cassels Brock delivered affidavits providing additional information about its assertion of privilege.

[32] The refusals from Mr. Saltman's examination for discovery have been grouped into four discrete groups; namely: (1) the quality assurance memorandum refusals; (2) Cassel Brock's view of the law refusals; (3) Mr. Saltman's departure from Cassel's Brock's refusals; and (4) information from other individuals' refusals.

[33] The groups of refusals are set out below:

Group #1: Quality Assurance Memorandum Refusals:

#	Page	Question	Description
14.	170	559/60	Refusal to advise what the specific issue was that the Ethics Committee considered as it relates to the memorandum dated January 17, 2001, item 1 in the Defendant's Schedule B, what the committee's view was and what the recommendation was.
15.	171	561	Refusal to advise if the subject matter of a memorandum dated January 17, 2001, item 1 in the defendant's Schedule B, related to a conflict of interest.
16.	171	562	Refusal to advise of the memorandum of January 17, 2001, item 1 in the Defendant's Schedule B, related to some other ethical or professional issue.

17.	171	563	Refusal to advise what the outcome was of the review by the Ethics Committee.
18.	171/2	564	Refusal to advise what the subject matter or the outcome was of the three memoranda referred to as CBB 386, 5146 and 5198 in the Defendant's Schedule B.
19.	173	572	Refusal to advise what the circumstances were under which an issue was brought to the attention of the Ethics Committee as it relates to the January 17, 2001 memorandum, item 1 in the Defendant's Schedule B
20.	174	573	Refusal to advise what facts are referred to in the memorandum of January 17, 2001 memorandum, item 1 in the Defendant's Schedule B
21.	174	574	Refusal to advise what facts are referred to in the four memoranda listed in the Defendant's Schedule B.
22.	176	582	Refusal to advise what the defendant understood the nature of the quality assurance issues were that the Ethics Committee was tackling.
23.	177	589	Refusal to advise what the Defendant's recollections are of what arose in relation to the three memoranda that are listed in Schedule B as of the first two months of 2001.
24.	179	598	Refusal to advise what the circumstances were under which Ms. Mercer came to pen a memorandum to the Ethics Committee.
25.	180	603	Refusal to advise why a member of the securities group would have been writing a memorandum to the Ethics Committee.
26.	180	605	Refusal to advise if the memorandum from Schedule B dated February 26, 2001 is in response to the memorandum dated January 17, 2001
27.	181	606	Refusal to advise if the third memorandum from Schedule B also dated 26 February 2001 is in response to the memorandum dated January 17, 2001.
28.	181	608/9	Refusal to produce any other documents that relate to the process undertaking by the Ethics Committee as of 2001, or its process of review and evaluation.

Group #2 Refusals: Cassels Brock's View of the Law:

#	Page	Question	Description
51.	834 (Nov 5, '15)	3137	Refusal to advise whether Cassels Brock, Mr. Saltman, advised other clients about the likelihood of success of CCRA challenges in respect of other similar tax arrangements.
52.	834/5 (Nov 5, '15)	3138	Refusal to advise if there is documentation internal to Cassels Brock analyzing the question of whether this type of tax arrangement could be successfully challenged by CRA after 2003.
53.	835 (Nov 5, '15)	3139	Refusal to produce documentation internal to Cassels Brock analyzing the question of whether this type of tax arrangement could be successfully challenged by CRA after 2003, redacted for client privilege issues.

Group #3 Refusals: Mr. Saltman's Departure from Cassels Brock:

#	Page	Question	Description
1.	10	29	Refusal to advise whether Mr. Saltman's departure from Cassels Brock was in any way related to the services he rendered in respect of this program and was there any complaint or issue raised with him at Cassels Brock in respect of this program.
2.	11	31	Refusal to advise if any client has complained to Mr. Saltman about the advice he gave in respect of this program.

Group #4 Refusals: Information from Other Individuals:

#	Page	Question	Description
29.	841 (Nov 5, '15)	3162	Under advisement to the extent that the defendant gets information from other individuals that is relevant to this proceeding, to provide a summary of that information as well as the name, address and contact information of those individuals.

C. Discussion and Analysis

1. Refusal Group #1: Quality Assurance Memorandum

[34] Cassels Brock asserts that the memoranda of its Ethics and Standards Committee are privileged from disclosure and production either because: (a) they are subject to solicitor-client privilege; or (b) they are subject to what is known as the quality assurance privilege.

[35] To qualify for solicitor-client privilege, a communication must be: (1) between a client and his or her lawyer who must be acting in a professional capacity as a lawyer; (2) given in the context of obtaining legal advice; and (3) intended to be confidential.[5]

[36] For the communication to be privileged, the person making the communication must be a lawyer. For the solicitor-client privilege to attach, the lawyer must be acting in his or her role of a lawyer. No solicitor-client privilege attaches to advice on purely business matters even where it is provided by a lawyer.[6] Communications with a lawyer who is employed as in-house counsel may qualify for solicitor-client privilege, but communications with an in-house counsel will not be privileged if the in-house counsel is acting in a non-lawyer capacity.

[37] In *Toronto-Dominion Bank v. Leigh Instruments*,[7] a document about the role of comfort letters for bank loans was circulated by a senior vice-president, a lawyer who was secretary and general counsel for the bank. The document was held not to be privileged because the court was not satisfied that the vice-president was acting as a lawyer as opposed to a business executive.

[38] In the immediate case, the Ethics and Standards Committee is comprised of lawyers and it provided both legal and business advice to Cassels Brock, which obviously is also comprised of lawyers. The Ethics and Standards Committee was in effect playing the same role as played by in-house counsel for a business entity like a corporation. The law firm, in effect, was the client of the Ethics and Standards Committee.

[39] In my opinion, insofar as the Ethics and Standards Committee or a law firm's in-house general counsel provides legal advice, it is entitled to invoke lawyer and client privilege. In my opinion, a law firm should be able to give itself legal advice about its own affairs including advice about avoiding being sued or about how to respond if it is in fact sued.

[40] That said, because it is difficult to differentiate legal advice, which is protected by lawyer-client privilege, from business advice, which is not protected, in professional negligence litigation, it is appropriate for the Plaintiff to challenge the law firm's claim for privilege. If there is a challenge to the claim for privilege, then the court should utilize rule 30.06, which provides in relevant part as follows:

> 30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may...

---

[5] *R. v. Campbell*, [1999] 1 S.C.R. 565; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Gower v. Tolko Manitoba Inc.* (2001), 196 D.L.R. (4th) 716 (Man. C.A.); *Wigmore on Evidence*, Vol. 8 (McNaughten rev., 1961), para. 2292.

[6] *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 50.

[7] (1997), 32 O.R. (3d) 575 (Gen. Div.). See also *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)*, [1988] O.J. No. 1090 (H.C.J.).

> (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
>
> (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

[41] In the immediate case, I inspected the three memoranda for which privilege was claimed by Cassels Brock for the purposes of determining their relevance and whether there was merit to the law firm's claim for privilege.

[42] Having done so, I can report that the documents are privileged as lawyer-client privilege, but the documents are irrelevant. Having reviewed the memoranda, it appears to me that Cassels Brock acted appropriately by disclosing the memoranda with a claim of privilege for review by the court, but it turns out that there has been much ado about nothing because the documents have no probative value. This is particularly true once it is recalled that Cassels Brock disclosed the attachments that accompanied the memoranda. Having reviewed the memoranda, I can add that their legal advice content in response to those attachments is miniscule.

[43] Having reached this conclusion about relevancy, technically speaking, for the purpose of this refusals motion, it is not necessary for me to consider whether or not the memoranda of the Ethics and Standards Committee are subject to quality assurance privilege.

[44] However, the claim of quality assurance privilege was fully argued, and the answer to this question is an important matter for the legal profession that may frequently arise in other professional negligence cases. Therefore, I shall proceed to determine whether this claim applies in the circumstances of the immediate case. I observe that in future cases where a claim is made that the legal advice that a law firm gives to itself is privileged as quality assurance communications, the court should, always inspect the allegedly privileged document.

[45] The quality assurance privilege, which in the past has been used by the medical profession for hospitals,[8] is recognized as a type of case-by-case privilege in accordance with the Wigmore criteria. The case-by-case privilege itself was recognized by the Supreme Court of Canada in *Slavutych v. Baker.*[9]

[46] The more precise issue to be determined in the immediate case is whether lawyers may have a case-by-case privilege based on the circumstances of their examining or inquiring about the quality of their own legal work in order to avoid mistakes in the provision of legal services.

[47] It should be emphasized that an affirmative answer to this precise question just means that on a case-by-case basis law, firms can assert a quality assurance privilege if the firm can satisfy the Wigmore criteria. Mr. Lipson's argument, however, was that a law firm can never asset a quality assurance privilege because in no circumstances could it ever satisfy the Wigmore criteria. While I might agree that a quality assurance privilege may on a case-by-case basis be difficult to prove, I disagree with Mr. Lipson's arguments that the quality assurance privilege can never be available to a law firm. The availability of the case-by-case privilege for lawyers is a case-by-case matter.

---

[8] *Steep v. Scott*, [2002] O.J. No. 4546 (Master); *Redman v. Hospital for Sick Children*, 2010 ONSC 3769 (Master). In the medical field, the quality assurance privilege is statutorily enshrined; see *Quality of Care Information Protection Act, 2016, S.O. 2016, c. 6.*

[9] [1976] 1 S.C.R. 254.

[48] The onus of proving that documents are privileged is on the party claiming the privilege.[10] The Wigmore criteria are: (a) the communications must originate in a confidence that they will not be disclosed; (2) confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would arise by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation.

[49] In the context of legal services, in my opinion, for the quality assurance privilege to be available, the court must be satisfied from its own review of the documents that the communications were genuinely made as a quality assurance measure with a view to improving the quality of legal services and to ensure that the firm's clients are safeguarded from mistakes in the firm's provision of legal services.

[50] Turning to the Wigmore criteria in the circumstances of the immediate case, I am satisfied that Mr. Lipson's communication with the Ethics and Standards Committee originated in a confidence that the communication would not be disclosed.

[51] I am also satisfied that the confidentiality between Mr. Lipson and the Ethics and Standards Committee was essential to the full and satisfactory maintenance of the relationship between a law firm and its partners and employees, which relationship entails that the law firm and its members be committed to providing competent legal services and that the law firm does so in accordance with its ethical and professional obligations.

[52] The attachments to the memorandum and Mr. Lipson's evidence reveals that he was communicating about whether the law firm may have legal and professional obligations in the circumstances where its opinion is being made available as part of the promotional material for a client's investment product. Mr. Lipson's communication was about a matter of the use that could be made of the firm's legal work product. From his perspective, the communication was being made as a quality assurance measure with a view to improving the quality of legal services the firm provided and to ensure that the firm's clients were safeguarded from mistakes, reservations, or qualifications to the firm's provision of legal services.

[53] In the circumstances of the immediate case, I am satisfied that the relationship between Mr. Lipson and the Ethics and Standards Committee was a relationship that ought to be sedulously fostered.

[54] Thus, on a case-by-case basis, I am satisfied that the first three of the four Wigmore criteria are satisfied in the case at bar. Turning to the fourth criterion, in a somewhat odd way, it too is satisfied. I say in an odd way because given the memoranda's irrelevancy, there would be no significant injury by the disclosure of the memoranda; however, given their irrelevance, the memorandum would not contribute to the probity of the disposal of the litigation.

[55] As it turns out, once again, in the circumstances of the immediate case, the controversy about the quality assurance privilege is much ado about nothing important to the immediate case.

[56] Generally speaking, the quality assurance privilege is available on a case-by-case basis to law firms, and it was available to Cassels Brock in the immediate case and so the firm's refusal to

---

[10] *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512 (Div. Ct.); *Toronto-Dominion Bank v. Leigh Instruments* (1997), 32 O.R. (3d) 575 (Gen. Div.).

answer was justified.

2. Refusal Group #2: Cassel Brock's View of the Law

[57] Cassels Brock provided its opinions between 2000 and 2003. Its opinions were based on the law as it existed during this period of time. In response to certain questions that were initially taken under advisement Mr. Saltman provided some evidence about how the case law changed after 2003.

[58] In response to Q. 3136, which was taken under advisement, Mr. Saltman testified that based on the state of law at the time that the opinions were given, he did not change his view regarding the likelihood of a successful challenge by the Canada Revenue Agency to Timeshare Program itself. In response to Q. 3134, which asked when Mr. Saltman or anyone at Cassels Brock arrived at a view that there might be a successfully challenge to the Timeshare Program, Mr. Saltman answered:

> A. Amendments were made to subsection 248(35) and following of the Income Tax Act announced December 21, 2002 and enacted June 2003, as well as the amendments proposed in the 2003 federal budget to subsection 237.1 (1) (the "Amendments"). As tax professionals began to absorb the guidance from the Amendments and various cases, including *Klotz* v. *The Queen*, 2004 TCC 651 (TCC); *Tolley* v. *The Queen*, 2004 TCC 650 (TCC); *Quinn* v. *The Queen* 2004 TCC 649 (TCC), Mr. Saltman advises that his view began to change with respect to the potential success of a challenge by CRA to future programs like the Athletic Trust Program. Mr. Saltman did not express any opinion on the Athletic Trust program itself after December 15, 2003 and Thorsteinssons LLP took over the analysis in respect of the CRA challenge.

[59] The Group #2 Refusals concern how Mr. Saltman's understanding of the case law may have changed in the years following the tax assessments made by Revenue Canada. I agree with Cassels Brock that this line of inquiry is irrelevant. It was justified in refusing to answer the questions.

3. Refusal Group #3: Mr. Saltman's Departure from Cassels Brock

[60] The investments that are the subject matter of this class action occurred between 2000 and 2003. The class action was commenced in 2009. Mr. Saltman resigned from Cassels Brock in 2013. Group #3 questions inquired whether Mr. Saltman's departure was connected to the subject matter of the litigation. Cassels Brock refused to answer these questions on the grounds of relevancy.

[61] I agree with Cassels Brock that this line of inquiry is irrelevant. It was justified in refusing to answer the questions.

4. Refusals Group #4:Information from Other Individuals

[62] Cassels Brock took under advisement question number 3162, which asked the law firm to produce a summary of relevant information it receives/received from others (witnesses or potential witnesses) as well as their names and contact information. Subsequently, the firm advised that Mr. Lipson request was too imprecise, but nevertheless, the firm would comply with its obligations under the *Rules of Civil Procedure*.

[63] In my opinion, this answer was satisfactory.

D. Conclusion

[64] For the above reasons, I dismiss Mr. Lipson's refusals motion.

[65] If the parties cannot agree about costs, they may make submissions in writing beginning with Cassels Brock's submissions within twenty days of the release of these Reasons for Decision, followed by Mr. Lipson's submissions within a further twenty days.

Perell, J.

Released: September 24, 2019

CITATION: Lipson v. Cassels Brock & Blackwell, LLP, 2019 ONSC 5483
COURT FILE NO.: CV-09-376511CP
DATE: 20190924

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

REASONS FOR DECISION

PERELL J.

Released: September 24, 2019

JEFFREY LIPSON
Plaintiff/Moving Party

- and -

CASSELS BROCK & BLACKWELL LLP
Defendant/Respondent

Court File No. CV-09-376511

September 24, 2019
Order to go in accordance with
Reasons for Decision released today
Perell, J.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

MOTION RECORD
(Refusals Motion)

ROY O'CONNOR LLP
Barristers
200 Front Street West
Suite 2300
Toronto, Ontario
M5V 3K2

David F. O'Connor (LSO # 33411E)
J. Adam Dewar (LSO # 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204

Solicitor for the Plaintiff/Moving Party

JEFFREY LIPSON	- and -	**CASSELS BROCK & BLACKWELL LLP et al.**	-and-	**MINTZ & PARTNERS LLP et al.**
Plaintiff		Defendant		Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

MOTION RECORD
(SETTLEMENT & FEE APPROVAL)
VOLUME 1 OF 2

ROY O'CONNOR LLP
Barristers
1920 Yonge Street
Suite 300
Toronto, Ontario
M4S 3E2

David F. O'Connor (LSO# 33411E)
J. Adam Dewar (LSO# 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204
Email: dfo@royoconnor.ca
Email: jad@royoconnor.ca

Lawyers for the Plaintiff

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

-and-

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

MOTION RECORD
(SETTLEMENT & FEE APPROVAL)
VOLUME 2 OF 2

November 30, 2022

ROY O'CONNOR LLP
1920 Yonge Street, Suite 300
Toronto, ON M4S 3E2

David O'Connor (LSO# 33411E)
Tel: 416-362-1989
Email: dfo@royoconnor.ca

J. Adam Dewar (LSO# 46591J)
Tel: 416-362-1989
Email: jad@royoconnor.ca

Lawyers for the Plaintiff

TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**
Barristers
130 Adelaide Street West, Suite 2600
Toronto, ON M5H 3P5

Peter Griffin (LSO# 19527Q)
Email: pgriffin@litigate.com

Rebecca Jones (LSO# 47826M)
Email: rjones@litigate.com

Jessica Kras (LSO# 77700K)
Email: jkras@litigate.com

Tel: (416) 865-9500
Fax: (416) 865-9010

Lawyers for the Defendant, Cassels Brock & Blackwell LLP

AND TO: **DEWART GLEASON LLP**
366 Adelaide Street West, Suite 102
Toronto, ON M5V 1R9

Sean Dewart (LSO# 26708B)
Email: sdewart@dgllp.ca

Adrienne Lei (LSO# 58975R)
Email: alei@dgllp.ca

Tel: (416) 971-8000
Fax: (416) 971-8001

Lawyer for the Third Parties, Gardner Roberts LLP and
The Estate of Ronald Farano, Deceased

AND TO: **DENTONS CANADA LLP**
Barristers & Solicitors
Toronto-Dominion Centre
77 King Street West, Suite 400
Toronto, ON M5K 0A1

Frank E.P. Bowman (LSO# 16649W)
Email: frank.bowman@dentons.com

Deepshikha Dutt (LSO# 62846F)
Email: deepshikha.dutt@dentons.com

Tel: (416) 863-4511

Fax: (416) 863-4592

Lawyers for the Third Party, Mintz & Partners LLP

AND TO: **BENNETT JONES LLP**
Barristers & Solicitors
One First Canadian Place, Suite 3400
P.O. Box 130
Toronto, ON M5X 1A4

Jeffrey Leon (LSO# 18855L)
Email: leonj@bennettjones.com

Ethan Schiff (LSO# 70448W)
Email: SchiffE@bennettjones.com

Tel: (416) 863-1200
Fax: (416) 863-1716

Lawyers for the Third Party, Prenick Langer, LLP

INDEX

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

-and-

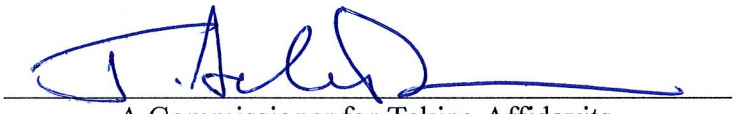
MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

INDEX

This is Exhibit "O" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022



A Commissioner for Taking Affidavits.

FILE/DIRECTION/ORDER

BEFORE JUDGE: Darla A. Wilson ACTION #: CV-09-376511-00CP/00CPA1

DATE OF PROCEEDING: December 3, 2021

Lipson
Plaintiff(s)

-v-

Cassels Brock & Blackwell LLP et al.
Defendant(s)

CASE MANAGEMENT: YES [ ] NO [X]

COUNSEL:	D. O'Connor & A. Dewar	PH NO.		EMAIL	dfo@royoconnor.ca jad@royoconnor.ca
COUNSEL:	S. Roy & J. Kras	PH NO.		EMAIL	sroy@litigate.com jkras@litigate.com
COUNSEL:	F. Bowman	PH NO.		EMAIL	frank.bowman@dentons.com
COUNSEL:	J. Leon, R. Agrawal and N. Butz	PH NO.		EMAIL	leonj@bennettjones.com agarwalr@bennettjones.com butzn@bennettjones.com
COUNSEL:	A. Lei	PH NO.		EMAIL	alei@dgllp.ca

[X] ORDER [ ] DIRECTION FOR REGISTRAR

[ ] REPORTED SETTLED ADJOURNED TO TRIAL SCHEDULING COURT

[ ] NO ONE APPEARED ADJOURNED TO BE SPOKEN COURT

Counsel in this action and the Third Party claims attended in Trial Scheduling Court on October

20, 2021 and fixed the trial to commence January 30, 2023 for a period of 30 days. A timetable for the service of expert reports was completed and filed with the Court. I convened today's case conference to deal with some preliminary issues.

After some discussion, the following timetable was agreed upon:

The Plaintiff shall deliver the factual documentation in its possession and any expert report it intends to rely on at the mediation by February 15, 2022.

The Defendants shall serve any expert report on which they intend to rely by April 30, 2022. A mediation shall be held no later than June 30, 2022.

If issues arise, counsel may contact me to arrange a further case conference. The service of damage reports for Mr. Lipson may be deferred until a further case conference. If the claims do not resolve at mediation, counsel shall contact me to schedule a further case conference, to take place on or before September 15, 2022.

December 3, 2021
DATE

D. A. Wilson J.

This is Exhibit "P1" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen St, Suite 1100
Ottawa, ON, Canada K1P 1J9
T 613.237.5160
F 613.230.8842
blg.com

BLG
Borden Ladner Gervais

File No. 340679-000001

July 13, 2011

By Email & By Regular Mail

Peter L. Roy & J. Adam Dewar
Roy Elliott O'Connor LLP
2300 – 200 Front Street West
Toronto ON M5V 3K2

Gentlemen

Re: Lipson v. Cassels Brock & Blackwell LLP
Your File: 7400
Court File No: CV-09-376511

A. Purpose & Scope of Opinion

1. You have retained me to provide a "fair, objective and non-partisan" opinion in the context of potential litigation in respect of certain potential proceedings under the *Class Proceedings Act* (1992).

B. Documents Reviewed

2. In connection with my opinion, you provided me with the following documents:

(a) Statement of Claim
(b) Legal Opinion of Cassels Brock & Blackwell dated October 6, 2000
(c) Legal Opinion of Cassels Brock & Blackwell dated May 18, 2001
(d) Deed of Trust
(e) Deed of Gift of the Timeshare Weeks by the Settlor of the Trust to the Trustee
(f) Sales Agreement between PVIL and Settlor
(g) Charge Against the Timeshare Weeks
(h) Rules and Regulations of the Sandyport Beaches Resort
(i) Beneficiary Application to the Trustee
(j) Deed of Gift of the Timeshare Weeks by a Class A Beneficiary to an RCAAA
(k) HCI Final Appraisal
(l) Michael Cane Final Appraisal
(m) Marketing and Sales Agreement with PVIL
(n) Resolution of the Trustee distributing Timeshare Weeks to a Class A Beneficiary

(o) Conveyance of a Timeshare Week from the Trustee to a Class A Beneficiary

(p) Correspondence between CRA and Atlantis Fiduciary Services (Trustee of the Athletic Trust)

(q) Correspondence between CRA and Canadian Athletic Advisors

(r) Correspondence between CRA and Rugby Canada (one of the registered charities)

(s) Auditor's Report prepared by CRA dated April 28, 2004

(t) Letter from CRA to J. Lipson disallowing donation claim dated October 19, 2004

(u) Notice of Appeal of Victor Peters (test case litigant) dated January 16, 2006

(v) Reply of Deputy General of Canada dated April 27, 2006

C. Overview & Background

3. You have reviewed the facts outlined below for accuracy.

4. Cassels Brock & Blackwell LLP (Cassels Brock) and Lorne H. Saltman (Saltman), a Partner at Cassels Brock, prepared a series of Legal Opinions in connection with a timeshare donation program (the Timeshare Program) that Athletic Trust of Canada (Athletic Trust) operated and promoted.

5. The purpose of the Timeshare Program was to support amateur athletes and reduce the tax liability of individuals who participated in the Program by providing tax credits under the *Income Tax Act* (Canada).

6. The arrangement proceeded in several steps. Mr. Adrian Crosbie-Jones, a resident of the Bahamas, settled a trust in Ontario (AT) with a gift of $100. The Trust had Class A and Class B Beneficiaries.

7. The Class A Beneficiaries were entitled to the capital of AT; the Class B Beneficiaries to its income.

8. The Class A Beneficiaries were Canadian resident individuals. A numbered corporation (1443372 Ontario Inc.) was the Class B Beneficiary.

9. In 2000, the Settlor acquired biennial Timeshare Weeks from a Bermuda corporation for the lesser of $9000 US or the fair market value of each Timeshare Week. The purchase price was payable as follows:

Cash	US $5800
Lien	3200
Total	US $9000

10. In 2001 to 2003, there were similar Timeshare transactions for approximately similar values.

11. The Lien was a limited recourse charge against the property only. There was no right of further recovery of any deficiency against any owners of the Timeshare Weeks.

12. The Settlor advised the Vendor of the Timeshare Interest that he intended to gift the properties to the Athletic Trust as a settlement of capital property.

13. The Trustee of the Athletic Trust was to select "qualified beneficiaries in Canada" who would be entitled to receive capital distributions from the Athletic Trust.

14. The contract provided that it was the "expectation of the Athletic Trust that the Canadian Beneficiaries will gift their Timeshare Interests as charitable donations" to registered Canadian Amateur Athletic Associations (RCAAAs).

15. The donation arrangements were as follows. During the taxation years 2000-2003 (inclusive), individuals who qualified as Canadian Resident Donors (Class A Beneficiaries) received Timeshare Weeks (with Liens) from the Athletic Trust.

16. The Donors would then donate the Timeshare Weeks plus a cash donation of (approximately) $4600 to $9700 CDN (depending upon the year) per Timeshare Week to RCAAAs.

17. The Donors received a charitable donation receipt of between (approximately) $13,275 CDN and $28,600 per Timeshare Week from the RCAAAs. Hence, they could claim charitable donation credits under the *Income Tax Act* (Canada).

18. Two independent valuators valued the Timeshare Weeks.

19. Through a marketing arrangement with a company called the Canadian Athletic Advisors Ltd. (CAA), the developers could acquire (call options), and were required to acquire (put options), the Timeshare Weeks for a price that was either 60 percent *below* the appraised fair market value of the Weeks, or (if more than 100 units purchased) between $1000 to $1100 US per week.

20. In effect, the developers would purchase (or be required to purchase) the property at a price substantially below the appraised fair market value of the properties, which ranged between $13,275 and $28,600.

21. The RCAAAs issued two charitable receipts to the Class A Beneficiaries as follows:

    (a) A receipt for $4600 to $9700 CDN with respect to the cash donation used to discharge the Lien; and

    (b) A receipt for the then fair market value of the donated Timeshare Weeks *less* the amount of any Lien registered against the property (if any).

22. The tax benefit on the receipts at the highest margin or rate would be equal to approximately $6100 to $13,100 CDN.

23. The Charge (Lien) on each Timeshare of $4600 to $9700 CDN was payable on demand with interest at 10 percent per year (annually in arrears) and was secured against the property. The Charge (Lien) was assignable.

24. The Purchase Agreement between the Vendors of the Timeshares and Crosbie-Jones provided that the donation by the Canadian Class A Beneficiaries was at their option and was not compulsory (Article 4(c)).

25. The Trustee had the sole legal title to all of the property comprising the Trust Fund and also had exclusive management and control of all Trust property (Article 2.3 of the Athletic Trust of Canada Trust Deed).

26. The Beneficiaries did not have any right or power to alienate or otherwise encumber the Timeshare Interests.

27. The Trustee had the absolute power, notwithstanding any rule of law to the contrary, to purchase Trust assets at fair market value on such terms, conditions and price as the Trustee in its absolute and uncontrolled discretion considered advisable. The Trustee's decision in this regard was final, absolute and binding without any other approval whatsoever (Article 2.4, Schedule 3, Athletic Trust of Canada).

28. The Class A Beneficiaries signed a promissory note for $4600 to $9700 CDN, payable on demand with interest accruing at 12 percent per year payable annually, in arrears. The principal was to accrue until such time that a demand was made and was to be added to the principal amount annually. Hence, interest would compound at an annual rate of 12 percent.

29. In the event of a default in payment, the entire amount outstanding would become due and all amounts paid prior to default were forfeited as "liquidated damages."

30. The Class A Beneficiaries were required to complete an application in which they indicated whether they had supported, or intended to support in the future, amateur athletics in Canada.

31. The application clearly stated that the Beneficiary was under "no obligation whatsoever to donate any or all such Timeshare Weeks to a registered Canadian amateur athletic association, or any other charitable organization."

32. The Timeshare Interests were valued by an independent appraiser (Michael Cane Consultants) on October 25, 2000 as follows:

One bedroom unit	$15, 000 US
Biannual one bedroom unit	$9000 US

33. The Valuation Report stated that the values were fair market value estimates without any discount for bulk sales or marketing costs and sales commissions.

34. The Report explicitly exonerated Michael Cane Consultants from giving testimony or attending in any court by reason of the appraisal.

D. Opinions Requested

35. You have asked for my opinion on the appropriateness of the Legal Opinions in respect of the validity of the donations of Timeshare Weeks as qualified charitable gifts for income tax purposes.

36. There are three separate issues in determining whether a gift is valid for income tax purposes:

(c) The existence of the "gift."

(d) The value of the "gift" (no opinion expressed).

(e) The risk of challenge for abusive tax avoidance under GAAR.

37. I address (a) and (c) above, and express no opinion on (b).

E. Analysis

(i) Meaning of "Gift" For Tax Purposes

38. The *Income Tax Act* (*Act*) encourages Canadians to donate to registered charities (and other listed organizations) by allowing them to claim a tax credit for their donations.[1] The tax credit reduces the net cost of the donation for the donor. Thus, the tax credit is an incentive to give to qualified donees. As the Supreme Court of Canada said in *Canada Trustco Mortgage Co.*,[2]

> Parliament intends taxpayers to take full advantage of the provisions of the *Income Tax Act* that confer tax benefits. Indeed, achieving the various policies that the *Income Tax Act* seeks to promote is dependent on taxpayers doing so. [para.31]

39. Because of the cost involved to the treasury, the *Act* controls the scope of the credit. A taxpayer may claim a credit only in respect of gifts to qualified organizations. The amount of the credit is, in most cases, limited in amount. The time during which the taxpayer may claim the credit is limited. There are also Regulations that specify the nature and detail of information that the taxpayer must file to support his or her claim.[3]

40. The general rule is that the total amount claimable for credits is equal to 75 percent of the individual's income for the year. There are special rules in respect of donations of capital property and shares of publicly-traded securities.[4] The definition of "total gifts" stipulates the maximum amount that an individual may claim as a tax credit in a particular taxation year.

---

1 Section 118.1, *Income Tax Act.*

2 [2005] SCC 54; [2005] SCR 601.

3 See, generally, section 118.1.

4 See the definition of "total gifts" subsection 118.1(1).

41. The *Act* does not define "gift." At common law, a gift is the voluntary transfer of property from a donor to a donee for which the donor receives no benefit or consideration – a transfer without expectation of economic reward or material return.[5] The donor must be impoverished by the transfer.

42. Thus, the essence of a gift is a transfer motivated by detached and disinterested generosity. [There are pending amendments to the *Act* to change the "impoverishment rule" that permit donations where the donor obtains partial value in exchange.[6]]

43. *Friedberg* identifies four elements of a "gift":[7]

(f) The donor must own the gifted property;

(g) The donor must transfer the property voluntarily;

(h) No consideration can flow to the donor in return for the gift; and

(i) The subject of the gift must be property and not services.[8]

44. Overarching these four elements is the notion that a taxpayer must have an intent to donate the property to the charity.[9] Intention to donate depends upon the facts of the arrangement and is intrinsic to the notion that the transfer must impoverish the donor of the property.

45. "The essence of a gift is that it is a transfer without *quid pro quo*, a contribution motivated by detached and disinterested generosity."[10] The donor of a gift must intend to benefit the recipient charity and cannot expect any benefit in return. Hence, the concept of "impoverishment" and donative intent are closely linked. According to the TCC:

> There is an element of impoverishment which must be present for a transaction to be characterized as a gift. Whether this is expressed as an *animus donandi*, a

---

5 See *The Queen v. Friedberg*, 92 DTC 6031 (FCA) at 6032.

6 See proposed subsections 248(30) to (33).

7 *The Queen v. Friedberg*, 92 DTC 6031 (FCA) at para. 15.

8 The TCC recently confirmed that a gift for income tax purposes must involve the transfer of "something known to law as property"; that is, something within the usual meaning of the term. "Property" does not include the supply of services without compensation. See *Slobodrian v. Canada (Minister of National Revenue)*, [2003] FCA 350 at paras. 11-15. See also *Slobodrian v. Canada*, [2005] FCA 336, in which the Federal Court of Appeal came to the same conclusion regarding the same facts. Leave to appeal the latter decision was dismissed, [2005] SCCA No. 552. See also *Rapistan Canada Limited v. Minister of National Revenue* (1974), 74 DTC 6426 (FCA), aff'd (1976), 65 DLR (3d) 383, [1976] SCJ No. 128 (SCC); *Manrell v. Canada*, [2003] FCA 128. "Property" is defined in the ITA at subsection 248(1).

9 *Coombs v. The Queen*, [2008] TCC 289 at para. 15.

10 *Tite v. M.N.R.*, [1986] 2 C.T.C. 2343, 86 DTC 1788 (TCC).

> charitable intent or an absence of consideration the core element remains the same.[11] [emphasis added]

46. Similarly, in *Commissioner of Taxation of the Commonwealth v. McPhail*[12], O.O. Owen, J., stated at p.348:

> But it is, I think, clear that to constitute a "gift," it must appear that the property transferred was transferred voluntarily and not as the result of the contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return.

47. The requirement that the donor not receive material advantage does not preclude an individual from obtaining a tax credit in exchange for his or her donation. As noted above, the purpose of the credit is to provide an incentive to donate to worthy causes.

48. A donor's hopes that his or her gift will be used in a particular way does not negate a transfer as a gift (see: *Benquesus v. Canada*[13]).

49. American courts have a similar approach under the *Internal Revenue Code*, which has provisions comparable to the Canadian charitable donation provisions. In *DeJong v. Commissioner of Internal Revenue Service*,[14] the Court at p.379 said:

> The value of a gift may be excluded from gross income only if the gift proceeds from a detached and disinterested generosity or other of affection, admiration, charity or like impulses and must be included if the claimed gift proceeds primarily from "the constraining force of any moral or legal duty or from the incentive of anticipated benefit of an economic nature."

50. Generally, the tax credit triggered by a charitable donation is not a sufficient "benefit" to vitiate a gift. According to the Federal Court of Appeal in *Friedberg*,

> The tax advantage which is received from *gifts* is not *normally* considered a "benefit" within this definition, for to do so would render the *charitable donations* deductions unavailable to many donors.[15] [emphasis added]

51. Although an individual is entitled to the advantage of the tax credit, the magnitude of economic material benefit can suggest the absence of donative intent. The anticipation of substantial material benefit can invalidate a donation even where the donor is under no legal obligation to make his or her contribution.[16]

---

11 *McPherson v. The Queen,* [2006] TCC 648 at para.20.

12 1967-1968, 41 ALJR 346.

13 [2006] TCC 193, [2006] TCJ No. 149 (QL) [*Benquesus* cited to TCJ].

14 309 F(2d) 373 (1962).

15 92 DTC 6031 (FCA).

16 99 DTC 5722, [2000] 1 CTC 35 (FCC). See also *Woolner*, where the Court says the main issue for determination is whether or not the contributions were made with the anticipation of a benefit or advantage of a material nature.

52. If a taxpayer donates money to a charity and receives a tax receipt in return, the donation constitutes a gift as long as the donor intends, at least in part, to benefit the charity.[17] However, if the taxpayer donates money with the sole intent of receiving a tax credit, the requisite donative intent is absent and the taxpayer is ineligible for a tax credit.

53. Two cases from the TCC illustrate the distinction. In *Cote v. Canada,*[18] the taxpayer had the requisite donative intent when donating art and jewellery to a charity, even though the taxpayer's primary motivation was to receive a tax advantage. The tax advantage was not a disqualifying benefit and the taxpayer was found to have intended, at least in part, to benefit the charity in question.

54. In contrast, in *Coombs v. Canada,*[19] the taxpayers gave money to a registered charity through a donation program created by an accountant, Harold Coombs ("Accountant"). The taxpayers received receipts from the charity. The evidence revealed that each "donation" involved no transfer of property to the charity or a transfer of money into the charity's bank account followed by a transfer out, on or around the same day, to the donors, to parties identified by the donors, or to parties closely connected to the Accountant. The only issue was donative intent. Although the mechanics of the donation program remained a mystery, the TCC concluded, "the scheme involved the issuance of false donation receipts in circumstances where there was never any intent to benefit the charity."[20] None of the taxpayers intended to contribute to the charity. Rather, their sole intent in writing cheques to the charity was to achieve a tax savings.[21] As a result, no gift was made at any time and the tax credit was properly disallowed.

55. A set of cases arising out of donations to the Association for the Betterment of Literacy and Education (ABLE) also offers insight into the courts' interpretation of donative intent.[22] While the workings of the ABLE donation program varied over time and by investor, one variant of the scheme involved donors transferring funds to ABLE, receiving a receipt for the full amount of the transfer, and then receiving a payment (dubbed an "educational gift") worth 75 percent of the original donation from ABLE or a third party. In each case, the taxpayer claimed a tax credit for the full donation amount on his or her tax return. In each case, the Minister disallowed the tax credit on the grounds that the educational gift was a kickback which vitiated the gift.

---

17 See, for instance, *Cote v. Canada*, [1998] TCJ No. 1046 (TCC); aff'd [2000] FCJ No. 1805 (FCA) [*Cote*] and *Paradis v. Canada*, [1996] TCJ No. 1638 (TCC). Note that both of these cases were subject to the *Civil Code of Quebec*.

18 [1998] TCJ No. 1046 (TCC); aff'd [2000] FCJ No. 1805 (FCA).

19 [2008] TCC 289.

20 [2008] TCC 289.

21 See also: *Abouantoun v. Canada*, [2001] TCJ No. 653 (TCC) and *Dutil v. Her Majesty the Queen* (1991), 95 DTC 281, in which the TCC concluded that taxpayers who make donations in order to receive a tax benefit are not eligible for a tax credit.

22 *Norton v. Canada*, [2008] TCC 91; *McPherson v. The Queen,* [2006] TCC 648; *Webb v. R* , [2005] TCC 619; *Doubinin v. The Queen,* [2004] TCC 438; aff'd [2005] FCA 298.

56. On appeal to the TCC, the issue was whether or not the taxpayers in question had donative intent when giving money to ABLE. In each case, the Court concluded that the taxpayer had no donative intent, at least not with respect to the full amount claimed. Rather, the taxpayers donated money to ABLE in order to receive a tax credit and a substantial refund of the amount "donated."[23] As a result, the taxpayers were ineligible for the tax credit. Documentation, signed by the taxpayers at the time of donation, stating that the donations were made without any material expectation of receiving a gift in return, did not rebut the conclusions. The documentation was merely "window-dressing or self-serving statements."[24]

57. In *Doubinin v. Canada,*[25] another case arising out of the ABLE donation program, the taxpayer followed the advice of his financial planner and donated $6887 to ABLE. The taxpayer had confirmed with the CRA that ABLE was a registered charity. The taxpayer believed that if he donated $6887, he would be eligible to receive a charitable donation receipt for $27,548 if a non-resident trust, the Publishers Philanthropic Fund of Bermuda (PPFB), a private philanthropic entity, made a charitable donation triple that of the taxpayer's, to ABLE on the taxpayer's behalf. The taxpayer was aware that PPFB was not obliged to make a donation and he neither expected nor knew that PPFB would donate. After the taxpayer made his donation, he received a tax receipt for $27,548. ABLE told the taxpayer that PPFB made the hoped for donation. As a result, the taxpayer claimed the full amount as a tax credit.

58. The Minister disallowed the credit on the basis that the expected benefit was an inflated tax receipt. Upon learning, from the Minister, that PPFB had not made a donation, the taxpayer reduced his claim for a tax credit to the amount of his personal cash donation – $6887.

59. The TCC held that ABLE's promoter might be part of a fraudulent scheme but that the taxpayer was not part of any tax evasion scheme. The TCC accepted that the taxpayer had the donative intent necessary to establish that his donation of $6887 was a charitable donation to a registered charity. The taxpayer did not expect anything in return for his donation.

60. On appeal to the Federal Court of Appeal (FCA), the Minister argued, *inter alia*, that the taxpayer's hope to be entitled to a tax credit of $27,548 disentitled the taxpayer to a tax credit for any amount. In other words, reliance on the inflated tax receipt was a benefit that vitiated the entire gift. The FCA rejected this argument, holding that the TCC did not err in finding that the taxpayer had no expectation of a benefit. There was no evidence that the taxpayer knew of any wrongdoing.

61. To summarize:

---

23 *Norton v. Canada*, [2008] TCC 91; *Webb v. R.*, [2005] TCC 619.

24 *Norton v. Canada*, [2008] TCC 91 at para. 14.

25 *Doubinin v. The Queen,* [2004] TCC 438; aff'd [2005] FCA 298.

(j) In order to constitute a gift, a donor must have donative intent.

(k) Donative intent is often a key issue in cases dealing with charitable donation tax shelter schemes. Recent cases demonstrate that a lack of donative intent is a consistent downfall for participants in charitable donation tax shelter schemes.

(l) While the presence or absence of donative intent is ultimately a factual inquiry, the cases confirm the "common sense" and "trite" points of law that "the anticipation and receipt of a cash *kickback* equal to 75 percent of [a] donation vitiates the gift"[26] and that donations made with the *sole* intent to receive a tax receipt do not trigger the tax credit provisions of the *Income Tax Act* (*ITA*).[27]

(m) Amendments to the *ITA*[28], first tabled in 2002 amplify the law regarding donative intent. The proposed split-receipting statutory regime will apply, even if the donor in question legitimately intends to give the full amount of a donation to a charity.

F. The Legal Opinions

62. A donor's hope that a gift will be used in a particular way does not alter the gift's legal characterization.

63. As noted above, the essential elements for determining the validity of a gift are: (1) the donation must be voluntary; (2) there must be no material benefit or consideration in exchange for the donation; and (3) the donor must have the requisite intention to donate.

64. The transactions clearly support the first test – namely, that the transfers by the Class A Beneficiaries to the RCAAAs were voluntary and not pursuant to a legal obligation to transfer.

65. The second and third tests are more subtle. There was a clear and substantial economic advantage for the Class A Beneficiaries to donate their property to the RCAAAs. The advantage flowed from the amounts at which the properties were valued.

66. For example, in 2000, the economic attraction of the donation arrangement was that it would provide a Canadian resident individual with an *assured* net cash credit of approximately $6200 in exchange for a cash donation of $4700 – that is an immediate cash return of approximately 32 percent.

67. Although a tax credit is not, per se, sufficient to constitute a material benefit such as to negate characterization of a donation as a "gift" for tax purposes, the magnitude of the credit may reflect on the donor's intent to benefit the charity.

---

26 *McPherson,* [2006] TCC 648, [2006] TCJ No. 519 at para. 22.

27 See *Coombs v. The Queen,* [2006] TCC 648.

28 Bill C-10, *An Act to amend the Income Tax Act, including amendments in relation to foreign investment entities and non-resident trusts, and to provide for the bijural expression of the provisions of that Act,* 2nd Sess., 39th Parliament, 2007 (as passed by the House of Commons 29 October 2007).

68. The net value of the cash credit varied between 2000 and 2003 depending upon the Lien and the fair market value of the Timeshare. However, in all years between 2000 and 2003, the value of the after-tax credit exceeded the Donor's total cost.

69. Without the donation, the individual would be at risk for the $4700 Lien on the property, which could be called upon demand. In addition, the individual would be responsible for maintenance and update expenditures on the property. In the circumstances, the taxpayer would need to forego a guaranteed profit of 32 percent if he or she did not donate the property to a RCAAA. The Donor had a strong economic incentive to donate his or her Timeshare Weeks.

70. To be sure, all gifts involve some form of "benefit" to the Donor. But only some forms of "benefit" are acceptable. For example, a moral benefit does not disqualify an otherwise valid donation to a charity.

71. The Class A Beneficiaries received their Timeshare Weeks without cost from the Trust. The financial terms of the package were such that it was expensive to hold the Timeshare Weeks and there was a requirement to disburse $4600 to $9700 CDN to satisfy and remove the Lien on the property. In exchange for donating the property and saving on the economic costs of holding the property, the arrangement provided the Class A Beneficiaries with an assured immediate profit of 32 percent on their cash outlay.

72. Thus, in each of the 2000-2003 taxation years, the values and structure of the transactions guaranteed that the tax benefits always outstripped the cost of the donation. In the circumstances, the Donors were not "impoverished" by the donation.

73. The Legal Opinion emphasizes the voluntary nature of the donations to the RCAAAs and the absence of material benefit (other than the tax credit). For example, at p.7, the Opinion states: "We assume that all donations will be made on a voluntary basis without expectation of return or any actual benefit, other than the donation receipt...."

(i) Opinion on Validity of Gift

74. The Cassels Brock Legal Opinions do not address the crucial link between "material benefit", "impoverishment" and "donative intent" where, as in the Timeshare Program, there is a guaranteed net cash tax credit that substantially exceeds the aggregate of the taxpayer's cash outlays, encumbrances and liens on the donated property. Hence, the Opinion does not fully inform the Donor of the risk of CRA assessment and denial of the credit.

75. Since the Donors were not "impoverished" but enriched, there was risk that the CRA would challenge the "donation" based on the magnitude of the tax credit claimed.

76. Disclosure of the risks would have informed the Donors of the potential of tax assessments and the inherent costs of dispute resolution and proceedings in the Tax Court of Canada.

77. In my opinion, the Cassels Brock Legal Opinions do not meet the standard of care expected of a tax lawyer.

(ii) Tax Avoidance & GAAR

78. The final question is whether the general anti-avoidance rule (GAAR) in the *Income Tax Act* might apply to nullify the tax credits that the Donors might otherwise enjoy from the Timeshare Program.

79. GAAR analysis involves several concepts: "Tax Benefit;" "Avoidance;" "Tax Abuse," and "Tax Misuse."

80. A "tax benefit" is any reduction, avoidance or deferral of tax. It would not be hard to find that the Donors received a "tax benefit" under s. 245(1) in an "avoidance transaction" as described in s. 245(2) and (3). The critical question, however, is whether the Timeshare Program transactions were an "abuse" or "misuse" of the *Act* within the meaning of s.245(4).

81. The Supreme Court of Canada has considered the scope of GAAR in *Canada Trustco Mortgage Company v. The Queen*[29], *Kaulius (Mathew) v. The Queen,*[30] and *Lipson v. Canada*[31]. The three decisions attempt to clarify the distinction between legitimate tax mitigation, where the GAAR would have no application, and "abusive tax avoidance," to which the GAAR could apply under s. 245(4) of the *Act*.

82. In *Kaulius*, the Supreme Court upheld a GAAR assessment by the CRA, whereas in *Canada Trustco* it overturned the GAAR assessment. While the Supreme Court expressed the GAAR criteria in new language, the dividing line between tax mitigation and abusive tax avoidance remains unclear. The Supreme Court stressed the importance of having some certainty for purposes of tax planning. However, the Court acknowledged the problem of uncertainty in *Canada Trustco*: "By what precisely constitutes abusive tax avoidance remains the subject of debate.[32]"

83. The Court stated that "the GAAR was enacted as a provision of last resort in order to address abusive tax avoidance, it was not intended to introduce uncertainty in tax planning."

84. The Court refers to the need to determine the "object, spirit and purpose" of the provisions of the *Act* alleged to have been abused: "the specific provisions at issue must be interpreted in their legislative context, together with other related and relevant provisions, in light of the purposes that are promoted by those provisions and their statutory schemes;" but "the abusive nature of the transaction must be clear."

---

29 [2005] DTC 5523.

30 [2005] DTC 5538.

31 [2009] 1 CTC 314 (SCC).

32 *Canada Trustco Mortgage Company v. The Queen*, [2005] DTC 5523.

85. The Court indicates that this process may involve a reference to "permissible extrinsic aids." Although it does not clarify how one determines what material outside the *Act* itself is "permissible," it refers several times to the explanatory notes provided by the Department of Finance when the GAAR provisions were first introduced.

86. It is not clear whether, in determining whether certain provisions of the *Act* have been abused, the Court would treat as "permissible" a reference to the explanatory notes accompanying the introduction of the alleged abuse provisions. This raises a serious question whether the Department of Finance should be allowed to make law by alleging purposes that are not reflected in the language of the provisions passed by Parliament. Consequently it is not clear how much weight should be assigned to sweeping statements of purpose contained in such "technical notes" when they clearly go beyond the language of a very technical package of amendments.

87. The Court stated that "abusive tax avoidance" exists "when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions." This is apparently the basis on which the Court held in *Kaulius* that the anti-avoidance provisions of former s.38(13) of the *Act* had been used in a manner not intended by the drafter so as to achieve a "tax benefit."

88. The only purpose of GAAR is to prevent "abusive" tax avoidance transactions or arrangements. The Technical Notes (June 30, 1988) explain the rationale of the rule as follows:

> ... [S]ection 245 of the Act is a general anti-avoidance rule which is intended to prevent abusive tax avoidance transactions or arrangements but at the same time is not intended to interfere with legitimate commercial and family transactions. Consequently, the new rule seeks to distinguish between legitimate tax planning and abusive tax avoidance and to establish a reasonable balance between the protection of the tax base and the need for certainty for taxpayers in planning their affairs.

89. Although GAAR attempts to draw a line between legitimate tax minimization and abusive tax avoidance, it is not a bright line that one can easily identify and apply in a complex world with evolving business structures – both domestic and international.

90. Thus, GAAR is a supplementary rule to catch abusive tax avoidance where other, more specific, anti-avoidance rules fail.

91. In *Lipson v. Canada.*[33], however, the majority of the Court readily accepted that Parliament legislated GAAR knowing that it would create widespread, serious and

---

33 [2009] 1 C.T.C. 314 (SCC).

unpredictable effects. Uncertainty is not sufficient to prevent the CRA from applying GAAR.

92. GAAR is not intended to catch transactions that comply with the policy of statutory provisions in the context of the *Act* read as a whole. The Technical Notes focus on the "object and spirit" of the *Act*:

> Transactions that comply with the object and spirit of other provisions of the Act read as a whole will not be affected by the application of this general anti-avoidance rule. For example, a transaction that qualifies for a tax-free rollover under an explicit provision of the Act, and that is carried out in accordance, not only with the letter of that provision but also with the spirit of the Act read as a whole, will not be subject to new section 245. However, where the transaction is part of a series of transactions designed to avoid tax and results in a misuse or abuse of the provision that allows a tax-free rollover, the rule may apply. If for example, a taxpayer, for the purpose of converting an income gain on a sale of property into a capital gain, transfers the property on a rollover basis to a shell corporation in exchange for shares in a situation where new section 54.2 of the Act does not apply and subsequently sells the shares, the new section could be expected to apply.

93. A transaction is not an avoidance transaction if the taxpayer undertakes it primarily for *bona fide* purposes other than obtaining the tax benefit. Thus, to avoid GAAR, a taxpayer should have substantial commercial, family or philanthropic reasons to support the transaction and tax savings should be ancillary in the overall plan.

94. One determines the "primary purpose" of tax arrangements or transactions in an objective manner. This requires a careful examination of the evidence – financial evidence, estimated tax benefits, cost of implementation, risk of loss, and probability of success – when the taxpayer was arranging the transaction. This is essentially a facts and circumstances test. It is not permissible to introduce hindsight evidence of intention or purpose. The determination of primary purpose is a prospective analysis from the vantage point of the taxpayer at the time he, she, or it was arranging and negotiating the transaction.

95. To summarize, GAAR analysis is a multi-step process:

(a) A factual finding whether the taxpayer engaged in a transaction (usually obvious) or series of transactions (less obvious).

(b) A factual finding that the taxpayer derived a "tax benefit" from the transaction or series of transactions through a reduction, avoidance, or deferral of tax.

(c) A factual finding whether the taxpayer arranged the transaction or series of transactions that gave rise to the benefit primarily for tax or non-tax purposes.

(d) If the taxpayer derived a tax benefit from a transaction arranged primarily for tax purposes, an analysis whether the transaction (or series of transactions) misused any provisions of the *Act* (textual analysis).

(e) GAAR applies if the transaction (or series of transactions) misuses a provision of the *Act* or abuses the provisions read as a whole (contextual and purposive analysis).

(f) The burden of establishing "misuse" or "abuse" of statutory transactions is on the Minister.

(g) The benefit of any doubt goes to the taxpayer.

96. The first three steps – existence of a transaction or series of transactions, determination of tax benefit and the primary purpose of a transaction (or series of transactions) – are essentially questions of fact. Hence, the taxpayer carries the burden to refute the Minister's assumptions and facts.

97. The determination as to whether the transaction (or series of transactions) constitute a misuse of a specific provision or an abuse of the provisions of the *Act* read as a whole are questions of law and tax policy. The Minister has the burden of proof.

98. The Federal Court of Appeal applied the reasoning in *Canada Trustco* in a recent decision, *Lehigh Cement Limited v. The Queen.*[34] The burden on the Minister is substantial. As the Federal Court of Appeal said:

> When Parliament adds an exemption to the *Income Tax Act*, even one as detailed and specific..., it cannot possible describe every transaction within or without the intended scope of the exemption. Therefore, it is conceivable that a transaction may misuse a statutory exemption comprised of one or more bright line tests....However, the fact that an exemption may be claimed in an unforeseen or novel manner, as may have occurred...does not necessarily mean that the claim is a misuse of the exemption. It follows that the Crown cannot discharge the burden of establishing that a transaction results in the misuse of an exemption merely by asserting that the transaction was not foreseen or that it exploits a previously unnoticed legislative gap....The Crown must establish by evidence and reasoned argument that the result of the impugned transaction is inconsistent with the purpose of the exemption, determined on the basis of a textual, contextual and purpose of interpretation *of the exemption.* [para.37]

99. The purpose of the charitable donation rule is to encourage philanthropy for worthy causes. The deduction is permitted as a matter of public policy to encourage individuals and corporations to donate for causes that might otherwise require the support of the state.

100. The purpose of the charitable donations statutory regime is not to enrich donors beyond what they actually contribute to the particular charity or otherwise qualified organization. Hence, the jurisprudence has carefully circumscribed the concept of "gift" with doctrines such as "no material benefit," "impoverishment," and "donative intent."

---

34 [2010] FCA 124.

(iii) Opinion on Tax Avoidance & GAAR

101. The existing jurisprudence suggests that the Timeshare Program would violate the general anti-avoidance provisions of the *Income Tax Act* by undermining the purpose of the charitable donation provisions and limits. However, the jurisprudence in the Supreme Court of Canada did not emerge until 2005. Hence, it would have been difficult for tax counsel to predict with any degree of certainty whether the Timeshare Program would be caught by GAAR.

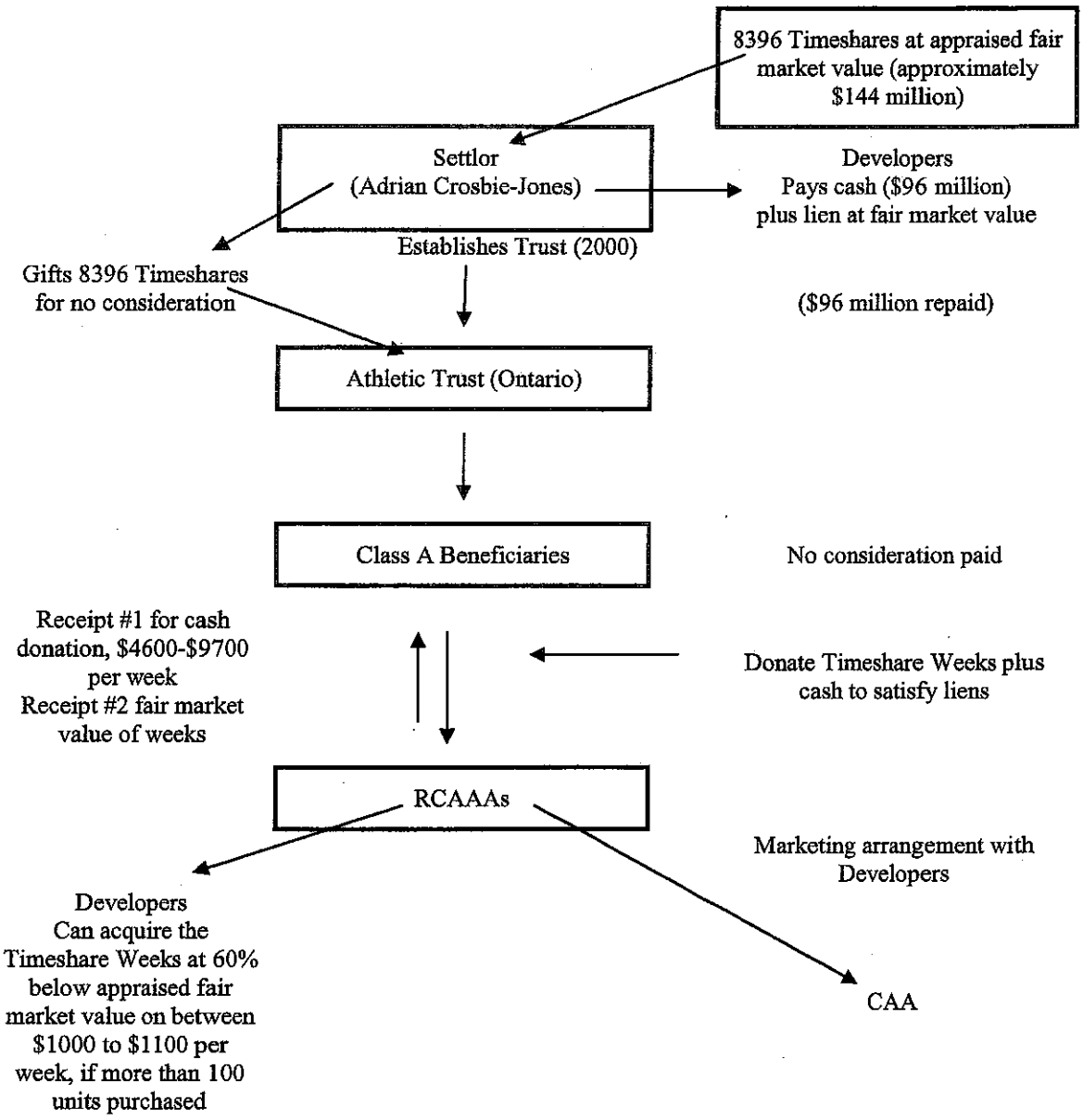
102. Indeed, even after the three Supreme Court of Canada decisions, there remains considerable uncertainty as to the scope and reach of GAAR. The Supreme Court of Canada has reserved a fourth decision (*Copthorne*).

103. In the circumstances, the Cassels Brock Legal Opinions reasonably addressed the anti-avoidance aspects of the Timeshare Programs in light of the available jurisprudence at the relevant time.

Yours very truly

Borden Ladner Gervais LLP

Vern Krishna, C.M., Q.C., LL.D.
VK/gmb
OTT01\4046709\1



Net effect:

(1) settlor pays nothing
(2) developers get back property
(3) donors receive net tax credits for more than their cash outlay

This is Exhibit "P2" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

MACKENZIE BARRISTERS

Gavin MacKenzie
416-304-9293
gavin@mackenziebarristers.com

Brooke MacKenzie
416-304-9294
brooke@mackenziebarristers.com

Law Clerk: Nikki Wilson
416-304-9295
nikki@mackenziebarristers.com

MacKenzie Barristers P.C.
Richmond-Adelaide Centre
120 Adelaide St. W., Suite 2100
Toronto, Ontario
M5H 1T1

Fax: 416-304-9296

www.mackenziebarristers.com

May 1 2019

David O'Connor
J. Adam Dewar
Roy O'Connor LLP
Suite 2300
200 Front Street West
Toronto, ON M5V 3K2

Dear Mr. O'Connor and Mr. Dewar:

Re: Lipson v Cassels Brock & Blackwell LLP, Court File No. CV-09-376511

Introduction

As counsel for the plaintiffs in the above-noted matter, you have asked for my opinion regarding the standard of care applicable to the defendant Cassels Brock & Blackwell LLP. Specifically, you have asked me to consider any professional responsibilities and duties that were owed, particularly concerning independence and disclosure, when offering the opinions and statements that the firm provided relating to the tax consequences of the Timeshare Program, as defined and described below.

Qualifications

I was called to the Bar of Ontario in 1977, and since then have maintained a litigation practice with a focus on providing advice, opinions, and representation on matters of professional responsibility concerning the practice of law. I have been retained to provide expert evidence on issues concerning the standard of care expected of lawyers on numerous occasions.

I am the author of *Lawyers & Ethics: Professional Responsibility and Discipline*, which was originally published in 1993 in both a supplemented practitioners' edition and a students' edition. The practitioners' edition has been supplemented at least annually over the last 25 years, and the 6th students' edition was published in 2018.

I was elected as a Bencher of the Law Society of Upper Canada for four consecutive four-year terms beginning in 1995, and was elected as Treasurer, the highest position in the Society, on three occasions between 2006 and 2008. As a bencher, I chaired the Law Society's task force on the reform of the Society's *Rules of Professional Conduct,* which resulted in the adoption by Convocation (the governing body of the Law Society) of new *Rules* in 2000. I also chaired the Society's Professional Regulation Committee, which is the standing committee responsible for matters of

professional conduct, and the Proceedings Authorization Committee, which is responsible for deciding whether discipline proceedings should be commenced. I have served as an adjudicator on hearing panels appointed to preside over discipline proceedings on a number of occasions.

In 2010, I was awarded an honorary Doctor of Laws (LL.D.) degree from the Law Society of Upper Canada. I have also been honoured by induction as a Fellow of the American College of Trial Lawyers (2000).

In 2016, I founded MacKenzie Barristers P.C., where advice and representation on issues of professional responsibility and liability for lawyers and law firms forms a significant portion of our practice. My curriculum vitae is attached as **Schedule A**.

Acknowledgement of Expert's Duty

I have signed an Acknowledgement of Expert's Duty form (Form 53) as required under rule 53.03(2.1)(7) of the *Rules of Civil Procedure*. It is attached as **Schedule B**.

Documents reviewed

I have reviewed the documents you have provided to me (an index of which is attached as **Schedule C**) to the extent they are relevant to the matters on which you have asked for my opinion.

Factual assumptions on which my opinion is based

I have premised my opinion on the following assumed material facts, which I have gathered from the documents provided to me:

(a) This action concerns a series of favourable tax opinions prepared by the defendant, Cassels Brock & Blackwell LLP ("**Cassels Brock**") respecting the tax consequences and benefits of a timeshare program operated and promoted by, among others, the Athletic Trust of Canada (the "**Timeshare Program**").

(b) Cassels Brock had a pre-existing solicitor-client relationship with the designers and promoters of the Timeshare Program, including Stephen Elliot, Steven Mintz, and companies controlled by them (the "**promoters**"), having advised them in respect of a different program involving timeshare units in 1999.

(c) In the spring of 2000, the promoters retained Cassels Brock to provide legal advice in respect of the design, structure, and operation of the Timeshare Program and the drafting of related documents.[1]

[1] As described below at footnote 2 and the accompanying text, the promoters' retainer may have been with or through the CAA, as defined below, or the client may have evolved from the promoters to the CAA; the evidence available to me does not make this clear. In any event, as noted below, Cassels Brock took instructions from the promoters, whether on their own behalf or on CAA's behalf. The precise retainer arrangement as between the promoters and CAA does not affect my opinion as to the obligations owed by Cassels Brock to the donors or class members.

(d) The Timeshare Program operated as follows:

i. The Athletic Trust of Canada (the "**Trust**") was established in 2000 under the laws of Ontario for the purpose of financially assisting amateur athletes and athletic associations in Canada. From 2000 to 2003, the Trust acquired, for no consideration, about 8,396 timeshare resort weeks at a resort in Nassau, Bahamas (the "**timeshare weeks**") from the settlor of the Trust, who in turn had acquired the timeshare weeks through an arrangement with the resort developers (who retained liens on the value of the timeshare weeks).

ii. The terms of the Trust provided that the trustee would distribute the timeshare weeks to individuals who expressed a willingness to support Canadian amateur athletics, including the Plaintiff and class members (the "**donors**"). It was requested and expected (although not required) that the donors would donate the timeshare weeks to certain registered Canadian amateur athletic associations ("**RCAAAs**"), together with a cash donation sufficient to discharge the applicable liens (in the range of approximately $4600 to $9700 per timeshare week).

iii. The promoters would earn commissions or fees from the sale of the timeshare weeks to participating donors.

iv. In return for their donations, the RCAAAs issued charitable donation receipts to the donors for amounts in the range of approximately $13,275 to $28,600 per timeshare week, representing the sum of the appraised fair market value of a timeshare week plus the value of the cash donated. The donors relied upon these charitable donation receipts to claim the related tax credits.

v. A company called Canadian Athletic Advisors Ltd ("**CAA**") represented the RCAAAs in the re-marketing and sale of the donated timeshare weeks. CAA had an arrangement with the resort developers that permitted them to require the developers to purchase the timeshare weeks at a discounted price, such that for each donated timeshare week the RCAAAs would receive about $1000 to $1100—not the appraised fair market value in the range of $8,575 to $18,900 per timeshare week (the amount used by the RCAAAs as the basis for the charitable donation receipts).

(e) Cassels Brock acted as corporate and tax counsel in respect of the Timeshare Program, and considered the promoters and the CAA to be Cassels Brock's clients in that regard.[2]

---

[2] Examination for Discovery of L. H. Saltman [Saltman EFD], Q 447-464, 1498-1505, 2714-2715. Cassels Brock understood that the promoters represented CAA in their discussions: see Saltman EFD, Q 478, 1504. Cassels Brock's accounts were paid by CAA: see Saltman EFD, Q 481-482. Cassels Brock's position is that "Elliot/Mintz or their companies were the initial clients and then it eventually evolved to CAA": see Saltman EFD, Q 2790. See also my comments at footnote 1.

(f) Cassels Brock's accounts in respect of the work done on the Legal Opinions were paid by CAA, and to the extent required they were discussed and arranged with the promoters, Mr. Mintz and Mr. Elliott.[3]

(g) As part of Cassels Brock's retainer to act as corporate and tax counsel for the promoters or CAA in respect of the Timeshare Program, Lorne Saltman, a senior partner in the Tax and Trusts practice group at Cassels Brock, prepared six legal opinions addressing the Canadian federal income tax consequences of making donations under the Timeshare Program, dated October 6, 2000; May 18, 2001; September 7, 2001, May 13, 2002, November 8, 2002; and April 8, 2003 (the "**Legal Opinions**").

(h) Mr. Saltman and Cassels Brock took instructions from and accepted input from the promoters on the ultimate content of the Legal Opinions.[4]

(i) Although addressed to the CAA, each of the Legal Opinions expressly stated: "This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property".

(j) Five of the six Legal Opinions (those dated May 18, 2001; September 7, 2001; May 13, 2002; November 8, 2002; and April 8, 2003) further expressly provided that they could be relied upon by potential donors, stating: "This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion." Mr. Saltman inserted this wording for the May 18, 2001 opinion and thereafter to "make it clear who the addressees of the opinion would be."[5]

(k) Each of the Legal Opinions maintained that donors who made donations under the Timeshare Program would be entitled to the the tax credits advertised by the Athletic Trust in their promotional materials, which included an approximately 30% return on the cash donated by the donors based on the donation receipts they would receive from the RCAAAs. More specifically, Cassels Brock concluded in each of the Legal Opinions that:

> "...in our opinion it is unlikely that the [Canada Revenue Agency] could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries who receive a distribution of the Timeshare Weeks from the [Athletic] Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAAA."

(l) At the relevant time, Mr. Saltman thought that:

i. there had to be a clear separation between the CAA and the donors;[6]

---

[3] Saltman EFD, Q 481-482, 1519-1525, 2834-2837.
[4] Saltman EFD, Q 474, 505-506; 2435, 2438-2439, 2678-2683, 2719-2742.
[5] In addition to the opinions cited, see also Saltman EFD, Q 2893-2895.
[6] Saltman EFD, Q 3140

ii. there had to be a clear separation between the promoters and the donors;[7]

iii. there had to be a clear separation between the promoters and the CAA;[8] and

iv. each of the CAA, the promoters, and the donors had different interests.[9]

(m) There was never any discussion within Cassels Brock about whether there was a conflict of interest in this matter,[10] and Mr. Saltman never considered whether any conflict of interest arose between the advice he was providing to CAA or the promoters on the one hand, and the interests of the potential donors on the other.[11]

(n) When preparing the Legal Opinions, Mr. Saltman and Cassels Brock believed they were preparing an independent opinion on the evaluation of the structure of the Timeshare Program.[12]

(o) When preparing the Legal Opinions, Mr. Saltman and Cassels Brock understood or expected that the donors and potential donors who could read the Legal Opinions would also think that they were each an independent opinion evaluating the structure of the Timeshare Program.[13]

(p) There was nothing in the Legal Opinions that disclosed that Cassels Brock was also involved in advising on the structure of the Timeshare Program.[14] Before finalizing the October 2000 opinion, Mr. Saltman considered whether to disclose this but decided it was not necessary.[15]

(q) When preparing the Legal Opinions, Mr. Saltman and Cassels Brock understood that they would be used by the CAA and the promoters or others as part of the marketing package for the Timeshare Program.[16] Copies of the Legal Opinions were in fact provided to the donors (including the Plaintiff, Mr. Lipson, and the other class members) as part of the marketing and promotion of the Timeshare Program.[17]

(r) The donors, including Mr. Lipson, decided to participate in the Timeshare Program and claimed charitable tax credits based on the tax receipts issued by the RCAAAs.

(s) The Canada Revenue Agency ("**CRA**") ultimately denied the majority of the tax credits claimed by the donors pursuant to the Timeshare Program, and the donors were collectively required to pay millions of dollars in arrears interest as a result.

---

[7] Saltman EFD, Q 3142
[8] Saltman EFD, Q 3143
[9] Saltman EFD, Q 3144-3147
[10] Saltman EFD, Q 2660-2669, 2679-2689.
[11] Saltman EFD, Q 2806-2807.
[12] Saltman EFD, Q 865.
[13] Saltman EFD, Q 866.
[14] Saltman EFD, Q 867.
[15] Saltman EFD, Q 870-876.
[16] Saltman EFD, Q 1872-1875, 2427-2430, 2874-2880.
[17] Saltman EFD, Q 2901-2903.

Issues

You have asked for my professional opinion as to whether Cassels Brock met the standard of care expected of a reasonably competent law firm in Ontario in its preparation of the Legal Opinions.

I have confined my opinion to whether any professional responsibility concerns are raised on the facts set out above, and provide no comment on the tax advice provided in the Legal Opinions.

Analysis

Rules of Professional Conduct

In responding to the question on which you have sought my opinion, I will refer to the *Rules of Professional Conduct* adopted by the Law Society of Upper Canada (now the Law Society of Ontario) that were in force at the material time (the "***Rules***"). The *Rules* have been promulgated by the Law Society's governing body, Convocation, under the authority of the *Law Society* Act, RSO 1990, c. L-8 as amended.

The Supreme Court of Canada has held that although rules of professional conduct are not binding on courts, they should nonetheless be considered important statements of public policy, and express the collective views of the legal profession as to the appropriate standards to which lawyers should adhere.[18] Rules of professional conduct have frequently been relied upon by Canadian courts as reliable indicators of the applicable standard of care in professional negligence actions against lawyers.[19]

During the time period at issue in the present case, various amendments were made to the *Rules*. The applicable *Rules* came into effect on November 1, 2000, having been adopted by Convocation on June 22, 2000[20] on the recommendation of the Task Force on Review of the *Rules of Professional Conduct*, of which I was Co-Chair. To the extent the matters at issue occurred before these *Rules* came into force, I have considered the professional conduct rules in effect at the relevant time, which are substantially similar.[21]

Rule 2.04 pertains to avoidance of conflicts of interest, and provides, in part:

> (1) A "conflict of interest" or a "conflicting interest" means an interest
>
> > (a) That would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

---

[18] See *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, *Galambos v. Perez*, 2009 SCC 48, and *R. v Cunningham*, 2010 SCC 10.

[19] See, for example, *Pelky v. Hudson Bay Insurance Co.* (1981), 35 O.R. (2nd) 97 (HCJ).

[20] Available at http://www.lsuc.on.ca/uploadedFiles/RulesProfessionalConductpreOct2014.pdf [*Rules*]. The *Rules* were amended in their entirety on October 1, 2014 to accord, in general, with the Federation of Law Societies' *Model Code of Professional Conduct*; as such, the *Rules* applicable at the relevant time are no longer in force.

[21] For the first few months of Cassels Brock's retainer (*i.e.* before November 1, 2000), the applicable rules were those in the Law Society of Upper Canada's *Professional Conduct Handbook*, 1998 Edition, second edition (as amended to 26 June 1998) [1998 Rules]. As described below, as they are substantively similar the version of the *Rules* that was in force at the relevant time does not affect my opinion.

> (b) That a lawyer might be prompted to prefer to the interests of a client or prospective client
>
> ...
>
> (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.[22]

The Commentary to Rule 2.04 provides, in part, as follows:

> A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

Unfortunately, the *Rules* provide little guidance applicable to the present circumstances. The *Rules* in effect consider the matter from the client's perspective, by focusing on whether a lawyer has an interest that will adversely affect his or her representation of or loyalty to a client. They are silent on the question of whether a lawyer acting for a client (and thus owing the accordant professional and fiduciary duties to that client) can purport to provide an "independent" opinion, intended to be relied upon by individuals other than the client (and who may have interests diferent from or adverse to the client) in matters that affect the client's interests.

The duty of loyalty

Importantly, however, the *Rules* are not a complete code of the conflict of interest principles applicable to lawyers; there are other sources of obligations applicable to lawyers. The Supreme Court of Canada's decision in *R v Neil*[23] provides a useful illustration. The Court in *Neil* held that it was a conflict of interest for a lawyer to "represent one client whose interests are directly adverse to the immediate interests of another current client—*even if the two mandates are unrelated*—unless both clients consent after receiving full disclosure".[24] At the time, the *Rules* said nothing about acting against a client in an unrelated mandate—they prohibited lawyers from acting against a client "(a) in the same matter, (b) in any related matter, or (c)... in any new matter, if the lawyer has obtained from the other retainer relevant confidential information".[25] In fact, the Commentary to the conflict of interest rule at the relevant time provided that "It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter".[26]

The Supreme Court's decision in *Neil* was premised not on applicable professional conduct rules but on lawyers' fiduciary obligations. In particular, the Court emphasized lawyers' duty of loyalty to their

---

[22] Provisions to the same effect appear in Rule 5 of the 1998 Rules, using slightly different phrasing.
[23] *R v Neil*, 2002 SCC 70 [*Neil*]
[24] *Neil* at para 29 [emphasis in original].
[25] *Rules*, Rule 2.04(4).
[26] *Rules*, Commentary to Rule 2.04(4). The *Rules* and associated Commentary were amended after *Neil* was determined to align lawyer's professional obligations under the *Rules* with the Court's decision.

clients. Writing for the Court, Justice Binnie cited the declaration of the Lord Chancellor Henry Brougham in his defence of Queen Caroline before the House of Lords in 1821:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[27]

Justice Binnie continued to explain that although these words are far removed from today's legal world, "the defining principle—the duty of loyalty—is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained".[28]

The duty of loyalty "is intertwined with the fiduciary nature of the lawyer-client relationship",[29] and "includes a much broader principle of avoidance of conflict of interest, in which confidential information may or may not play a role".[30] The duty of loyalty includes not only a duty to avoid conflicting interests, but also a duty of candour and, of particular importance to the present case, a duty of commitment to the client's cause.[31] A client is "entitled to a level of commitment from his lawyer that whatever could properly be done on his behalf would be done as surely as it would have been done if the [client] had had the skills and training to do the job personally".[32]

The Supreme Court of Canada engaged with the duty of commitment to the client's cause more recently in *CN Railway v McKercher LLP*, in which it explained:

> The duty of commitment is closely related to the duty to avoid conflicting interests. In fact, the lawyer must avoid conflicting interests precisely so that he can remain committed to the client... The duty of commitment prevents the lawyer from undermining the lawyer-client relationship.[33]

Can lawyers assume a duty to a class of non-clients by authoring an opinion upon which the class members will foreseeably rely?

Whether Cassels Brock owed a duty of care to the donors in this case is an issue of mixed fact and law that must ultimately be determined by the court. It is worth exploring in brief, however, before turning to address the scope of Cassels Brock's professional responsibilities on the facts presented.

---

[27] *Neil* at para 12, citing *Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part 1, at p. 8.
[28] *Neil* at para 12. While *Neil* was decided in 2002, *i.e.* during the course of the matters at issue in the underlying proceeding, in my opinion Justice Binnie's reasons make clear that the duty of loyalty to which he referred has been owed by lawyers throughout recent history.
[29] *Neil* at para 16.
[30] *Neil* at para 17-18, citing *Drabinsky v. KPMG* (1998), 1998 CanLII 14699 (ON SC), 41 O.R. (3d) 565 (Gen. Div.) at p. 567.
[31] *Neil* at para 19; see also *CN Railway v McKercher LLP*, 2013 SCC 39 at para 19.
[32] *Neil* at para 24.
[33] *McKercher* at paras 43-44.

Lawyers and other professionals' duties are not necessarily limited to their clients. They can be held responsible for negligent professional advice provided to a third party who foreseeably and reasonably relied on the advice.[34]

The common law will generally not find that a lawyer owes a duty to an opposing party whose interests are directly adverse to those of the lawyer's client—whether because of a lack of proximity, because the adverse party's reliance would be unreasonable, or because of public policy reasons that weigh against imposing conflicting duties on the lawyer.[35]

None of these factors provides a basis to negate or fail to recognize a duty owed by Cassels Brock to the non-client donors in the present case, however. Indeed, three facts in particular weigh in favour of recognizing a duty owed by Cassels Brock to the donors respecting the content of the Legal Opinions:

(1) When preparing the Legal Opinions, Mr. Saltman and Cassels Brock believed they were preparing an independent opinion on the structure of the Timeshare Program;[36] knew that they would be used by the CAA and the promoters or others as part of the marketing package for the Timeshare Program;[37] and expected that the donors and potential donors reading the Legal Opinions would similarly believe that they were independent opinions evaluating the structure of the Timeshare Program.[38]

(2) The Legal Opinions expressly stated that they were "specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property", and that they "may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion."

(3) There was nothing in the Legal Opinions that disclosed or otherwise indicated that Cassels Brock was involved in advising on the structure of the Timeshare Program,[39] or otherwise had a previous or continuing solicitor-client relationship with the promoters. Although Mr. Saltman turned his mind to whether to make such disclosure, he decided it was not necessary.[40]

In my opinion, where Cassels Brock (1) believed it was providing an independent opinion evaluating the structure of the Timeshare Program and expected non-client readers would also believe it was an independent opinion; (2) specifically directed the opinion to be relied upon by donors for the purpose of participating in the Timeshare Program; and (3) did not disclose their continuing solicitor-client relationship with (and thus duties owed to) the promoters, Cassels Brock owed a duty to donors reading the opinion. On this basis, for the purpose of the next section of my opinion I have assumed that Cassels Brock assumed or undertook a duty to the donors.

---

[34] See, *e.g.*, *Haig v Bamford*, [1977] 1 SCR 466; *347671 BC Ltd v Heenan Blaikie*, 2002 BCCA 126; *Hercules Management Ltd v Ernst & Young*, [1997] 2 SCR 165, *Deloitte & Touche v Livent Inc (Receiver of)*, 2017 SCC 63.
[35] See, *e.g.*, *Mantella v Mantella*, [2006] OJ No 1337 (SCJ); *D'Amore Construction (Windsor) Ltd v Lawyer's Professional Indemnity Co*, [2005] OJ No 448 (Div Ct).
[36] Saltman EFD, Q 865
[37] Saltman EFD, Q 1872-1875, 2427-2430, 2874-2880.
[38] Saltman EFD, Q 866
[39] Saltman EFD, Q 867.
[40] Saltman EFD, Q 870-876.

Cassels Brock's conflicting duties in the present case

Cassels Brock owed professional and fiduciary duties to its clients—the promoters and CAA—including a duty of loyalty, a duty of commitment to the clients' cause and a duty to avoid conflicting interests.

Insofar as the Legal Opinions were concerned, the promoters' interests and the donors' interests were not aligned. The promoters' interests in the Legal Opinions included using them to market and solicit potential donors' participation the Timeshare Program, because the promoters would earn commissions or fees from the sale of the timeshare weeks to participating donors—regardless of the tax consequences of the Timeshare Program for the donors. The donors' interest in the Legal Opinions, on the other hand, was in having an independent evaluation of the tax consequences of the Timeshare Program, so they could make an informed decision about whether the benefits of the program made it worthwhile for them to participate.

Upon assuming a duty to the donors and potential donors reading the Legal Opinions, Cassels Brock was in a conflict of interest.

Because Cassels Brock owed a duty of loyalty—including a duty of commitment to its clients' cause—to the promoters and CAA, it could not provide an independent opinion to the donors and potential donors about the tax implications of the Timeshare Program.

Disclosure of Cassels Brock's solicitor-client relationship with the promoters and CAA in the Legal Opinions would not necessarily have cured Cassels Brock's lack of independence, but it may have vitiated any duty assumed or owed to third-party readers—and thus any conflict of interest—by rendering it unreasonable for the donors to rely on the conclusions communicated by Cassels Brock in the Legal Opinions or to believe that these conclusions constituted an independent evaluation of the Timeshare Program.

Put simply, on the facts above, in my opinion Cassels Brock could not be independent in preparing the Legal Opinions, and was in a conflict of interest and fell below the standard of care in providing them.

I trust this opinion is satisfactory. Please let me know if you wish to discuss any aspect of it.

Yours truly,

MacKenzie Barristers P.C.

Per:

Gavin MacKenzie
Encl.

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEFFERY LIPSON

Plaintiff

- and –

CASSELS BROCK & BLACKWELL LLP

Defendant

- and –

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP,
GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP,
TMK FINANCIAL GROUP LTD., GARDINER ROBERTS LLP,
THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100,
JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and
JOHN DOE LLP 1-100

Third Parties

Proceeding under the *Class Proceedings Act, 1991*

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Gavin MacKenzie. I live in the City of Toronto, in the Province of Ontario.

2. I have been engaged by or on behalf of the Lawyers for the Plaintiffs to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

(c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

May 1, 2019

Gavin MacKenzie

JEFFERY LIPSON	-and-	CASSELS BROCK & BLACKWELL LLP	MINTZ & PARTNERS LLP et al.
Plaintiff		Defendant	Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ACKNOWLEDGMENT OF EXPERT'S DUTY

ROY ELLIOTT O'CONNOR LLP
Barristers
200 Front Street West, Suite 2300
Toronto ON M5V 3K2

Peter L. Roy LSO #16132O
J. Adam Dewar LSO #46591J
Tel: 416 362 1989
Fax: 416 362 6204

Lawyers for the Plaintiff

GAVIN MACKENZIE
OFFICE – 416 304-9293
FAX – 416 304-9296
EMAIL – gavin@mackenziebarristers.com
WEBSITE – www.mackenziebarristers.com

CAREER

June 2016 – Present	MacKenzie Barristers PC
2013 –2016	Partner – DLA Piper (Canada) LLP (formerly Davis LLP)
2000 – 2013	Partner – Heenan Blaikie LLP
1998 – 2000	Partner – Genest Murray
1993 – 1998	Partner – Davies, Ward & Beck
1990 – 1993	Senior Counsel, Law Society of Upper Canada
1989 – 1990	Partner – Fasken Campbell Godfrey Member, Management Committee, 1989 – 1990
1982 – 1989	Partner – Campbell, Godfrey & Lewtas Member, Management Committee, 1986 – 1988
1977 – 1982	Associate, Campbell, Godfrey & Lewtas
1975 – 1976	Articled to Claude R. Thomson, Q.C. Campbell, Godfrey & Lewtas

PROFESSIONAL QUALIFICATIONS

1977	-	Called to the Ontario Bar
1989	-	Certified by Law Society of Upper Canada as a Specialist in Civil Litigation (recertified 1994, 1999, 2004)
1994	-	Called to Alberta Bar (Occasional Appearance)
1995	-	Called to Saskatchewan Bar (Occasional Appearance)
1997	-	Called to Nova Scotia Bar (Occasional Appearance)
1997	-	Harvard Mediation Workshop (Diploma)

HONOURS

1993 - present	-	Recipient of "AV" ("Pre-eminent") peer review rating by Martindale-Hubbell (highest available rating for legal ability and adherence to high ethical standards.)
2000	-	Inducted as Fellow of American College of Trial Lawyers
2010	-	Admitted to degree of Doctor of Laws, Honoris Causa, by Law Society of Upper Canada
2011	-	Inducted as Fellow, Litigation Counsel of America
	-	Toronto Lawyer of the Year in Field of Legal Malpractice (*Best Lawyers in Canada*)
2012	-	Toronto Lawyer of the Year in Field of Appellate Law (*Best Lawyers in Canada*)
2012 - present	-	Listed in *Best Lawyers in Canada* in Administrative and Public Law, Alternative Dispute Resolution, Appellate Law, Class Action Litigation, Legal Malpractice Law, and Product Liability Law
2013	-	Selected by American Lawyer Media and Martindale-Hubbell as a 2013 Top Rated Lawyer in Canada
2014	-	Named Litigation Star by Benchmark Canada

ADVOCACY BEFORE COURTS AND TRIBUNALS

Experience as counsel includes appearances before the following courts and tribunals.

Supreme Court of Canada
Ontario Court of Appeal
Federal Court of Appeal
Federal Court
Tax Court of Canada
Divisional Court
Ontario Superior Court of Justice (and predecessor courts)
Ontario Court of Justice (and predecessor courts)
Patented Medicine Prices Review Board
Ontario Securities Commission
Competition Tribunal
Board of Inquiry, Police Services Act
Professional Conduct Committee - Institute of Chartered Accountants of Ontario
Discipline Committee - Institute of Chartered Accountants of Ontario
Discipline Committee - College of Physicians and Surgeons

Discipline Committee - Royal College of Dental Surgeons
Discipline Committee - Law Society of Saskatchewan
Discipline Committee - Nova Scotia Barristers' Society
University of Toronto Disciplinary Tribunal (Trial Division)
Coroners' Inquests
Justices of the Peace Review Council
Health Services Appeal Board
Hospital Appeal Board
Commercial Registration Appeal Tribunal
Ontario Municipal Board
Ontario Labour Relations Board
City of Toronto Court of Revision
Discipline Committee - Law Society of Upper Canada
Admissions Committee - Law Society of Upper Canada
Convocation - Law Society of Upper Canada
Numerous Arbitrators, Arbitration Boards, and Mediators

LAW SOCIETY OF UPPER CANADA

Compliance-Based Entity Regulation Task Force 2015 – 2016 (Vice Chair)
Treasurer (Elected Head) 2006 – 2008
Elected bencher, Law Society of Upper Canada, 1995 (re-elected 1999, 2003, 2007)
Ex Officio Bencher 2008 - present
Professional Regulation Committee (Chair)(professional conduct and discipline)
LibraryCo (Board Chair)
Task Force on Revision of Rules of Professional Conduct (Co-Chair)
Strategic Planning Committee (Co-Chair)
Legal Education Committee (Vice-Chair)
Interjurisdictional Mobility Committee (Vice-Chair)
Admissions and Membership Committee
Discipline Committee (Policy Section)
Professional Conduct Committee
Finance Committee
Public and Media Relations Committee
Government Relations Committee (Legislation Subcommittee)
National Committee on Accreditation Subcommittee
Working Group on Revision of Discipline Rules of Procedure (Chair)
Working Group on Complainants' Role in Discipline Process (Co-Chair)
Working Group on Amendment to Rule of Professional Conduct on Lawyers as Mediators (Chair)
Working Group on Amendment to Rule of Professional Conduct on Duty of Lawyers to Report Apparent Professional Misconduct (Co-Chair)

PUBLICATIONS

(a) Books

Lawyers and Ethics: Professional Responsibility and Discipline (Toronto: Carswell, 1993). (Annual Supplements 1994 – present; 5th student edition 2009)

Consulting Editor (with Justice Mary Newbury of British Columbia Court of Appeal), Barristers and Solicitors in Practice (Canadian version of Cordery on Solicitors, Markham, Butterworth's, 1998)

(b) Articles, Reviews and Case Comments

"The Ethics of Negotiation and Settlement", in "L'avocat dans la cité: éthique et professionnalisme", Sous la direction de Benoît Moore, Catherine Piché et Marie-Claude Rigaud Montréal, Éditions Thémis, 2012

"The Ethics of Advocacy", Advocates' Society Journal, Autumn 2008

"Regulating Lawyer Competence and Quality of Service", Alberta Law Review, vol. 45, no. 5, p. 143 (June 2008)

"How Murky Can Bright Line Be? Coping with Conflicts of Interest in the wake of R. v. Neil", Canadian Bar Association, August 3 2005

"Regulatory Models and Options for the Legal Profession in the 21st Century", International Institute of Law Association Chief Executives, Auckland, New Zealand, October 2004

"Legends", Advocates' Society Journal, Spring 1997

"Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism", Law Society of Upper Canada Gazette, June 1995. (Also published in The Canadian Journal of Law & Jurisprudence, Volume IX, January 1996)

"The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession", Law Society of Upper Canada Gazette, September 1994. (Also published in Alberta Law Review, volume XXXIII, August 1995; and in Donald Buckingham, Jerome Bickenback, Richard Bronaugh and Bertha Wilson, Legal Ethics in Canada: Theory and Practice (Toronto: Harcourt Brace, 1996)

"Procedural Fairness and the Role of Tribunal Counsel in Professional Discipline Proceedings", Law Society of Upper Canada Special Lectures 1992 (Toronto: Law Society of Upper Canada, 1993)

"Case Comment", a comment on Khan v Ontario College of Physicians and Surgeons (1992), 9 O.R. (3d) 641 (C.A.), 2 Reid's Administrative Law 75 (1993)

"Law Society Discipline Proceedings", Advocates' Society Journal, June 1992

Review of Honourable Justice: The Life of Oliver Wendell Holmes, Canadian Bar Review, December 1990

"Lawyer Discipline and the Independence of the Bar: Can Lawyers Still Govern Themselves?", Law Society of Upper Canada Gazette, December 1990

"Objections to Questions on Examination for Discovery Under Ontario's New Rules of Civil Procedure", 46 Carswell's Practice Cases 269 (1985)

(With Claude R. Thomson, Q.C.) "The Defence of Disciplinary Proceedings Before the Law Society of Upper Canada's Discipline Committee", Advocates' Society Journal, October and December 1982

(c) Columns

Columnist (with Brooke MacKenzie), "Conduct Becoming", Canadian Bar Association National Magazine, 2015 to present

Columnist, "The Profession" column, Law Times, 1995 to 2007

(d) Netletter

Gavin MacKenzie's Netletter on Professional Responsibility, Discipline, and Liability, Quicklaw, 1998 to 2004

CONFERENCE PRESENTATIONS

2016

- *Ontario Bar Association, "Privilege Issues for In-House Counsel", Toronto*
- *Ontario Bar Association, "Advocacy on Appeals", Toronto*
- *Advocates' Society, "Ethical Issues in Administrative Proceedings", Toronto*
- *Canadian Bar Association, "Should Lawyers Have a Monopoly on Providing Legal Services?", Ottawa*

2015 - *Osgoode Hall Continuing Education, "The Business of Law and Professionalism: Challenges and Opportunities for the Personal Injury Bar", Toronto*

2014 - *Ontario Bar Association, "Ethical Red Flags in Immigration Law", Toronto*

- *Osgoode Hall Law School, "10th Annual Conference on Crown Liability", Toronto*

2013 - *Canadian Institute for the Administration of Justice,(Chair) "Ethics and Civility in the Practice of Law", Toronto*

- *Ontario Bar Association Continuing Professional Development, "Planning and Building on Professionalism", Toronto*

- *Ontario Bar Association Business Law Section, "Professionalism Issues for Business Lawyers", Toronto*

- *Osgoode Hall Law School Continuing Education, "Ethical Issues in Personal Injury Practice"*

- *3rd Annual Business Law Summit, "Conflicts and the Perils of Dealing with Family Members in Business Deals", Toronto*

- *Heenan Blaikie LLP, "Revised Rules of Professional Conduct", Toronto*

- *Heenan Blaikie LLP, "Rules Rules Rules: 8 Minute Regulatory Issues/Update", Toronto*

2012 - *Canadian Bar Association, "Ethics for Litigators", Skilled Lawyer Series II*

- *Heenan Blaikie LLP, "Receiving Privileged Documents: The Lessons of Celenese", Toronto*

- *Heenan Blaikie LLP, "Equitable Remedies for Fraud", Toronto*

- *Heenan Blaikie LLP, "Oral Advocacy", Toronto*

- *Heenan Blaikie LLP, "8 Minute Updates: Professionalism", Toronto*

2011
- *Canadian Bar Association, (Quebec), "The Ethics of Negotiation and Settlement", Montreal*
- *Osgoode Hall Law School, "8th National Symposium on Class Actions", Toronto*
- *Association of Professional Responsibility Lawyers, "National and International Developments in Unauthorized Practice", Toronto*
- *Heenan Blaikie LLP, "Privilege and the In-House Lawyer: Ethical and Practical Dimensions", Toronto*

2010
- *Spring Symposium: Mastering the Art of Advocacy, Toronto*
- *Canadian Bar Association, Live Online PD: Update on Solicitor-Client Privilege: Case Studies, Toronto*
- *Law Society of Upper Canada, Teleseminar - "Best Practices for Teaching Professionalism", Toronto*
- *Canadian Bar Association, "The Competition Law 2010 Spring Forum: Crime and Punishment Redux: The Practice, Procedure and Substance of Criminal Competition Law", Toronto*
- *Law Society of Upper Canada, "Conflicts of Interest - Teleseminar", Toronto*

2009
- *Law Society of Upper Canada, "Professional Responsibility and Practice", Toronto*
- *The Chief Justice of Ontario's Advisory Committee on Professionalism, 12th Colloquium, "Intrusions on the Independence of the Bar", Kingston*
- *Law Society of Upper Canada, Teleseminar "Ethical Dilemmas in Criminal Law", Toronto*

2008
- *Ontario Bar Association, "Privilege, Confidentiality and Conflicts of Interest: Traversing Tricky Terrain", Toronto*
- *Ministry of the Attorney General of Ontario, Legal Directors' Retreat, "The Business and Practice of Law in the 21st Century", Niagara-on-the Lake*
- *Advocates' Society, "The Role of the Canadian Legal Profession in Upholding the Rule of Law Internationally", Prague, Czech Republic*
- *The Chief Justice of Ontario's Advisory Committee on Professionalism, 10th Colloquium, "How Murky can a Bright Line be? Coping with Conflicts of Interest in the Wake of R. v. Neil", Ottawa*

2007
- *The Canadian Institute, "Managing Complex Litigation", Toronto*
- *Advocates' Society Fall Convention, "The Ethics of Advocacy", Bahamas*

2006
- *Law Firm Leaders' Invitational Forum, Millcroft Inn, Roundtable Panel on Conflicts of Interest*
- *Law Society of Alberta 100th Anniversary Conference, "Regulating Competence", Edmonton*
- *University of Western Ontario Faculty of Law, "Legal Ethics and Professionalism", London*
- *The Chief Justice of Ontario's Advisory Committee on Professionalism, 6th Colloquium. "Shakespeare and the Law", Toronto*
- *Federal Prosecution Service Conference, "Ethics in Court", Toronto*

2004
- *International Institute of Law Association Chief Executives, "Regulatory Models and Options for the Legal Profession in the 21st Century" Auckland, New Zealand*

2002
- *University of Toronto First Year Bridge Program, "Legal Ethics and Professionalism", Toronto*
- *Central East Advocacy Conference, "Civility", Whitby*

2001
- *Canadian Bar Association (Ontario), "Civility Among Lawyers", Toronto*
- *Law Society of Upper Canada, "The New Rules of Professional Conduct", Toronto*
- *Law Society of Upper Canada, "Equity, Law, Social Context, and the Rules of Professional Conduct", Toronto*
- *Canadian Bar Association (Ontario), "Criminal Law Ethics", Toronto*
- *All China Lawyers Association, "Regulating the Legal Profession: Professional Conduct and Discipline", Changsha, China*

2000
- *Criminal Lawyers' Association, "Defence of the Defence Bar: Ethical Issues in a Changing Justice System", Toronto*
- *Advocates' Society, "Civility in the Legal Profession", Toronto*
- *University of Ottawa Faculty of Law, "Professional Responsibility Issues in a Criminal Law Practice", Ottawa*

1999
- *Insight, "Y2K Litigation – Potential Liability of Professionals", Toronto*
- *Lexpert, "Year 2000 Pre-Litigation Strategy – Potential Liability of Professionals", Toronto*
- *Osgoode Hall Law School, LL.M. Program, "Professional Responsibility Issues in Dispute Resolution", Toronto*
- *Intellectual Property Institute of Canada, "Self-Governance, Professional Conduct and Discipline", Ottawa*

1998
- *Law Society of Upper Canada, "Suing and Defending Professionals" (Conference Co-Chair and Panel Chair), Toronto*
- *Conference of Ontario Boards and Agencies, "The Ethical Decisionmaker", Toronto*
- *Law Society of Upper Canada, "Regulating Competence in the Legal Profession", Toronto*
- *Law Society of Upper Canada, "Lawyers and the Media", Toronto*
- *Canadian Bar Association (Ontario), "Solicitor-Client Relationships", Toronto*
- *Patent and Trademark Institute of Canada, "Codes of Conduct", Ottawa*
- *Federated Press, "Cross-Examining the Biased Witness", Toronto*

1997
- *Ontario Centre for Advocacy Training, "Lawyers and the Media", Toronto*
- *Durham Law Association, "Challenges Facing the Legal Profession", Oshawa*
- *Canadian Bar Association (Ontario), "Remedies in Oppression Proceedings", Toronto*
- *Canadian Bar Association (Ontario), "Professional Responsibility Considerations in Mediation", Toronto*
- *Canadian Bar Association (Ontario), "Law Society Discipline Proceedings", Toronto*
- *Osgoode Hall Law School, "Professional Ethics in a Transactional Practice", Toronto*
- *Osgoode Hall Law School, "Commercial Arbitrations: What Every Commercial Lawyer Needs to Know - A Barrister's Perspective", Toronto*

1996
- *Infonex, "Conflict and Complaint Resolution in the Regulation of Professionals", Toronto*
- *Osgoode Hall Law School, LL.M. Program, "Professional Responsibility Issues in Alternative Dispute Resolution", Toronto*

1995
- *Advocates' Society, "Defending the Advocate Before the Discipline Committee", Toronto*
- *Westminster Institute for Ethics and Human Values, "Does the Adversary System Favour the Ethics of Business Over the Ethics of Professionalism?", London*
- *Law and Society Association, "Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism", Toronto*
- *Infonex, "Professional and Disciplinary Hearings", Toronto*

1994
- *Council on Licensure, Enforcement and Regulation, "Procedural Safeguards in Professional Discipline Proceedings, Toronto*
- *Canadian Association of Law Teachers; Federation of Law Societies of Canada, National Conference on the Legal Profession and Ethics, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession", Toronto*
- *Canadian Institute, "Professional Responsibility and Liability Considerations in Providing Opinions in an Intellectual Property Practice", Toronto*

1993
- *Conference of Ontario Boards and Agencies, "Term Limits for Members of Administrative Tribunals", Toronto*
- *County of Carleton Law Association, Keynote Address, "Professional Discipline Proceedings", Montebello, Quebec*
- *Law Society of Upper Canada, "Ethical Issues in an Immigration Practice", Toronto*
- *Law Society of Upper Canada, "Representing the Professional", Toronto*
- *Medico-Legal Society of Toronto, "Professionals' Duty to Report", Toronto*

1992
- *Law Society of Upper Canada Special Lectures, Administrative Law, "Procedural Fairness", Toronto*
- *Canadian Institute, "Professional Liability and Discipline: Doctors and Lawyers", Toronto*
- *Canadian Bar Association (Ontario), "The New Battlefield for Litigators - Criminal Law Invades the Boardroom" (Law Society Prosecutions), Toronto*
- *Canadian Bar Association (Ontario), Administrative Law Section, "Your Worst Nightmare - A Law Society Discipline Hearing", Toronto*

1991
- *Canadian Bar Association (Ontario), Estates and Trusts Section, "Professional Conduct Concerns in an Estates Practice", Toronto*
- *Canadian Bar Association (Ontario), Corporate Counsel Section, "Professional Conduct Issues for Corporate Counsel", Toronto*
- *Canadian Bar Association (Ontario), Administrative Law Section, "Developments in Professional Discipline", Toronto*
- *Advocates' Society, "Solicitation, Advertising, and Contingency Fees", Toronto*
- *Law Society of Upper Canada, "Open Windows, Changing Times – The Law Society and the Media", Toronto*

1990
- *Canadian Bar Association (Ontario), Wednesday Series, "Motions and Applications" (Co-Chair), Toronto*
- *Association of Discipline Counsel of Canada, "Cross-*

Examination in Professional Discipline Proceedings", Vancouver

- *Canadian Institute, "Coroner's Inquests and Nursing and Retirement Homes", Toronto*

1988 - *Canadian Institute, "Corporate Crisis Management, Liability, and Litigation", Toronto*

1986 - *Canadian Institute, "Regulatory Charges and Actions Against Nursing Homes", Toronto*

EDITING

Member, Editorial Board, Carswell's Practice Cases, 1982-1988. Author of over twenty annotations to cases published in this series of law reports

Member, Editorial Board, Commercial Litigation Journal, 1996 to 2006

TEACHING

2008 - 2009 - *Osgoode Hall Law School, Adjunct Professor, "Legal Values: Legal Ethics"*

1990 - 1993, 1999, 2000 - *Law Society of Upper Canada, Bar Admission Course, Professional Responsibility Section*

1990 - *Law Society of Upper Canada, Bar Admission Course, Advocacy Section*

1984 - 1988 - *Law Society of Upper Canada, Bar Admission Course, Civil Litigation Section*

1981 - 1982, 1985 - 1986 - *Law Society of Upper Canada, Bar Admission Course, Administrative Law and the Charter of Rights*

OTHER

2014 - *Chair, Canadian Bar Association Working Group on Reforms to Discipline Process of Canadian Judicial Council*

2014 - *Member, Ethics Advisory Committee for Genome Sequencing for Exceptional Individuals (Einstein's Brain)*

2002 - 2004	-	*Counsel, Canadian Bar Association Ethics and Professional Issues Committee*
2001 - 2005, 2008 - 2014	-	*Director, Canadian Institute for the Administration of Justice (Second vice-president 2004-5)*
1997 - 2000	-	*Member of Council, Canadian Bar Association – Ontario*
1997 - 2000	-	*Advocates' Society Award of Justice Selection Committee*
1997 - 2000	- -	*Member of Council, Medico-Legal Society of Toronto* *Professional Liaison and Education Committee*
1996 - 1998	-	*Member, Canadian Institute of Actuaries Task Force on Discipline Reform*
1996 - 1997	-	*Member, Canadian Bar Association National Committee on Professional Liability*
1995 - 1998	-	*Member, Advisory Council, Canadian Bar Association Wellness in the Profession Project*
1994 - 1997	-	*Director, LINK - The Lawyers' Assistance Programme*
1994 - 1997	-	*Director, Advocates' Society*
1993 - 1994	-	*Commission Counsel, Commission of Inquiry into the Conduct of His Worship Leonard Blackburn, J.P.*
1997 - 1998	-	*Commission Counsel, Commission of Inquiry into the Conduct of His Worship John Farnum, J.P.*
1999 - 2000	-	*Thesis Examiner, University of Ottawa LL.M. Programme*
2003	-	*Commission Counsel, Commission of Inquiry into the Conduct of His Worship Rick C. Romain, J.P.*
2003	-	*Commission Counsel, Commission of Inquiry into the Conduct of His Worship G. Leonard Obokata, J.P.*
2006	-	*Commission Counsel, Commission of Inquiry into the Conduct of His Worship Richard Quon, J.P.*
2008	-	*Commission Counsel, Commission of Inquiry into the Conduct of His Worship Benjamin Sinai, J.P.*

2008 - *Commission Counsel, Commission of Inquiry into the Conduct of His Worship John Farnum, J.P.*

2010 - *Commission Counsel, Commission of Inquiry into the Conduct of His Worship Vernon A. Chang Alloy*

EXPERT REPORTS AND TESTIMONY

1996 - *Stewart v C.B.C.,* Ontario Court of Justice (General Division) action number 92-CQ-25041 (reported at 150 D.L.R. (4th) 24.)
- *Segal (Chapter 11 Trustee for Bonneville Pacific Corporation) v Portland General Corporation,* United States District Court (Utah), Civil No. 92-C364J
- *Mulroney v Attorney General of Canada,* Superior Court of Quebec, Action No. 500-05-012098-958

1997 - *Ansley v Poole,* Ontario Court of Justice (General Division), Action No. 92-ND-191235CM

1998 - *Petro-Canada v Dicola Fuels Limited et al,* Ontario Court of Justice (General Division), Action No. 92-CQ-18730CM
- *Petro-Canada v 124952 Canada Inc. et al,* Ontario Court of Justice (General Division), Action No. 93-CQ-393
- *Canadian Imperial Bank of Commerce v Maxwell J. Wagner and Nadir Zulquernain; Blake, Cassels & Graydon and Michael Carman, Third Parties,* Ontario Court (General Division), Action No. 92-CQ-30767B

1999 - *Azarbar v Burke-Robertson*, Ontario Court (General Division), Action No. 96-CU-107917

2000 - *Rahmanian v Segal*, Ontario Superior Court of Justice, Action No. 01-CV-218489CM

2004 - *Bogoroch & Associates v. Sternberg,* Ontario Superior Court of Justice, Action No. 02-CV-226550 SR (reported at [2005] O.J. No. 2522, affirmed in part [2007] O.J. No. 3820 (Div. Ct.)

2008 - *CenTra Inc. v. Estrin*, United States District Court in the Eastern District of Michigan Southern Division, Case No. 06-15185

2011 - *Krasner v Stern et al*; Ontario Superior Court of Justice, Action No. 04-CV-265386CM3

2012 - *1483677 Ontario Limited v. Crain et al*; Ontario Superior Court of Justice, Action No. 07-CV-038944

Eustace Reeves v Patrick Aylward, Supreme Court of Prince Edward Island, Action No. S1-GS-19465

CGC Holding Company, LLC et al v. Hutchens et al, Civil Action No. 11-CV-1012, United States District Court, District of Colorado

2013 - *Tetreault v. Nussbaum*; Ontario Superior Court of Justice, Action No. CV-12-461392

2016 - *Society of Energy Professionals, IFPTE Local 160 v. Legal Aid Ontario*, Ontario Superior Court of Justice, Action No. CV-15-537113

2017 - *Alliance H. Inc. v. Gardiner Roberts*, Ontario Superior Court of Justice, Action No. CV-11-441515

2018 - *Urban Mechanical Contracting Ltd. v. Urban Alliance Inc.*, Ontario Superior Court of Justice, Action No. CV-15-522982

2019 - *Huang v. Li*, Supreme Court of British Columbia, Action No. 5173324, Vancouver Registry
- *Lipson v. Cassels Brock & Blackwell LLP*, Ontario Superior Court of Justice, Action No. CV-09-376511

PROFESSIONAL MEMBERSHIPS

Advocates' Society
American College of Trial Lawyers
Litigation Counsel of America
Canadian Bar Association
Lawyers' Club
Medico-Legal Society of Toronto
Osgoode Society for Canadian Legal History

COMMUNITY SERVICE

Director, York Region Rose of Sharon Services for Young Mothers, 1989 to 1996 (President and Board Chair, 1992-1994)

Member, Advisory Board, York Region Rose of Sharon Services For Young Mothers, 1999 to 2003

This is Exhibit "P3" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

GSNH
GOLDMAN SLOAN NASH & HABER LLP
BARRISTERS & SOLICITORS
dedicated to your success

STATEMENT OF BRIAN NICHOLS

OCTOBER 27, 2020

PART I: OVERVIEW

A. INTRODUCTION

1. This report has been prepared at the request of Dewart Gleason LLP who have retained me as an expert in income tax matters in connection with the action (the "Action") bearing court file number CV-09-376511 which has been certified under the Class Proceedings Act, 1992 and in particular with respect to the third party claim bearing court file number CV-09-376511CPA1, brought by Cassels Brock & Blackwell LLP ("CB") against Gardiner Roberts LLP ("GR"), the Estate of Ronald J. Farano, Deceased ("Farano Estate") and others. In this statement, I shall refer to the members of the class as the "Donors".

2. I have set out my qualifications in Appendix A.

3. In Appendix B I have set out the documents that I reviewed in connection with the Action that were relevant in formulating my opinion. I have also set out the jurisprudence and the tax literature which I have reviewed.

4. I have been provided with a copy of the tax opinion (the "CB Opinion") dated October 6, 2000 by CB to Canadian Athletic Advisors Ltd.

5. I have been provided with a commentary (the "Farano Commentary") on the CB Opinion dated December 22, 2000 which was given by Ronald J. Farano ("Farano") of GR. The Farano Commentary states that based on Farano's understanding of the law as it existed on December 22, 2000, the CB Opinion properly reflects the legal situation in an income tax context.

6. I have been provided two legal opinions, dated June 7, 2010 and July 13, 2011 (the "Krishna Opinions") given by Vern Krishna ("Krishna") of Borden Ladner Gervais to Roy Elliott O'Connor LLP. The Krishna Opinions state that the CB Opinion does not meet the standard of care expected of a tax lawyer with respect to matters other than the general anti-avoidance rule ("GAAR"). The Krishna

Opinions indicate that the CB Opinion reasonably addressed GAAR issues in light of the available jurisprudence at the relevant time.

7. In this statement I will be expressing my views as to whether the Farano Commentary met the standard of care of a reasonably competent tax specialist lawyer at the time the Farano Commentary was given. As the Krishna Opinions indicate that the CB Opinion reasonably addressed GAAR issues, I shall not comment on GAAR issues in this statement. The Farano Commentary was dated December 22, 2000. The Statement of Defence and Cross-Claim of Third Parties, GR and the Farano Estate, to the Third-Party Claim indicates that the Farano Commentary was not released until January 25, 2001. I am of the view that the standard of care did not change between December 22, 2000 and January 25, 2001.

8. The following sources of information ("Indicia of Standard of Care") are relevant for the purposes of determining the standard of care of a tax specialist lawyer on December 22, 2000:

(a) Reported Cases
(b) Published Tax Literature
(c) Canada Revenue Agency ("CRA") Audit Report
(d) CRA communications with Donors and Thorsteinssons LLP ("Thorsteinssons")
(e) Thorsteinssons communications with CRA and with Donors

Thorsteinssons were retained as tax litigation counsel by some of the Donors to act on their behalf in the tax dispute with the CRA. I shall refer to the Indicia of Standard of Care in this Statement.

B. FACTS AND FARANO'S RETAINER

B.1 FACTS

9. In paragraph 1 of the CB Opinion, CB described the facts as follows:

> (a) In order to administer a programme of support for Canadian amateur athletics, a trust (the "Trust") has been settled in Ontario on Atlantis Fiduciary Services Inc. (an affiliate of Atlantis Asset Management Inc.), a resident of Canada, which acts as the Trustee of the Trust (the "Trustee"), by Adrian Crosbie-Jones who is a resident of The Bahamas and who has never been resident in Canada (the "Settlor") for the benefit of a class of individuals, both residents of Canada and non-residents of Canada, who have indicated a willingness to support Canadian amateur athletics, e.g. Registered Canadian Amateur Athletic

Associations (individually, an "RCAAA"), and who will be designated by the Trustee as Class A Beneficiaries. Such support could be demonstrated either by past donations or services to amateur sports, or by an expressed willingness to do so in the future. A company incorporated pursuant to the laws of Ontario and wholly-owned by the Trust is designated as the Class B Beneficiary.

(b) The Settlor transferred $100 of his own funds in settlement of the Trust by way of an irrevocable gift to the Trustee which holds the assets comprising the "Trust Fund". A deed of trust (the "Deed") governed by the laws of Ontario evidencing the establishment of the Trust provides that the Class A Beneficiaries are entitled to the capital of the Trust fund (the "Fund") and the Class B Beneficiary is entitled to the income of the Fund.

(c) During the year 2000, the Settlor will acquire biennial timeshare weeks (the "Timeshare Weeks") from Portfolio Vacations International Ltd., a corporation established under the laws of Bermuda, ("PVIL") that holds the master leasehold interest pursuant to which the Timeshare Weeks have been created at the Sandyport Beaches Resort, a successful timeshare resort in Nassau, Bahamas (the "Developer"). The purchase price for each Timeshare Week is an amount that is equal to the appraised fair market value of such week, or US$9,000, whichever is less. The US$9,000 purchase price (based upon the US$9,000 appraisal amount) is payable to PVIL in the following manner:

US$5,800	Cash
US$3,200	Vendor Take-Back Charge

(d) The Charge being taken back by PVIL as Vendor will be registered as a charge against the title of each Timeshare Week, in the proper registry office in The Bahamas. The Charge will have the following terms:

(i) Due on Demand;
(ii) Interest at a market rate payable in arrears upon demand being made; and
(iii) May be prepaid at any time without notice or bonus.

(e) The Charge is a limited-recourse debt obligation. Upon any default being made under the Charge, the only recourse of PVIL will be against the charged property itself. PVIL will not be entitled to recover any deficiency from the Settlor or any subsequent owner of the Timeshare Week. Any transfer of title to a Timeshare Week will be made subject to this registered charge.

(f) The Settlor will make a gift to the Trustee of the Timeshare Weeks so acquired in further settlement of the Trust Fund, and will receive no consideration from the Trustee for such transfer. The Trustee will acquire

valid ownership and title to these Timeshare Weeks, subject to the Charge for US$3,200 registered on title, unless the outstanding balance has been paid and the Charge has been removed.

(g) The Deed gives the Trustee wide discretion to make distributions out of the Trust Fund to the Beneficiaries and, in particular, does not require the Trustee to make distributions of Timeshare Weeks only to Class A Beneficiaries who wish to make donations of Timeshare Weeks to RCAAAs. Following the further settlement referred to in (f) above and later in 2000, the Trustee will distribute the Timeshare Weeks to the Class A Beneficiaries of its choice. Each Class A Beneficiary in receipt of a Timeshare Week will acquire valid ownership and title thereto. Each Timeshare Week distributed will be subject to the US$3,200 Charge, unless the balance has been paid and the charge has been removed.

(h) As a holder of Timeshare Weeks subsequent in title to the Trustee and the Settlor, the Class A Beneficiary will be in the same position with respect to the liability to the Developer. In other words, if the Developer demands payment of interest and principal, the Class A Beneficiary has no personal liability to make the payments. A failure to pay will result in the Developer having the right only to repossess the Timeshare Weeks.

(i) The distribution of Timeshare Weeks to the Class A Beneficiaries will be made without any conditions, or any obligations on the part of the Class A Beneficiary to make a subsequent donation to any RCAAA, and there is no arrangement that a donation will be made of Timeshare Weeks pursuant to the expression of willingness to support Canadian amateur athletics. Given this expression of support, however, it is expected that most Class A Beneficiaries will make donations of Timeshare Weeks to RCAAAs. Nevertheless, there is nothing that would prevent a Class A Beneficiary from retaining a Timeshare Week for his or her own personal use or for any other lawful and permitted purpose.

(j) Canadian Athletic Advisors Ltd. ("CAA") represents certain RCAAAs which have expressed a willingness to accept donations of Timeshare Weeks from Class A Beneficiaries. These particular RCAAAs, however, are unwilling to accept a donation of property that is subject to a demand charge that may result in the equity in such property being immediately foreclosed. To protect the interests of the RCAAAs, CAA has requested, on behalf of participating RCAAAs, that donors who make a gift of Timeshare Weeks to RCAAAs, also make a cash donation in the amount of Cdn $4,700, for each Timeshare Week being donated. This amount is the Canadian dollar equivalent of the amount necessary to permit an RCAAA to discharge the outstanding Charge and obtain encumbrance-free ownership of a Timeshare Week. (In this letter a reference to Canadian dollars should be taken as a reference to the Canadian dollar equivalent of the US dollar amount based on current exchange rates, and

it should be understood that at a future date when the amount referred to has to be revalued it may change depending upon the rates at that time.)

(k) CAA, on behalf of the RCAAAs, has entered into a marketing agreement with PVIL whereby PVIL will market the donated Timeshare Weeks to members of the public at the Developer's sales office. Under the terms of the agreement, PVIL will be responsible for all marketing costs and expenses, and will remit to the RCAAAs the net proceeds from the sale of the Timeshare Weeks after deduction of sales and marketing fees and expenses, in accordance with timeshare industry practice.

(l) When a Class A Beneficiary makes the gifts to an RCAAA, the RCAAA will issue two charitable receipts as follows:

(i) A receipt in the amount of Cdn$4,700 with respect to the cash donation,

(ii) A receipt in the amount of the then fair market value of the donated Timeshare Weeks as evidenced by two independent valuations, less the amount of any debt registered against the property (that is the Charge in the amount of Cdn$4,700, unless it has previously been discharged).

The sum of the two charitable receipts will total an amount that is equal to the appraised fair market value of the Timeshare Week, or Cdn$13,275.

10. The Farano Commentary included a schedule which is the content page of the Due Diligence Book of Documents (the "Due Diligence Book") provided to Farano by Stephen Elliott, president of Sport Share Inc., on November 1, 2000. Farano indicated that he had reviewed the Due Diligence Book and made the following comment:

> The Opinion rendered by Cassels Brock & Blackwell dated October 6th, 2000, (the "Opinion") refers to the facts as I understand them and refers to the review of documents which essentially correspond to the documents in the Due Diligence Book which was sent to me on November 1, 2000.

11. The Due Diligence Book contains a draft dated October 12, 2000 of Timeshare Remarketing Agreement (“TRA”) between Canadian Athletic Advisors Ltd. (“CAA”) and Portfolio Vacations International Inc. (“PVII”). The TRA indicates the following:

(a) PVII is the sole and exclusive marketing agent for the sale of timeshare weeks at the Sandy Beaches Resort (the “Resort”) in Nassau, Bahamas.

(b) The CAA is the exclusive representative of certain Canadian Amateur

Athletic Associations ("RCAAA's") who have received donations of timeshare weeks at the Resort (the "Donated Timeshare Weeks").

(c) PVII has the option to acquire timeshare units from CAA on an individual basis in which case rules are specified with respect to the commission to be paid to PVII.

(d) CAA has the option to require PVII to purchase blocks of at least 100 Donated Timeshare Weeks at a bulk purchase price of USD $1,000 for each Donated Timeshare Week.

12. The Due Diligence Book also contains a Timeshare Marketing and Re-Sale Agreement (the "Pooling Agreement") which each of the RCAAAs was required to enter into with CAA. Pursuant to the Polling Agreement, each of the RCAAAs was required to transfer each of the Donated Timeshare Weeks to CAA for marketing. It appears that in the case of bulk sale the Pooling Agreement allows CAA to retain a portion of the USD $1,000 to be paid by PVII for each Donated Timeshare Week.

B.2 FARANO'S RETAINER

13. Farano's retainer appears to have been limited to providing commentary on whether the CB Opinion gave a reasonable description of how tax law, as it existed on December 22, 2000, applied to the facts as described in the CB Opinion and in the Due Diligence Book.

C. FRAMEWORK OF THIS STATEMENT

14. Krishna asserts that at the time the CB Opinion was given, the tax jurisprudence required that a donor of a charitable gift must intend to diminish his or her net worth by making the donation. Krishna expresses this by saying that the donor is "impoverished" by the donation. This assertion forms the lion's share of the Krishna Opinion. I agree that Krishna's assertion represents the state of tax jurisprudence on July 11, 2011 as well as the current state of the tax jurisprudence. For the reasons set out in Part II of this statement, it is my view that Krishna's assertion did not represent the state of the tax jurisprudence when the CB Opinion and the Farano Commentary were given. It is my view that it was possible to make a "profitable gift" at that time.

15. The CB Opinion does not refer to bulk sales of Donated Timeshare Weeks. As a result, section 1(k) of the CB Opinion, which is set out in paragraph 9 of this statement, is not an accurate statement of the facts. It appears that Farano was

given information in the Due Diligence Book which could have allowed him to identify the inaccuracy in section 1(k) of the CB Opinion. Farano did not refer to bulk sales in the Farano Commentary.

16. In Part III of this statement, I consider whether on December 22, 2000 a reasonably competent tax specialist lawyer would have modified his or her opinion because of the likelihood that there would be sales in bulk at discounted prices. In Part IV of this statement, I refer to and comment on the sham doctrine.

PART II: WAS IT POSSIBLE TO MAKE A PROFITABLE GIFT?

D. THE KRISHNA OPINIONS

D.1 SUMMARY OF KRISHNA CONCLUSIONS

17. In this statement I shall refer to the latest of the two Krishna Opinions which was given by Krishna on July 13, 2011.

18. In paragraphs 41 to 44 of the Krishna Opinion, Krishna describes the meaning of "gift" for tax purposes as follows:

> 41. The Act does not define "gift." At common law, a gift is the voluntary transfer of property from a donor to a donee for which the donor receives no benefit or consideration-a transfer without expectation of economic reward or material return. The donor must be impoverished by the transfer.
>
> 42. Thus, the essence of a gift is a transfer motivated by detached and disinterested generosity. [There are pending amendments to the Act to change the "impoverishment rule" that permit donations where the donor obtains partial value in exchange.]
>
> 43. Friedberg identifies four elements of a "gift":
>
> (f) The donor must own the gifted property;
>
> (g) The donor must transfer the property voluntarily;
>
> (h) No consideration can flow to the donor in return for the gift; and
>
> (i) The subject of the gift must be property and not services.
>
> 44. Overarching these four elements is the notion that a taxpayer must have an intent to donate the property to the charity. Intention to donate depends upon

> the facts of the arrangement and is intrinsic to the notion that the transfer must impoverish the donor of the property.[1]

19. Krishna concludes as follows in paragraphs 74 to 76 of the Krishna Opinion:

> 74. The Cassels Brock Legal Opinions do not address the crucial link between "material benefit", "impoverishment" and "donative intent" where, as in the Timeshare Program, there is a guaranteed net cash tax credit that substantially exceeds the aggregate of the taxpayer's cash outlays, encumbrances and liens on the donated property. Hence, the Opinion does not fully inform the Donor of the risk of CRA assessment and denial of the credit.
>
> 75. Since the Donors were not "impoverished" but enriched, there was risk that the CRA would challenge the "donation" based on the magnitude of the tax credit claimed.
>
> 76. Disclosure of the risks would have informed the Donors of the potential of tax assessments and the inherent costs of dispute resolution and proceedings in the Tax Court of Canada.

On December 22, 2000 there was some authority from Federal Court Trial Division and from the Tax Court of Canada indicating that a gift must require impoverishment of the donor. However, there was authority from the Federal Court of Appeal ("FCA") indicating that there could be a profitable gift. On December 22, 2000, tax specialist lawyers were of the view that the FCA authority (that there can be a profitable gift) trumped the lower court authority that a gift must require impoverishment of the debtor.[2]

D.2 LACK OF CONSIDERATION TO POINT-IN-TIME LAW

20. The Krishna Opinion cites post December 22, 2000 authority as well as pre-December 22, 2000 authority to support his position that in order for there to be a gift the donor must be impoverished. The Krishna Opinion, however, does not refer to paragraph 9 of the *Friedberg* FCA decision which specifically contemplates a profitable gift.[3] Krishna has relied on post December 22, 2000 authority to support his position as to what the law was on December 22, 2000. In my view, post December 22, 2000 authority can be relied upon by Krishna for that purpose only if he is asserting that the law was static between December 22, 2000 and July 13, 2011.

---

[1] In paragraph 43 of his opinion, Krishna is referring to *Friedberg v. R.*, 92 D.T.C. 6031 (FCA), which is discussed in Part F.1 of this statement.

[2] I shall discuss the jurisprudence in detail in Part F.1 of this statement.

[3] See Part F.1, at paragraph 25, below.

21. In this statement, I will explain that the law was not static between December 22, 2000 and July 13, 2011. I will explain why a reasonably competent tax specialist lawyer would have concluded on December 22, 2000 that it was possible to make a profitable gift. I will also refer to evidence indicating that tax specialist lawyers believed that it was possible to have a profitable gift until several years after December 22, 2000. Finally, I shall refer to evidence that the CRA did not initially assess the Donors on the basis that a donor must be impoverished in order to have a gift for tax purposes. It appears that the CRA did not adopt this argument in its Tax Court of Canada litigation with the Donors, until 2007. I will refer to some post December 22, 2000 jurisprudence to illustrate the evolution of the law after December 22, 2000 and to highlight certain submissions made by tax counsel to the courts. These submissions clearly indicate that tax counsel were taking the position that there could be a profitable gift until at least 2004.

E. CHARITABLE DONATION TAX SHELTER ENVIRONMENT ON DECEMBER 22, 2000

E.1 CAT AND MOUSE GAME

22. The essence of a charitable donation tax shelter is that the donor would profit by reducing the amount of taxes payable by an amount in excess of his "real" cash donation to the charity. Not surprisingly, the CRA attacked these arrangements in the courts. A cat and mouse game ensued.[4] When the courts upheld a particular arrangement, Finance would amend the Income Tax Act (the "Act") to close off the arrangement. Tax shelter promoters would then fine tune their products to adjust to the new legislative regime and market their new products. The CRA would challenge the new products and the wheel would continue to turn.

E.2 TAX SHELTERS IN LATE 1990s

23. The tax shelter products available in the late 1990s have been described as follows[5]:

> The tax shelters at issue can be grouped into two categories: "buy low, donate high" arrangements on the market in the late 1990s, and are sometimes referred

---

[4] This has been referred to as a cat and mouse game in the following publications:

(i) Jim Cruickshank, "Charities and Not-for-Profit Organizations: Selected Topics of Current Interest," *2010 Atlantic Provinces Tax Conference*, (Halifax: Canadian Tax Foundation, 2010), 8A:1-18.

(ii) Patrick J. Boyle, "Charitable Gifts: An Update," *Report of Proceedings of Fifty-Sixth Tax Conference*, 2004 Conference Report (Toronto: Canadian Tax Foundation, 2005), 7:1-36.

[5] Jim Cruickshank, "Charities and Not-for-Profit Organizations: Selected Topics of Current Interest," *2010 Atlantic Provinces Tax Conference*, (Halifax: Canadian Tax Foundation, 2010), 8A:1-18.

> to as "art flips" (as the property donated in these arrangements was often artwork.) When these plans came under attack by CRA, promoters shifted to "leveraged donation" schemes.

24. In 2008, the CRA described abusive tax shelter arrangements as follows[6]:

> There are three common types of abusive tax shelter arrangements involving charities, although variations of these and other new arrangements are being promoted. Examples of the three common arrangements are:
>
> - Buy low, donate high: an individual buys property for $3,000, then transfers the property to a charity and receives a $10,000 receipt.
> - Gifting trust arrangements: an individual pays $3,000 cash to a charity, receives property from a trust with a purported fair market value of $7,000 which is also transferred to a charity, and receives a donation receipt of $10,000.
> - Leveraged cash donations: an individual purportedly borrows $8,000, adds another $2,000, and transfers $10,000 to a charity for a $10,000 receipt. The individual then pays another $1,000 to third party to repay the loan in full.

F. JURISPRUDENCE

F.1 JURISPRUDENCE PRIOR TO DECEMBER 22, 2000

25. In *Burns v. M.N.R.*[7], the taxpayer attempted to deduct an amount paid by him to the Canadian Ski Association (the "CSA"). The taxpayer's daughter trained with the CSA. The taxpayer admitted that he would not have made payments had his daughter not been part of the CSA training squad. The Minister disallowed the deduction taking the position that the taxpayer's payment did not constitute a gift because the taxpayer had an expectation that his daughter would receive benefits. The Federal Court Trial Division found in favour of the Minister. At paragraph 28, Pinard J. made the following comment:

> 28. I would like to emphasize that one essential element of a gift is an intentional element that the Roman law identified as animus donandi or liberal intent (see Mazeaud, Leçon de Droit Civil, tome 4ième, 2ième volume, 4 ième édition, No. 1325, page 554). The donor must be aware that he will not receive any compensation other than pure moral benefit; he must be willing to grow poorer for the benefit of the donee without receiving any such compensation. In my view, the defendant believed he was paying for his daughter's ski training and he considered that to be the benefit. Consequently, the defendant did not have the

---

[6] CRA Registered Charity Newsletter #29, Winter 2008.
[7] 88 D.T.C. 6101, (1985 FCTD, affirmed by the FCA [1990] 1 CTC 350).

> animus donandi or liberal intent required to allow the payments he made to the C.S.A. to be considered "gifts" under subparagraph 110(1)(a)(ii) of the Act.

26. *Burns* is the earliest Canadian case, which I am aware of, that stipulates that a donor must be impoverished in order for there to be a gift. In *Dutil v. R.*,[8] Dussault made similar comments.[9]

27. *Friedberg v. R*,[10] is the leading case decided prior to December 22, 2000. In *Friedber*g, the taxpayer acquired two collections of ancient textiles and donated them to a museum. This was a buy low, donate high situation where the taxpayer intended to profit from his gift. The FCA commented as follows at paragraphs 4 and 5:

> 4 The Income Tax Act does not define the word "gift", so that the general principles of law with regard to gifts are utilized by the courts in these cases. As Mr. Justice Stone explained in *The Queen v. McBurney*, [1985] 2 C.T.C. 214, 85 D.T.C. 5433, at page 218 (D.T.C.5435): "The word gift is not defined in the statute. I can find nothing in the context to suggest that it is used in a technical rather than its ordinary sense." Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (see Heald, J. in *The Queen v. Zandstra*, [1974] C.T.C. 503, 74 D.T.C. 6416, at page 509 (D.T.C. 6420). The tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors.
>
> 5 In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *Canada v. Irving Oil Ltd.*, [1991] 1 C.T.C. 350, 91 D.T.C. 5106, per Mahoney, J.A.)….

At Paragraph 9, the FCA ruled that it is possible to have a profitable gift:

> 9 It is clear that it is possible to make a "profitable" gift in the case of certain cultural property. Where the actual cost of acquiring the gift is

---

[8] (1991) 95 D.T.C. 281 (T.C.C.).

[9] In *Langlois v. R*, [1999] 3 C.T.C. 2589 at paragraph 60, Garon TCJ indicated that similar comments were made in *Gagnon v. Canada*, Doc. 91-38 (IT) (T.C.C.), and that both *Dutil* and *Gagnon* were decided on July 25, 1991. As *Gagnon* has not been reported, I have not been able to read it.

[10] *Friedberg*, (FCA) supra note 1.

> low, and the fair market value is high, it is possible that the tax benefits of the gift will be greater than the cost of acquisition….

28. In the following cases, the courts held that it is possible to make a profitable gift:

    (a) *Francoeur* v. *R.* - a buy low, donate high scheme involving scientific material;[11]

    (b) *Whent v. R.* - a buy low, donate high scheme involving works of art (commonly referred to as an "art flip");[12]

    (c) *Plante v. R.* - an art flip;[13] and

    (d) *Aikman v. R.* – an art flip.[14]

29. On November 3, 2000, less than two months prior to the date of the Farano Commentary, the FCA decided the following trilogy of cases:

    (a) *Langlois v. R.* – an art flip;[15]

    (b) *Duguay v. R.* – an art flip;[16] and

    (c) *Coté v. R.* – an art flip.[17]

    Each of these cases involved an art flip. At Tax Court, the taxpayers relied upon the passage in *Friedberg* which indicates that there can be a profitable gift. They also relied upon *Francoeur*. The Department of Justice relied upon *Dutil*. Neither the Tax Court nor the FCA explicitly adopted the passage in *Friedberg* which indicates that there can be a profitable gift. However, both the Tax Court and the FCA decided that even though the taxpayer's primary motivation was to obtain a tax benefit, that did not nullify the taxpayer's intent to give. The Tax Court and the FCA went on to decide the cases on valuation issues. The emphasis that the Tax Court and the FCA placed on valuation issues indicates that they were of the view that there could be a profitable gift.

---

[11] *Francoeur v. R.*, [1993] 2 C.T.C. 2240 (T.C.C.).
[12] *Whent v. R.*, [1996] 3 C.T.C. 2542 (T.C.C.) affirmed [2000] 1 C.T.C. 329 (F.C.A.) leave to appeal denied 2000 CarswellNat 2397 (S.C.C.).
[13] *Plante v. R.*, [1999] 2 C.T.C. 2631 (T.C.C.).
[14] *Aikman v. R.*, 2000 D.T.C. 1874 (T.C.C.).
[15] *Langlois v. R.*,2000 CarswellNat 3241 (FCA).
[16] *Duguay v. R.*, [2002] 1 C.T.C. 8 (FCA) which was decided on November 3, 2000 together with *Langlois* and *Coté v. R.*, 2000 D.T.C. 6615 (Fr.)(FCA).
[17] *Coté, supra* note 16.

30. The Department of Justice referred to the *Dutil* impoverishment concept from time to time in argument.[18] However, this argument was not successful prior to December 22, 2000. For example, in *Plante v. R.*,[19] Tardif TCJ made the following comment in footnote 1 (corresponding to paragraph 38 of the decision):

> In *Dutil v. R.* file no. 91-42(IT) [reported (1991), 95 D.T.C.281 (T.C.C.)] my colleague Judge Dussault looked at whether a gift exists where the taxpayer's "sole" motivation is clearly to enrich, not to impoverish, himself or herself. As counsel for the Minister acknowledged in her written arguments, Judge Dussault's comments were made in obiter. Moreover, I consider the issue to have been settled by the Federal Court of Appeal's decision in Friedberg, which was rendered after *Dutil*.

31. In the 1990s, the Department of Justice tended to use the following arguments when attacking art flips:

(a) the fair market value of the art when the taxpayer donated it to a charity was equal to the price paid by the taxpayer for the art;[20]

(b) the taxpayer never took title to the art and therefore could not have gifted the art to the charity; and[21]

(c) by purchasing the art at a low price and donating it at a high price, the taxpayer was involved in an adventure in the nature of trade with the result that the difference between the donation value and the acquisition price of the art should be taxed in the hands of the taxpayer as ordinary income.[22]

32. On December 22, 2000, the jurisprudence favoured the *Friedberg* concept that it was possible to have a profitable gift. The courts were not adopting the *Burns* or *Dutil* concept that the donor must be impoverished in order for there to be a gift.[23]

---

[18] For example, the Department of Justice referred to *Dutil* at the Tax Court level in *Langlois, Duguay* and *Coté, supra* note 16.
[19] *Supra* note 13.
[20] *Coté, supra* note 16.
[21] This was one of the positions initially taken by the CRA to support its reassessments of the Donors. See Section G of this statement.
[22] *Francoeur, supra* note 11.
Whent v. R., supra note 12.
Loewen v. R., 94 D.T.C. 6265 (FCA).
[23] In the 2002 Quebec Court of Appeal decision, *R. c. Bouchard*, 163 C.C.C. (3d) 86, 2002 CarswellQue 3899 the Court reaffirmed "profitable" donations are acceptable, especially in light of the then recent decision in *Duguay*, at paras. 68-71.

F.2 JURISPRUDENCE AFTER DECEMBER 22, 2000

33. On July 5, 2004, Clifford Rand argued a trilogy of art flip cases on behalf of the taxpayer before Bell T.C.J.[24] Bell T.C.J. reproduced Mr. Rand's written submissions in his reasons for judgment. Paragraphs 10 to 12 of the written submissions refer to the understanding of the law at that time and in particular to the concept that it was possible to make a profitable gift:[25]

> 10. The Respondent has assessed the Appellants on the basis that the amount of their total charitable gifts is equal to the amount the Appellants paid to acquire the prints from CVIAM. It follows that the Respondent has assumed in issuing its reassessments that the fair market value of the prints was equal to the Appellants' cost of the prints.
>
> 11. The arrangements promoted by CVIAM under which the Appellants acquired and donated the prints have been referred to by the Department of Finance as "buy-low, donate-high" arrangements. It is understandable that the Minister of National Revenue and the Department of Finance do not like "buy-low, donate-high" arrangements. Permitting taxpayers to make a profit from the tax system through the mechanism of a charitable donation is clearly not in accordance with good tax policy. Nonetheless, as Mr. Justice MacDonald noted in Nova Corp. of *Alberta v. R.*, if there is a [opportunity] in the Act, then a taxpayer who finds it and exploits it while it is available is entitled to any resulting advantage.
>
> 12. The loophole exploited by the tax shelter promoters who designed charitable gifting arrangements resulted from the combination of two factors. First, the Courts had recognized that a taxpayer can make a "profitable" gift. Second, in 1996 and 1997 the federal government introduced measures "to help all charities attract donations from modest income Canadians" by significantly enhancing the charitable donation tax credit system. Specifically, the percentage of an individual's income that could be tax-effectively donated to charity was increased from 20% to 50% in [the] March 6, 1996 federal budget, and then to 75% in [the] February 18, 1997 budget. The door had been opened to permit the marketing of charitable gifting arrangements to ordinary lower- and middle-income Canadians, and the tax shelter promoters did not hesitate to walk right through it. Within a few months of the 1997 budget, CVIAM was busy promoting its charitable giving plan to Canadian taxpayers.

---

[24] *Tolley v. R.*, 2004 D.T.C. 3360 (T.C.C.) at para 53.
Quinn v. R., 2004 D.T.C. 3328 (T.C.C.) at para 52.
Nash v. R., 2004 D.T.C. 3391 (T.C.C.) at para 53.

[25] *Nash*, *Quinn*, and *Tolley* were successful at trial. The Federal Court of Appeal overturned the trial judge's decisions on the basis of valuation. *R. v. Nash*, 2005 CAF 386, 2005 FCA 386.

34. *Klotz v. R.*,[26] is another art flip case. At paragraphs 55 and 56, Bowman A.C.J.T.C., as he then was, continued to accept that there could be a profitable gift. The dispute between the taxpayer and the Department of Justice related solely to valuation issues. *Klotz* was appealed to the FCA, 2005 D.T.C.5279, which also decided the matter based on valuation issues.

35. *McPherson v. R.*,[27] involved a leveraged donation scheme. At paragraphs 20 and 21, the court referred to *Burns* and the requirement that the donor must be impoverished in order for there to be a gift. The Tax Court of Canada released its decision on December 6, 2006. In my view, *McPherson* represents the point at which the courts backed away from the *Friedberg* concept of profitable gift in favour of the *Burns* and *Dutil* concept that there is a gift only if the donor is impoverished.

36. *Maréchaux v. R.*,[28] involved a leveraged donation. The taxpayer paid $100,000 to a charity. The taxpayer used $30,000 of his own money together with $70,000 of borrowed funds to pay the $100,000. In order to obtain the $70,000, the taxpayer borrowed $80,000 by way of an interest free loan. The additional $10,000 of borrowed funds was used to pay a fee of $1,200 to the lender, to provide the lender with an $8,000 security deposit and to pay the lender an $800 premium for an insurance policy. It was intended that the security deposit would be invested and would grow to $80,000 within 20 years. The insurance policy insured the risk that the $8,000 security deposit would not grow to $80,000 within 20 years. The taxpayer also had the right at any time after January 15, 2002 to apply (the "Put Option") the security deposit and the insurance policy as full payment of the loan. The Tax Court of Canada held that the interest free loan coupled with the Put Option constituted a benefit which vitiated the gift. The *Maréchaux* decision was upheld by the FCA in 2010.[29]

37. *Maréchaux* is interesting because the benefit was provided not by the charity but by a third party. *McBurney v. R.*,[30] refers to Australian jurisprudence which alludes to the provision of benefits by third parties. However, *Maréchaux* is the earliest Canadian case which I found which indicates that benefits provided by third parties may vitiate a gift.[31]

---

[26] 2004 D.T.C. 2236 (T.C.C.).
[27] 2007 D.T.C. 326 (T.C.C.).
[28] 2009 D.T.C. 1379 (T.C.C.).
[29] 2010 D.T.C. 5174.
[30] 85 D.T.C. 5433 (FCA).
[31] In Jamie Wilks, Jeffrey Fung, Mary-Ann Haney, and David Wentzell, "Current Cases," (2011), vol. 59, no. 1 *Canadian Tax Journal*, 67-83 the author states that *Maréchaux* is the first case to hold that benefits provided by third parties may vitiate a gift.

G. COMMUNICATIONS FROM THE CRA, DEPARTMENT OF JUSTICE ("DOJ") AND THORSTEINSSONS

38. In Section G of this statement, I shall refer to communications from the CRA, the DOJ and Thorsteinssons and to a CRA internal report on form T20. These documents indicate how the CRA, the DOJ and Thorsteinssons viewed the dispute between the Donors and the CRA. In particular, none of the CRA, the DOJ or Thorsteinssons initially analyzed the dispute through the prism of whether the Donors were impoverished by the "gifts". This issue did not emerge until 2007 when the law had changed as a result of the *McPherson* case.

39. The communications indicate that Thorsteinssons and the Donors agreed to settle the dispute on the basis offered by the DOJ only after Thorsteinssons became concerned about *McPherson* and after they became aware of the very low prices received by CAA for the timeshare units pursuant to the TRA.

40. The CRA set out its initial assessing position in proposal letters which it sent to the Donors and in the internal Auditor's Report T20. The Thorsteinssons' correspondence indicates that Thorsteinssons received a copy of the CRA proposal letter on or before March 15, 2004. I have reviewed a CRA proposal letter dated October 19, 2004 addressed to Jeffrey Lipson (the "Lipson Proposal Letter"). I have also reviewed an Auditor's Report T20 dated April 28, 2004 in respect of Israel Adud (the "Adud Auditor's Report").

41. The positions taken by the CRA in the Lipson Proposal Letter and the Adud Auditor's Report are identical. H. Kamalia of the CRA set out this position as follows:

> **1. Trust validity**
>
> For a trust to be valid it must have the "three certainties": certainty of intention, certainty of subject matter, and certainty of objects. Where the intention to create a trust and the subject matter of the trust are clear, as is the case here, one must be able to say with certainty who qualifies as a beneficiary and to what extent under the Trust. There is no certainty of objects in the Trust. The beneficiaries are not described with sufficient certainty to allow a determination as to whether an individual is, or is not, a beneficiary. Where there is insufficient certainty of objects the trust must fail and the property will revert to the settlor. As a result, in this case there can be no subsequent transfer of title from the Trust to CJGA. Alternatively, the Minister relies on the following grounds to maintain the amount of tax payable as assessed.

2. Validity of the gift:

Based on our review of the method by which you became a beneficiary of the Trust, you did not hold legal title to the unit prior to the transfer to the RCAAA. You submitted an application form, signed a post-dated deed of gift transferring the property to CJGA, plus a cheque sufficient to cover the charge/lien on the timeshare. We are of the opinion that you did not actually receive legal title prior to the donation, or that you passed legal title to the RCAAA.

Without legal title you had nothing to donate to the RCAA. Therefore, your donation is considered ineligible for the donation credit.

3. Purpose:

Alternatively, this trust is considered to be a purpose trust, which are normally not recognized in Canada unless they fall under one of the four heads of charity: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. Based on our analysis, the purpose of this trust does not fall under one of the four heads of charity.

4. Conditional gift:

Alternatively, the gifting of the timeshare week was not a true gift. The CJGA would not accept the gift unless a cash donation of $4,600 was given. Consequently, the gift of the timeshare is not a charitable donation for purposes of Section 118.1 as it was not given without conditions.

Also, the cash donation was directed, as part of a predetermined arrangement by the CJGA to pay a lien on the property donated by you and was not given willingly without restrictions to the charity.

5. Fair Market Value:

Alternatively based on information we have acquired, it is our contention that the reported fair market value of $13,500 CDN is significantly overstated, and is therefore considered unacceptable for purposes of Section 118.1 of the ITA.

42. It appears that Thorsteinssons was aware of the CRA positions several months prior to the date of the Lipson Proposal Letter. In an email to Farano dated April 19, 2004, Paul Gibney ("Gibney"), a senior tax litigator at Thorsteinssons, commented as follows regarding the CRA's position:

> It seems to me that most of the arguments raised by the CRA don't have much merit. It appears that the fifth argument they raise - the valuation issue - is their strongest argument. However, presumably the donors will get their cash plus

> something for the timeshare weeks if this is the argument they win on. Since they want to deny the donation in its entirety, they appear to be trying to focus on other elements of the transaction.

43. On June 24, 2005, Gibney wrote to Eric Chan of the CRA. In that letter, Gibney gave reasons in support of his position that with the exception of the fair market value issue none of the arguments given by the CRA in support of its position had merit.

44. The earliest reference to the need for a donor of a gift to be impoverished, which I am aware of, was in a CRA letter to Farano dated April 11, 2007 (the "April 11, 2007 CRA Letter"):

> No Animus Donandi — An essential element of a gift is that there be an intent to give. It must be clear that the donor intends to enrich the donee, by giving away property, and to grow poorer as a result of making the gift. It is our view, based on the aforementioned transactions, that the primary motivation of the donor was not to enrich the RCAAA, but through a series of transactions and a minimal monetary investment, to make a profit through the tax credits so obtained.
>
> In support of this position, we again note that the advertising literature primarily focuses on the 35-50% return on investment as a result of participation. Minimal involvement is required of participant "donors". "Donors" receive a distribution of Timeshare Weeks from a trust and transfer these to the RCAAA but neither use nor see the property. Minimal information is provided to prospective "donors" as to how these "donations" will benefit the RCAAA, or to the activities of the RCAAA that they are supporting. Transactions are pre-arranged and handled entirely by promoters, or other pre-arranged third parties. Participants in the Donation Program are merely expected to put forward a minimal investment to receive generous tax receipts in return. As such, it is our position that there is no intention to make a "gift" within the meaning assigned by section 118.1 of the Act. Participants in the Donation Program are primarily motivated by a desire to profit from a manipulation of the tax incentives available from donations rather than from a desire to enrich the participating RCAA
>
> **Transfers not gifts —** In addition, we are of the opinion that the transactions themselves lack the necessary elements to be considered gifts at law. In order to claim a tax credit for a donation there must be a complete gift of the property to a qualified donee. Each of several elements must be found in order for a donation to qualify as a gift for income tax purposes. Generally a gift is made if all three of the conditions listed below are satisfied:
>
> - Some property is transferred by a donor to a registered charity or other qualified donee;
> - The transfer is voluntary; and

- The transfer is made without expectation of return. No benefit of any kind may be returned to the donor or to anyone designated by the donor, except where the benefit is of nominal value.

> You received consideration for your donation in the form of a benefit that was linked to and flowed from certain predetermined conditions. You received the benefit of becoming a Class A beneficiary and having Timeshare Week(s) distributed to you, without cost from the Trust. When you applied to become a beneficiary of the Trust, you signed a post-dated Deed of Gift agreeing to donate the Timeshare Week(s) to the RCAAA. In addition, you made a Cash Payment to the RCAAA and your entitlement to receiving the Timeshare Week(s) from the Trust was linked to the amount of the Cash Payment. It is our position that the Timeshare Week(s) was distributed to you in consideration for the Cash Payment and agreeing to donate the Timeshare Week(s). Consequently, both the transfer of Timeshare Week(s) and Cash Payment are not valid gifts per section 118.1 of the Act.

45. The April 11, 2007 CRA Letter also referred to valuation issues and to the TRA.

46. In a letter to Farano dated November 20, 2007, Thorsteinssons indicated that the impoverishment issue had become clear as a result of the examinations for discovery and referred to a shift in the attitude of the Tax Court:

> As a result of the examinations for discovery, we now have a clearer idea of the CRA's case. Stated simply, its case is that the contribution of cash and the timeshare units to the "registered Canadian amateur athletic association" ("RCAAA") was not a donation at law because it was one step in a preordained scheme and was motivated solely by self-interest and thus not a true gift or donation. On this basis, the DOJ will argue in court that there should be no tax credit — not even for the cash portion. The DOJ's two alternative positions are that the donors did not have legal title to the timeshare units and that the value of the units (as encumbered by the lien) is zero. In either of these alternatives, the tax relief would be based solely on the cash component of the donation.
>
> When you made your donation to the RCAAA, the state of the law was such that, the DOJ's primary theory that there should be no relief even for the cash component would have been considered far-fetched. Even at the time the Tax Court appeals were ommenced, we viewed it as very unlikely that such an argument would be successful.
>
> While we remain doubtful that the DOJ's argument would be accepted by a court, the DOJ is clearly emboldened by the hostile stance that the Tax Court has taken toward all "retail" tax programs. Since 2004, not one publicly marketed tax-motivated transaction subject to judicial scrutiny has been able to deliver the tax benefits claimed by the participants. The courts have used a

> variety of approaches to deny the tax benefits but have always found a way to rule against the taxpayers. When you made your decision to participate in the Program, this line of cases did not exist and many tax practitioners are surprised that the courts have strained so vigorously to deny the tax benefits. Nevertheless, the reality is that you are now facing a hostile judicial environment.
>
> A current case-in-point is the recent Tax Court decision in McPherson v. The Queen, 2006 TCC 648. In that case, the Crown succeeded with the argument that the entire donation should be disregarded because it lacked donative intent. The taxpayers received no tax relief, not even for the cash portion. While the facts of the McPherson case were considerably more offensive to the Court than the timeshare Program and the decision of the Court was poorly reasoned, it does demonstrate that the DOJ's primary theory may find a receptive audience before some judges of the Court. On that basis, the DOJ's primary theory cannot be dismissed entirely.

47. The communications do not refer to the need for the donor to be impoverished for there to be a gift, until the April 11, 2007 CRA Letter. It appears that none of the CRA, DOJ or Thorsteinssons saw the need for the donor to be impoverished as an issue until several years after the Farano Commentary was given on December 22, 2000.

H. PUBLISHED TAX LITERATURE

48. The published tax literature is one of the Indicia of the Standard of Care of a tax specialist lawyer on December 22, 2000.

49. David Stevens delivered a comprehensive paper on charity taxation at the 2001 Conference of the Canadian Tax Foundation.[32] In that paper, Mr. Stevens referred to *Friedberg* as authority for the proposition that there can be a profitable gift.[33]

50. The kind of arrangement described in the CB Opinion is referred to as an existing tax shelter on November 20, 2003 in a short paper written by Graham Turner.[34] Mr. Turner did not refer to the risk of attack on the grounds that the donor must be impoverished in order for there to be a gift.

---

[32] David P. Stevens, "Update on Charity Taxation, "*Report of Proceedings of Fifty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002) 28:1-41, see also - Patrick J. Boyle, "Charitable Gifts: An Update," *Report of Proceedings of Fifty-Sixth Tax Conference*, 2004 Conference Report (Toronto: Canadian Tax Foundation, 2005), 7:1-36.

[33] *Supra* at page 28:18.

[34] Graham Turner, "Tax Shelters-Past Present and Future", CCH Tax Topics, Issue 1654, November 20, 2003.

I. SUMMARY

51. On December 22, 2000, *Friedberg* was the leading tax case in relation to donations to a charity. *Friedberg* indicated that there could be a profitable gift. The consensus was that *Friedberg* overruled *Burns* and *Dutil* which had held that a donor must be impoverished in order for there to be a gift.

52. On November 3, 2000, the FCA released its decisions in *Langlois*, *Duguay* and *Coté*, in which it held that it was possible to have a profitable gift.

53. Much of the litigation in the late 1990's related to buy low, donate high schemes. Cases were often determined on the basis of valuations.

54. The attitude of the Tax Court to tax shelters began to change around 2004. In Thorsteinssons letter of November 20, 2007 to its clients, Thorsteinssons referred to the change in attitude of the Tax Court which took place in 2004.

55. The Tax Court did not firmly establish that a donor could make a gift for tax purposes only if he were impoverished until it decided *McPherson* in 2006.

56. The courts did not firmly establish that benefits received from a third party could taint a gift until *Marechaux* was decided in 2009.

57. At least one tax litigator, Clifford Rand, continued to make submissions in court that there could be profitable gifts until at least 2004.

58. The DOJ, CRA and Thorsteinssons did not look at the tax dispute between some of the Donors and the CRA through the prism of whether there could be a profitable gift until 2007.

59. The tax literature recognized the concept of a profitable gift for at least one year after Farano gave the Farano Commentary.

60. For the reasons set out above, I am of the view that on December 22, 2000 a competent tax specialist lawyer would have accepted that there could be a profitable gift.

PART III: WOULD LIKELIHOOD OF BULK SALES EFFECT THE LEGAL OPINIONS ON DECEMBER 22, 2000?

61. In the CB Opinion, CB states that CB are not valuators. CB’s discussion of valuation is limited to a discussion of the comments made by the courts in reported tax cases. Similarly, Farano is not a valuator, Krishna is not a valuator,

and I am not a valuator. My analysis is limited to the comments which a tax specialist lawyer could have made on December 22, 2000 regarding valuation.

62. The CB Opinion states the following about the comments made by the courts in reported tax cases:

> The valuation of any Timeshare Weeks to be donated by the Class A Beneficiaries will be a very important factor in determining whether the donations are accepted by the CCRA at the amount receipted by the RCAAA. A valuation is particularly important in the case of a donation, because there is generally an absence of hard bargaining between the donor and the donee. It is generally accepted that fair market value means "the highest price available estimated in terms of money which a willing seller may obtain for the property in an open and unrestricted market from a knowledgeable purchaser acting at arm's length".
>
> The CCRA has recently challenged certain gifts-in-kind to charities on the basis of inadequate valuations. According to the CCRA, the determination of the fair market value of a gift-in-kind must be performed by a person who is competent and qualified to evaluate the particular property being transferred. We have reviewed the two valuations of the Timeshare Weeks that have been performed for you on behalf of the RCAAAs by accredited appraisers familiar with the timeshare market. Where the valuation is undertaken by accredited and experienced valuators familiar with the nature of timeshare property and is supported by contemporaneous transactions in the timeshare market, the valuation should be accepted by a court as determinative. However, a court is not bound by the valuations proposed by either the individual or the CCRA, and there can be no assurance that the valuation will be determinative. Although not free from doubt, we believe that the CCRA will not take the position that the fair market value of the Timeshare Weeks is reduced by the commission that may have to be paid by the RCAAA in the course of disposing of the Timeshare Weeks. We base our opinion on the fact that the value of the donated Timeshare Weeks is dependent on what a third party would agree to pay at the time of donation, and not on what the donee would subsequently receive as proceeds net of commission. (See Dailley Recreational Services Limited eta v. M.N.R., 85 DTC 134 (TCC)).
>
> The fair market value of the Timeshare Weeks at the time of donation is required in order to determine the amount of the donation credit and capital gain, if any. Accordingly, updated, independent appraisals at the time of donation of any of the Timeshare Weeks should be obtained by the RCAAA for a gift by any individual who wishes to donate. We remind you that we are not valuators and cannot provide any view as to the fair market value of the Timeshare Weeks. The foregoing comments outline the factors which the reported tax cases indicate are relevant to

ensure that the valuations used for any donation are defensible.

(emphasis added)

63. The Farano Commentary says the following about valuation:

> The Opinion discusses valuation and the critical importance that valuation has in the context of CCRA's challenge to gifts-in-kind to charities on the basis of inadequate valuation. The Opinion concludes ....
>
> > "Although not free from doubt, we believe that CCRA will not take the position that the fair market value of the Timeshare Weeks is reduced by the commission that may have to be paid by the RCAAA in the course of disposing of the Timeshare Weeks. We base our opinion on the fact that the value of the donated Timeshare Weeks is dependent on what a third party would agree to pay at the time of donation, and not on what the donee would subsequently receive as proceeds net of commission.... Accordingly, updated independent appraisals at the time of donation of any of the Timeshare Weeks should be obtained by the RCAAA for a gift by any individual who wishes to donate".

64. Krishna did not make any comments regarding valuation issues in the Krishna Opinions.

65. The valuation issue concerns the fair market values of the Timeshare Weeks when they were donated by the Class A Beneficiaries of the Trust to the RCAAAs. In particular, would the probability that the RCAAAs would likely receive USD $1,000 (less CAA's fees) when disposing of a Timeshare Week be a significant factor, as a matter of law, when determining the fair market value of a Timeshare Week when it was donated to the RCAAAs.

66. Law firms give different degrees of comfort when giving legal opinions on tax shelters. A legal opinion that the courts would decide an issue a certain way (a "Would Opinion") provides a high degree of comfort. A legal opinion that the courts should decide an issue a certain way (a "Should Opinion") provides a degree of comfort which is high but is not as high as a Would Opinion.

67. CB gave neither a Would Opinion nor a Should Opinion. CB's opinion began with "Although not free from doubt, we believe that the CCRA will not take the position that." This indicates that CB's degree of comfort is in excess of "on the balance of probabilities." However, CB qualifies its opinion with the words "although not free from doubt." The reader of the opinion should understand that there is a risk, which is not negligible, that the CCRA would pay attention to what happens when the RCAAAs dispose of the Timeshare Weeks.

68. CB's opinion refers to whether "the fair market value of the Timeshare Weeks is reduced by the commission that may have to be paid by the RCAAA in the course of disposing of the Timeshare Weeks." A reader of the opinion, who is not familiar with resales of timeshare units, might understand that the commission referred to is the 5% to 6% commission charged by real estate brokers in 2000 with respect to sales of Canadian real estate. In giving its opinion, CB relies upon *Dailley Recreated Services Limited et al. v. M.N.R.*, 85 DTC 134 (TCC). In that decision, there was a transfer of real estate between two persons who did not deal at arm's length. Where there is a transfer between two parties who do not deal at arm's length, the Act contains a provision which deems the transferor to dispose of the property for its fair market value. In *Dailley*, the issue was whether notional real estate commission of 6% would reduce the fair market value. The Tax Court of Canada held that the 6% notional real estate commission would not reduce the fair market value. One may question the reliance by CB on *Dailley* given the differences between the facts of that case and the facts relating to Athletic Trust of Canada.

69. There was very little jurisprudence available on December 22, 2000 that discussed situations where a charity resold property donated to it.

70. The charity resold artwork in the Federal Court of Appeal trilogy of *Langlois*[35], *Duguay*[36], and *Coté*.[37] In the trilogy, the charities received between 4% and 10% of the proceeds of the artwork. However, the FCA did not take this information into account when determining the fair market value of the artwork when it was donated to the charity.[38] In *Paradis v. R.,* [1997] 2 CTC 2257 (TCC), the art flips were co-ordinated by the same promoter as in the FCA trilogy. The charities recovered about 10% of the sale proceeds. The court focused on independent sales to establish the fair market value of the artwork. The court did not focus on what the charity was left in the end.

71. In *Consolidated Truck Linen Ltd v. M.N.R.,* 68 DTC 399 (Tax Appeal Board), a yacht was donated to the University of Toronto. The donor's original intention was that the yacht be used by the university for research. Ultimately that did not happen. When the university was unable to sell the yacht, it sold off various parts of the yacht. The university received only a very small fraction of the appraised value of the yacht. The tax authorities reassessed the donor on the basis that the fair market value of the yacht was equal to what the university received for the parts. The Tax Appeal Board upheld the donor's appeal.

---

[35] *Supra* note 15.
[36] *Supra* note 16.
[37] *Supra* note 16.
[38] In *Plante,* [1999] 2 CTC 2631 (TCC) there was likely a resale of donated artwork. However, there was no discussion regarding the amount the charity received on resale. In *Décarie v. R.,* [1992] 2 CTC 2054 (TCC), there was likely a resale. However, the case was decided on other grounds.

72. I have not been able to locate any decision prior to December 2000[39] in which the court has used the amount received by a charity on disposition of a donated property for the purpose of determining the fair market value of the property at the time the donor donates it to the charity. However, as the courts, which chose not the take the charity's proceeds of disposition into account, did not explain their reasoning, it is instructive to examine first principles to determine whether they support the decisions made by the courts.

73. In my view, in December 2000, a reasonably competent tax specialist lawyer, who chose to examine first principles, would consider the definition given by the courts to "fair market value" and would also consider the warning given by Bowman, J. in *Aikman,* 2000 DTC 1874 (TCC) which warning is referred to in paragraph 75 of this statement.

74. The judicial definition of fair market value which is frequently cited by the courts is that of Chattanach, J. in *Henderson Estate and Bank of New York v. M.N.R.,* 73 DTC 5471 at paragraph 21:

> The statute does not define the expression "fair market value", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand. These definitions are equally applicable to "fair market value" and "market value" and it is doubtful if the use of the word "fair" adds anything to the words "market value".
>
> (emphasis added)

75. In *Aikman*, Bowman, J. cites the *Henderson* definition of fair market value at paragraph 69 of the decision. However, at paragraph 10 of the decision, Bowman, J. gives the following warning:

---

[39] I have not search for decisions made after December 2000.

> 10 A second point that should be emphasized is that a taxpayer's motive in acquiring an object of cultural property with the intention of donating it to a specified institution is irrelevant. If a taxpayer is successful in obtaining such an object for a price that is less than its fair market value with the intention of obtaining a tax advantage by making a charitable gift this is perfectly acceptable. (See: *Friedberg v. R.* (1991), 92 D.T.C. 6031 (Fed. C.A.) aff'd on a different issue (1993), 93 D.T.C. 5507 (S.C.C.); *Zelinski v. R.* (1999), 2000 D.T.C. 6001 (Fed. C.A.)). The intent or expectation of obtaining a tax advantage does not vitiate the charitable gift. Nonetheless an appellant in such circumstances runs a risk that the Board or the court may conclude that the best evidence of fair market value is the price at which the object was bought.

76. The donation of a Timeshare Week to an RCAAA and the disposal by the RCAAA of the Timeshare Week are two separate transactions. The relevant question is what is the fair market value of the Timeshare Week at the time it is donated to the RCAAA. The net proceeds received by the RCAAA is relevant only to the extent that is valuable as evidence of the fair market value of the Timeshare Week at the time it is donated to the RCAAA. In my view, the disposition of a Timeshare Week by an RCAAA is valuable as evidence only if that disposition itself is a sale of the kind described in *Henderson.*

77. When the *Henderson* definition of fair market value is considered, it appears to indicate that the amount of proceeds received by the RCAAAs for the Timeshare Weeks is not valuable evidence of the fair market value of the Timeshare Weeks when they were donated to the RCAAAs:

(i) Paragraph (5) of the Pooling Agreement[40] requires the RCAAAs to transfer all of the Donated Timeshare Weeks to CAA for marketing. Pursuant to the TRA,[41] CAA has the option to require PVII to purchase blocks of at least 100 Donated Timeshare Weeks at a bulk purchase price of USD $1,000 for each Donated Timeshare Week. Accordingly, when disposing of the Timeshare Weeks, the RCAAAs do not meet the *Henderson* requirement that the vendor not be under any compulsion to sell.

(ii) *Henderson* requires that we inquire about the "highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question." This requires consideration of what is the normal market for the sale of Timeshare Weeks.[42] CB was provided

[40] Paragraph 12 of this statement refers to the Pooling Agreement.
[41] Paragraph 11 of this statement refers to the TRA.
[42] The courts examined what constituted the normal market for sales of artwork in *Dutli* (*supra* note 8) and

> with valuation opinions prepared by Michael Cane Consultants and by Hotel Consulting International. The valuation opinions indicated that there was an actual retail market for timeshare units, both in Nassau, where the units in question were located, and in the Caribbean in general. The valuation opinions considered actual sales of timeshare units including actual sales of units within the Sandyport Development, the actual development area where the Timeshare Weeks were located. The market considered in the valuation opinions appears to be the normal market.[43] The sales of Timeshare Weeks by the RCAAAs is not the normal market.

78. The CRA position, as set out in the Lipson Proposal Letter,[44] does refer to fair market value, as one of the grounds for denying tax relief for the donations. However, the CRA did not refer to the amounts received by the RCAAAs on the disposition of the Timeshare Weeks as part of its basis for challenging the fair market value.

79. Thorsteinssons did not raise concerns about the amount the RCAAAs received on the disposition of the Timeshare Weeks. When Gerald Prenick raised concerns about this in February 2008, Matthew Williams of Thornsteinssons replied to him as follows in an email on February 15, 2008:

> I trust that you received the information I e-mailed you yesterday. I received a copy of the letter you forwarded to the other advisers and just wanted to clarify your comment that we believe that the resales for $1,000 have made the appeal "extremely difficult if not impossible." As we discussed yesterday, our main concern with this case is that the Courts are moving away from the proper method of determining fair market value. We think it would be wrong for the Courts to look at what the [sic] RCAAAs sold the units for since they aren't even in the business of selling timeshares. The test is supposed to be the value for the highest and best use; and one would expect a professional agent to be able to get more than the RCAAAs would. That being said, in light of recent decisions, it would be naïve for us to think that the Courts won't look at the bulk sales to support their strained analysis. It is not a helpful fact in the circumstances.

80. Based on the foregoing analysis, on December 22, 2000, a competent tax specialist lawyer could have agreed with the conclusion set out in the CB Opinion regarding valuation.[45]

---

in the FCA trilogy (*supra* notes 15, 16, and 17).

[43] The choice of a normal market is considered in the FCA trilogy.

[44] This is set out above in paragraph 41 of this statement.

[45] The conclusion is set out above in paragraph 62 of this statement.

PART IV: SHAM DOCTRINE

81. The decision of Lord DipLock in *Snook v. London + West Riding Investments*, [1967] 1 ALL ER 518 is often cited for the following definition of sham:

> I apprehend that, if [sham] has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations(if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities… that for the acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpected intentions of a "shammer" effect the rights of a party whom he deceived.

82. In theory, the CRA could have taken the position that what is really happening is that the CCA or PVII is paying an accommodation fee to the RCAAAs for issuing charitable receipts to the donors and that nothing was actually happening to the Timeshare Weeks. The CRA could then have attempted to use the sham doctrine to deny tax relief to the Donors.

83. The CRA has from time to time raised the sham argument in the art flip cases. However, the courts have declined to apply the sham argument to art flip cases. For example, the Federal Court of Appeal commented as follows at paragraph 160 of the *Langlois* decision:

> Even though I believe, as I will explain later in these reasons, that the appellant was somewhat negligent as regards his tax obligations, I do not consider the sham doctrine applicable here. The appellant genuinely intended to make gifts to charities and did in fact make those gifts, although in doing so he may have been negligent in using receipts based on inflated appraisals in order to obtain the deduction for charitable gifts.[46]

The *Langlois* decision is part of the FCA trilogy. The FCA made almost identical comments in the other two cases of the trilogy, *Duguay*[47] and *Coté*.[48] In view of the attitude displayed by the FCA in the trilogy, an December 22, 2000, the risk that the courts would apply the sham doctrine to the donation scheme was quite low.

---

[46] *Supra* note 15.
[47] *Supra* note 16.
[48] *Supra* note 17.

84. Thornsteinssons did not refer to the sham doctrine in the materials provided to me. The Krishna Opinions do not refer to the sham doctrine. The CB Opinion did not refer to the sham doctrine. In my view, Farano cannot be criticized for not commenting on the sham doctrine in the Farano Commentary.

DATED at Toronto the 27th day of October, 2020

Brian Nichols*
Goldman Sloan Nash & Haber LLP
1600-480 University Avenue
Toronto, ON M5G 1V2

* On behalf of Brian Nichols Professional Corporation

APPENDIX A

BACKGROUND

- University of Toronto, B.Sc. (Mathematics, Physics and Chemistry), 1967-71
- University of Toronto, LL.B., 1971-1974
- Year of call to the Bar: 1976
- Articling Student, Goodman & Goodman 1974-75
- Associate, Campbell, Godfrey & Lewtas 1976-1979
- Partner, Speigel Nichols Fox LLP 1979 to 2018
- Counsel, Goldman Sloan Nash & Haber LLP from 2019 to present

ARTICLES

Canadian Tax Foundation

(a) "Creditor Proofing and Family Law Issues", 1991 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 1991), 11: 1-68.

(b) "Update of Shareholder and Employee Benefits" and "Corporate Law Matters of Interest to the Practitioners", 1993 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 1993), 2A: 1-33 and 2B: 1-31.

(c) "Chants and Ritual Incantations – Rethinking the Reasonable Expectation of Profit Test", Report of the Proceedings of the 48th Tax Conference, 1996 Tax Conference (Toronto: Canadian Tax Foundation, 1997), 28: 1-48.

(d) "Income Splitting", 1997 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 1997), 2: 1-65.

(e) "Civil Penalties for Third Parties", 1999 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 1999), 1: -79.

(f) "Third Party Penalties", 2000 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 2000), 3: 1-59

(g) "GAAR and More", 2002 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 2002), 1: 1-42.

(h) "Current Tax Cases Part II" 2010 Ontario Tax Conference (Toronto: Canadian Tax Foundation 2010) 2B: 1-14.

Walters Kluwer Canada/CCH Canadian Limited

(a) "Beyond the Accountant's Fine" Tax Topics no, 1437 (Toronto CCH Canadian, September 23, 1999), 1-5 co-authored with David Louis.

(b) "Beyond the Accountant's Fine Part II :The Tax Law from Hell" Tax Topics no 1438 (Toronto: CCH Canadian Limited) co-authored with David Louis.

(c) "Civil Penalties for Tax Advisors – The Nightmare Continues" Tax Topics No. 1457 (Toronto: CCH Canadian, February 10, 2000), 1-3 co-authored with David Louis.

(d) "Wake Up Call: the CCRA's Views on the Civil Penalties – Part 1", Tax Topics 1491 co-authored with David Louis.

(e) "Estate Planning in the 21st Century" a series of articles co-authored with Michael Atlas and David Louis. Published in Tax Topics from 2002 to 2004.

(f) "Non Resident Beneficiaries, Pipelines, and Section 212.1", (Tax Topics: September 1, 2020) 2530:1-3 (co-authorized with Kelsey Horning).

Canadian Bar Association

"Current Income Tax Issues for Real Estate Lawyers", 1998 Institute of Continuing Legal Education.

Hume Publishing Limited

Special Contributor, "Compensation Strategies for the Canadian Executive", (Toronto: Hume Publishing Limited, 1981).

Carswell Thomson Professional Publishing

Editor of LEGALeeze newsletter, published ten times per year, dealing with current legal issues of interest to accountants (1996-1997).

Presentations

Canadian Institute of Chartered Accountants

(a) "Tax Smarts" course; presented Tax Smarts course (co-authored with Alan Vale) across Canada in 1986 and 1987.

(b) Lectured at various professional development CICA courses.

(c) Presentation on Rectification at CICA National Conference on Income Taxes.

Canada Revenue Agency

Toronto West CRA and the Tax Practitioners Group presentations to tax practitioners over many years including presentations relating to current cases between February 12, 2003 and May 28, 2008.

Canadian Bar Association

Presentation on Rectification in September 2011.

APPENDIX B

A. Vern Krishna's Expert Statement

(1) June 7, 2010 Report
(2) July 13, 2011 Report

B. Pleadings

(1) Statement of Claim dated April 15, 2009
(2) Third Party Claim dated April 15, 2011
(3) Statement of Defence dated September 1, 2011
(4) Fresh as Amended Statement of Claim amended on August 24, 2011
(5) Amended Statement of Defence dated August 19, 2011
(6) Reply to the Statement of Defence of the Defendant Cassels Brock & Blackwell LLP dated September 12, 2011
(7) Statement of Defence of Third Parties, Gardiner Roberts LLP and Estate of Ronald J. Farano, Deceased to the Main Action dated October 17, 2011
(8) Statement of Defence and Crossclaim of Third Parties Gardiner Roberts LLP and the Estate of Ronald J. Farano Deceased to the Third Party Claim dated October 11, 2011
(9) Statement of Defence of the Third Party, Mintz & Partners LLP, to the Main Action dated August 31, 2011
(10) Statement of Defence and Crossclaim of the Third Party, Mintz & Partners LLP, to the Third Party Claim dated August 31, 2011
(11) Third Party Defence of Prenick Langer LLP dated October 12, 2011

C. Legal Opinions

(1) Legal Opinion of Cassels Brock & Blackwell dated October 6, 2000
(2) Legal Opinion of Gardiner Roberts LLP dated December 22, 2000
(3) Legal Opinion of Cassels Brock & Blackwell dated May 18, 2001
(4) Legal Opinion of Cassels Brock & Blackwell dated May 13, 2002

D. Documents Relating to Timeshare

(1) Deed of Trust
(2) Deed of Gift of the Timeshare Weeks by the Settlor to the Trustee
(3) Sale Agreement between PVIL and the Settlor
(4) Promissory Note and Charge Against the Timeshare Weeks
(5) Beneficiary application to Trustee
(6) Deed of Gift of the Timeshare Weeks by a Class A Beneficiary to an RCAAA
(7) Marketing and Sales Agreement with PVIL
(8) Resolution of the Trustee distributing Timeshare Weeks to a Class A Beneficiary
(9) Conveyance of a Timeshare Week from the Trustee to a Class A Beneficiary

(10) Option to Purchase and Marketing Agreement
(11) Venture Edge Sales Literature dated November 3, 2000
(12) Beneficiary Guide
(13) Frequently Asked Questions
(14) Sandyport Rules & Regulations
(15) Hotel Consulting International Final Appraisal of Timeshare Units dated September 13, 2000
(16) Michael Cane Consultants Final Appraisal of Timeshare Units dated August 18, 2000
(17) Timeshare Pooling Agreement
(18) Due Diligence Book

E. Communications with the Canada Revenue Agency (the "CRA")

(1) CRA letter of December 4, 2002 to Atlantis Fiduciary Services
(2) CRA letter of December 5, 2002 to Canadian Athletic Advisors Ltd.
(3) CRA letter of October 24, 2003 to Rugby Canada
(4) CRA letter to Jeffrey Lipson dated October 19, 2004
(5) CRA letter to Farano dated December 13, 2004
(6) CRA letter to Farano dated April 11, 2007

F. CRA Internal Documents

(1) Auditor's Report T20

G. Tax Court Pleadings

(1) Victor Peters Notice of Appeal dated January 16, 2006.

H. Communications Involving Thorsteinssons

(1) Thorsteinssons letter to Lorn Kutner dated March 15, 2004
(2) Gibney email to Farano dated April 21, 2004
(3) Thorsteinssons letter to Farano dated April 4, 2004
(4) Thorsteinssons letter to Farano dated May 7, 2004
(5) Thorsteinssons letter to Farano dated May 13, 2004
(6) Thorsteinssons letter to Farano dated December 20, 2014
(7) Thorsteinssons letter to Eric Chan of CRA dated June 24, 2005
(8) Thorsteinssons letter to Farano dated June 28, 2005
(9) Thorsteinssons letter to Farano dated January 19, 2006
(10) Thorsteinssons letter to Farano dated May 15, 2006
(11) Emails between Farano and Colin Smith of Thorsteinssons dated July 10, 2006
(12) Thorsteinssons letter to Farano dated December 12, 2006
(13) Thorsteinssons letter to Farano dated November 20, 2007
(14) Mathew Williams email to various accountants dated January 9, 2008

(15) Farano email of January 24, 2008 forwarding Williams email of January 9, 2008
(16) Thorsteinssons letter to Farano dated January 30, 2008
(17) Prenick email of February 17, 2008 forwarding Mathew Williams email of February 15, 2008
(18) Prenick email of March 20, 2008 forwarding Mathew email of March 20, 2008 to various accountants
(19) Thorsteinssons letter dated March 20, 2008 to investors seeking instructions
(20) Thorsteinssons letter to CRA seeking taxpayer relief dated June 17, 2008
(21) Thorsteinssons letter to Farano dated June 23, 2008
(22) Thorsteinssons letter to Farano dated October 22, 2008
(23) Thorsteinssons letter to Farano dated June 14, 2010

I. Cases

Aikman v. R., 2000 D.T.C. 1874 (TCC)
Bassila v. R., 2004 D.T.C. 2253 (2253)
Burns v. M.N.R., 88 D.T.C. (FCTD)
Consolidated Truck Linen Ltd. v. M.N.R., 68 DTC 399 (Tax Appeal Board)
Coombs v. R., 2008 D.T.C. 4004 (TCC)
Coté v. R., 2000 D.T.C. 6615 (Fr) (FCA)
Dailley Recreated Services Limited et al. v. M.N.R., 85 D.T.C. 134 (T.C.C.)
Doubinin v. R., [2004] 3 C.T.C. 2297 (TCC)
Duguay v. R., [1999] 3 C.T.C. 2342 (TCC) affirmed [2002] 1 C.T.C. 8 (FCA)
Duguay v. R., [2002]1C.T.C.8 (FCA)
Dutil v. R., 95 D.T.C. 281 (TCC)
Francoeur v. R., [1993] 2 C.T.C. 2440 (TCC)
Friedberg v. R., 92 D.T.C. 6031 (FCA)
Gagnon v. Canada, Doc. 91-38 (IT) (T.C.C.)
Henderson Estate and Bank of New York v. M.N.R., 73 D.T.C. 5471
Klotz v. R., 2004 D.T.C. 2236 (TCC), affirmed 2005 D.T.C.5279 (FCA), leave to appeal denied 2006 CarswellNat 930 (SCC)
Langlois v. R., [1999] 3 C.T.C. 2589
Langlois v. R., 2000 CarswellNat 3241 (FCA)
Loewen v. R., 94 D.T.C. 6265 (FCA)
Maréchaux v. R., 2009 D.T.C. 1379 (T.C.C.)
McBurney v. R., 85 D.T.C. 5433 (FCA)
McPherson v. R., 2007 D.T.C. 326 (TCC)
Nash v. R., 2004 D.T.C. 3391 (T.C.C.)
Nova Corp. of Alberta v. R., [1997] 3 C.T.C. 291 (FCA)
Paradis v. R., [1997] 2 C.T.C. 2257 (T.C.C.)
Plante v. R., [1999] 2 C.T.C. 2631 (T.C.C.)
Quinn v. R., 2004 D.T.C. 3328 (T.C.C.)
R. c. Bouchard, 163 C.C.C. (3d) 86, 2002 Carswell Que 3899
Snook v. London and West Riding Investments, [1967] 1 ALL ER 518
Tite v. MNR., 86 D.T.C. 1788 (TCC)
Tolley v. R., 2004 D.T.C. 3360 (T.C.C.)
Whent v. R., 96 D.T.C. 1594 (TCC) affirmed 2000 D.T.C. 6001 (FCA)

Woolner v. R., 99 D.T.C. 5722 (FCA)

J. Tax Literature

David P. Stevens, "Update on Charity Taxation, "*Report of Proceedings of Fifty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002) 28:1-41.

Jamie Wilks, Jeffrey Fung, Mary-Ann Haney, and David Wentzell, "Current Cases," (2011), vol. 59, no. 1 *Canadian Tax Journal*, 67-83.

Rob DePetris, "Stopping Perceived Abusive Charitable Tax Schemes and Much More," *2004 Ontario Tax Conference*, (Toronto: Canadian Tax Foundation, 2004), 5B:1-17.

Jim Cruickshank, "Charities and Not-for-Profit Organizations: Selected Topics of Current Interest," *2010 Atlantic Provinces Tax Conference*, (Halifax: Canadian Tax Foundation, 2010), 8A:1-18.

Robert B. Hayhoe and Kate Campbell, "Charities Update," *Report of Proceedings of Fifty-Eighth Tax Conference*, 2006 Conference Report (Toronto: Canadian Tax Foundation, 2007), 31:1-18.

Adam Parachin, "Reforming the Meaning of "Charitable Gift": The Case for an Alternative to Split Receipting," (2009), vol. 57, no. 4 *Canadian Tax Journal*, 787-838.

Patrick J. Boyle, "Charitable Gifts: An Update," *Report of Proceedings of Fifty-Sixth Tax Conference*, 2004 Conference Report (Toronto: Canadian Tax Foundation, 2005), 7:1-36.

CRA Registered Charity Newsletter #29, Winter 2008

Graham Turner, "Tax Shelters-Past Present and Future", CCH Tax Topics, Issue 1654, November 20, 2003

This is Exhibit "P4" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Edward Heakes Law
300 Chartwell Road
Oakville, ON L6J 3Z9

Telephone: 416-948-8851 (Cell)
Email: edheakes399@gmail.com

November 19, 2020

Private and Confidential

Lenczner Slaght Royce Smith Griffin LLP
130 Adelaide Street West
Suite 2600
Toronto, Ontario M5H 3P5

Attention: Mr. Peter Griffin

Dear Sirs:

Re: Expert Report of Edward A. Heakes

I have been retained by you to provide my expert report with respect to the "Cassels Opinions" in connection with the "Proceeding", each as defined below.

The Cassels Opinions address tax consequences under the *Income Tax Act* (Canada) (the "**Act**") for individuals resident in Canada who made donations of cash and timeshare weeks ("**Timeshare Weeks**") related to two resorts (the "**Resorts**"), being the Sandyport Beaches Resort located in Nassau, The Bahamas and the Alexandra Resort located in the Turks and Caicos Islands. The donation arrangements are collectively referred to herein as the "**Timeshare Program**". The relevant donations occurred in the years 2000 to 2003, inclusive.

You have requested my opinion as to whether the applicable standard of care was met by Cassels, Brock & Blackwell LLP ("**Cassels**") in rendering the Cassels Opinions.

Expert Qualification

I graduated from the University of Western Ontario Law School in 1978 and was called to the Ontario Bar in 1980. Since 1981, I have specialized in the practice of income tax law. My

practice has been a general transactional practice which has included advising with respect to the Canadian income tax implications of a broad range of transactions, including mergers and acquisitions, financings and syndications. The parties to such transactions have included individuals, corporations, trusts and partnerships. In many cases, my role included the preparation and delivery of opinions to be made available to third party investors. In some cases, the opinions were included in public disclosure documents for a wide range of transactions, typically involving public corporations, including financing transactions, merger and acquisition transactions and corporate reorganizations. Typically such disclosure would include opinions regarding tax consequences to shareholders of, or lenders to, the public corporation in situations in which my firm was acting for the public corporation or for investment dealers (where such investment dealers were assisting the corporation with raising funds, or advising it in connection with a particular proposed transaction). In other cases, the opinions were delivered privately and then made available to potential investors and their professional advisors, typically on a confidential basis. A copy of my C.V. is attached hereto as Schedule "A".

Expert Acknowledgment

I acknowledge that it is my duty to provide opinion evidence in relation to this proceeding that is fair, objective, and non-partisan and that is related only to matters that are within my area of expertise. I also acknowledge that it is my duty to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Attached at Schedule "B" is an executed copy of my Form 53, Acknowledgement of Expert's Duty, with respect to this opinion.

Background Facts

Class action CV-09-376511-00CP (the "**Proceeding**") was commenced by Jeffery Lipson as Representative Plaintiff (the "**Plaintiff**") under the Class Proceedings Act, 1992, seeking damages from the Defendant, Cassels, on behalf of persons who participated as donors ("**Donors**") in the Timeshare Program in the years 2000, 2001, 2002 and 2003.

The Cassels Opinions were rendered based on the implementation of the Timeshare Program as described in the opinions themselves. In particular, as described in the Cassels Opinions, an Ontario special purpose trust (the "**Trust**") was established to administer a program of support for Canadian amateur athletics. The settlor of the Trust (the "**Settlor**") was Mr. Adrian Crosbie-Jones, a resident of The Bahamas. The capital (Class A) beneficiaries of the Trust were a class of individuals who had indicated a willingness to support Canadian amateur athletics. The income (Class B) beneficiary of the Trust was an Ontario corporation.

The Settlor acquired the Timeshare Weeks from one or more third parties for a purchase price equal to the appraised value of such Timeshare Weeks. The purchase price was payable by the Settlor partly in cash and partly by the issue by the Settlor of limited recourse vendor take-back charges. Recourse under each charge was limited to the corresponding Timeshare Weeks to which it related.

The Settlor then donated the Timeshare Weeks to the Trust, which acquired the Timeshare Weeks subject to the limited recourse charges. The Cassels Opinions assume that the Trustee would acquire valid ownership and title to the Timeshare Weeks prior to their distribution to the Donors.

The Trust identified the Donors as Class A beneficiaries of the Trust based on non-binding indications from the Donors that the Donors wished to benefit amateur sports in Canada. The Trust distributed Timeshare Weeks to the Donors. The Donors acquired the Timeshare Weeks subject to the security under the existing limited recourse charges. The distributions by the Trust to the Donors were made with no conditions attached; however it was expected that the Donors would in fact donate the Timeshare Weeks along with sufficient cash to retire the corresponding limited recourse charges on the Timeshare Weeks to one or more registered Canadian amateur athletic associations (each of which is referred to herein as an "**RCAAA Donee**").

In most but not all cases, the Donors made the expected donations ("**Donations**") and claimed a tax credit in respect of the cash donated and the appraised fair market value of the Timeshare Weeks that they had donated (net of the amount of the assumed charge). Separate receipts were issued to the Donors in respect of the cash Donations and the in kind Donations.

Canadian Athletic Advisors Ltd. ("**CAA**") entered into a marketing and sales agreement on behalf of the RCAAA Donees under which a marketing agent would sell the donated Timeshare Weeks on behalf of the RCAAA Donees in exchange for an agreed commission.

For each of 2000, 2001, 2002 and 2003, tax opinions (the "**Cassels Opinions**") were delivered by Cassels in respect of the Canadian income tax consequences under the Act to the Donors of participating in the Timeshare Program. The Cassels Opinions are respectively dated October 6, 2000, May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002, and April 8, 2003. The Cassels partner primarily responsible for the Cassels Opinions was Lorne H. Saltman ("**Saltman**"). James Parks ("**Parks**"), another partner of Cassels, was consulted extensively by Saltman in connection with the analysis and delivery of the Cassels Opinions. Saltman and Parks each specialized in providing Canadian income tax advice during the period in which the Cassels Opinions were prepared and issued.

The Cassels Opinions are addressed to CAA. With the exception of the first Cassels Opinion (dated October 6, 2000), the Cassels Opinions expressly state that they may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purposes only of the transactions contemplated by the Cassels Opinions.

The Cassels Opinions describe the proposed transactions and state that Cassels had reviewed drafts of certain listed implementing agreements. The Cassels Opinions assume that the transactions would be implemented using documents which were the same as those reviewed by Cassels. The listed agreements include the marketing and sales agreement entered into by CAA on behalf of the RCAAA Donees as discussed above.

The Cassels Opinions expressly assume that the Donors will acquire the requisite level of ownership in order to make a legally effective gift of the Timeshare Weeks. In particular, the Cassels Opinions state that Cassels did not envision any transfer problems arising from the leasehold nature of the Timeshare Weeks, as they understood that leasehold interests may be conveyed in the same manner as fee simple interests. The Cassels Opinions state that they were relying on an opinion of local counsel in this regard.

The Cassels Opinions discuss the valuations that had been obtained in regard to the Timeshare Weeks and state the circumstances in which a valuation should be accepted by a court as determinative. The Cassels Opinions expressly state that Cassels are not valuators and that they could not provide any view on the fair market value of the Timeshare Weeks.

The Cassels Opinions conclude, based on the review described therein, that it was unlikely that the Canada Customs and Revenue Agency (now the Canada Revenue Agency) could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credits claimed by, those Donors who received a distribution of the Timeshare Weeks and subsequently chose to make a "voluntary and complete" donation of some or all of their Timeshare Weeks to an RCAAA Donee.[1]

The Canada Revenue Agency (the "**CRA**") challenged the tax credits (in respect of both the cash donation and the donation of the Timeshare Weeks) claimed for the Donations by the Plaintiff (as well as other Donors) on a number of grounds, including that the Donations were not valid gifts at law and that the value of the donated property was overstated. The CRA did not raise the application of the general anti-avoidance rule under section 245 of the Act ("**GAAR**") as a possible basis to challenge the transactions.

---

[1] See the penultimate paragraph of the Cassels Opinions.

Following the challenge by the CRA, a test case (the "**Test Case**") involving two of the participants (other than the Plaintiff) in the 2000 Timeshare Program was brought before the Tax Court of Canada. Prior to trial, the Test Case was settled, on the basis that a tax credit would be allowed to the taxpayers in respect of the cash portion donation, but no tax credit would be allowed in respect of the donation of the Timeshare Weeks. Following the resolution of the Test Case, the Plaintiff's dispute with the CRA was settled on the same basis as the Test Case, such that the Plaintiff was allowed a credit only for his cash donation. Since the Plaintiff was ultimately allowed a deduction for the cash donation, this Report addresses only the portion of the Cassels Opinions that deals with whether a Donor would be entitled to a deduction in respect of the donation of Timeshare Weeks.

The Plaintiff alleges that Cassels owed a duty of care to the Plaintiff and that it breached the applicable standard of care in providing the Cassels Opinions.

Assumptions

In preparing this report, I have assumed that the Cassels Opinions were rendered based on the description of the Timeshare Program set out in those opinions, as well as the assumptions and limitations therein. Except as otherwise indicated, I have made the same assumptions and limitations as those set out in the Cassels Opinions. The assumptions and limitations include the following:

- the Cassels Opinions are directed to donors who are individuals who hold the Timeshare Weeks as capital property[2];
- the transactions described in Cassels Opinions will use the same documents as those listed in the Cassels Opinions and reviewed by Cassels[3];
- the Cassels Opinions are based on the (then) current provisions of the Act and Cassels' understanding of current administrative practices of the CRA[4];
- the Cassels Opinions take into account proposed amendments publicly announced by Minister of Finance[5]; and
- no tax ruling has been applied for from the CRA to confirm the tax consequences[6].

---

[2] See the second paragraph of each of the Cassels Opinions.

[3] See for example the last paragraph under Heading 1 (Facts) of the October 6, 2000 Cassels Opinion, page 5.

[4] See for example the first paragraph under heading 9 (General Comments) of the October 6, 2000 Cassels Opinion, page 13.

[5] See reference in footnote 4.

[6] See reference in footnote 4.

In my view, these are typical of assumptions and limitations made in tax opinions of this nature.

I have made the following additional assumptions:

1. The Representative Plaintiff was successful from a business and financial perspective in that:

   (i) Lipson was active, experienced and successful as a businessman[7];
   (ii) Lipson was encouraged to and did review the Timeshare Program with his own advisors, including principally Mr. Morris Langer of the accounting firm Prenick Langer, which had obtained a written tax opinion on the Timeshare Program from Mr. Ronald Farano. Mr. Farano was a tax lawyer engaged by the Prenick Langer firm to review the Cassels Opinion;[8] and,
   (iii) Lipson invested cash of approximately $1.6 million in the Timeshare Program over the years 2000-2003.

2. The Cassels Opinions were addressed to CAA. I understand that Cassels took instructions on behalf of CAA regarding the Cassels Opinions from both Mr. Stephen Elliott and Mr. Steven Mintz and that each of these individuals had a detailed understanding of the various tax issues for Donors. Therefore CAA as addressee of the Cassels Opinions was also a sophisticated party, fully aware of Cassels' role in relation to the Timeshare Program.

3. Neither Saltman nor Parks was aware of any proposed challenge by the CRA of any tax credits claimed by any Donor in relation to the Timeshare Program on or prior to the issue of any of the Cassels Opinions, with the exception of one denial of tax credits based on the narrow point of whether the Timeshare Weeks were a "right to use" and therefore

---

[7] See Examination of Lipson, May 6, 2020, Questions 31-33 and 42-53. Cross-Examination of Lipson, October 2011, Questions 33-35.

[8] See para. 11 of the letter dated August 31, 2004 from Lipson to CRA (J. Deguillo), stating that Lipson had received verbal tax advice from Mr. Prenick, and a copy of a written tax opinion from Mr. Farano regarding the potential tax benefits of making a donation under the Timeshare Program. I note that Mr. Lipson's evidence was inconsistent on this point. See Examination of Lipson May 6, 2020, Questions 62-74, 102-116, 124-130, 149-150, 369-378, 400-402 , and Examination of Lipson August 17, 2015, Question 172, Cross-Examination of Lipson October 12, 2011, Questions 42-51, 68-93, 289-290.

not capable of being the subject of a gift. Saltman concluded that this denial was ill-founded.[9]

4. The Timeshare Program was implemented as described in the Cassels Opinions.

Materials Reviewed

I have reviewed copies of the documents listed in Schedule "C" to this report. This review has included the examinations of Lorne Saltman, Vern Krishna, and Jeffrey Lipson, and the written answers to their respective undertakings in connection with such examinations, with the exception of the Plaintiff's answers to undertakings to his examination on May 6, 2020. I have also reviewed the answers to written examination for discovery of Harley Mintz, and Gardiner Roberts LLP and Ronald Farano. At the time of the issue of this letter, the undertakings of the Plaintiff pursuant to his examination were still outstanding. This letter is therefore qualified in that it does not take into account any further information that may be provided by or on behalf of the Plaintiff pursuant to such undertakings.

I have not discussed this matter or this report with Saltman, Parks or any of the parties to the Proceeding and I have assumed the authenticity of all documents reviewed by me.

Scope of Review

I have been asked to review the Cassels Opinions and consider whether, as at the time that they were delivered, the Cassels Opinions met the applicable standard of care for a tax opinion delivered in such circumstances.

I have prepared this report on the basis that the applicable standard of care in issuing the Cassels Opinions is that Cassels should identify and consider the appropriate issues, statutory provisions and jurisprudence, and the Cassels Opinions should reflect the application of an appropriate degree of professional care, skill and judgment that would be expected to be exercised by a competent tax lawyer in the circumstances. It is important to emphasize that the standard of care is not whether the Cassels Opinions ultimately prove to be correct as later determined by the Courts or by a settlement. Accordingly, I have borne in mind the need to assess the Cassels Opinions by reference to the jurisprudence that was available as at the time the Cassels Opinions were issued.

---

[9] See Examination of Saltman November 5, 2015, Question 2934 and Answer 25 to Saltman Undertakings.

I understand that in cases where a legal opinion is found to include an error, in order to show that the standard of care was not met by the solicitor, the plaintiff must also show that the error was "one that a reasonably competent solicitor in comparable circumstances would not have made."[10]

I understand that the Defendant denies that any duty of care was owed to the Plaintiff by Cassels. The issue of whether or not such a duty of care was owed to the Plaintiff is outside the scope of my Report.

Analysis and Opinion

Based on my review of Statement of Claim, the Cassels Opinions and the other documents as described above, the main issues in relation to which the Cassels Opinions have been called into question by the Plaintiff are:

- whether the full amount of the Donations constituted gifts at law;
- whether the tax risks to an individual resident in Canada of becoming a Donor were adequately disclosed in the Cassels Opinions;
- whether the issue of valuation was appropriately dealt with in the Cassels Opinion;
- whether in providing the Cassels Opinions, Cassels acted inappropriately given its involvement in acting for CAA and other parties in connection with the design and implementation of the Timeshare Program and given that the Cassels Opinion dealt with tax consequences to the Donors, rather than the client or clients of Cassels.

As discussed in more detail below, in my opinion, the Cassels Opinions identified and considered the appropriate and material Canadian income tax issues, statutory provisions and available jurisprudence that were relevant to Donors who were individuals resident in Canada and the Cassels Opinions reflected an appropriate degree of professional care, skill and judgement on the part of Cassels.

The Cassels Opinions also considered the possible application of the general anti-avoidance rule in section 245 of the Act ("**GAAR**"). As the CRA did not invoke GARR in its challenge of the Plaintiff, this Report does not address the analysis in the Cassels Opinions of the potential application of GAAR.

---

[10] Wilfrid Estey, *Legal Opinions in Commercial Transactions*, 3rd edition, LexisNexis, p. 674.

Gifts at law

It is an accepted principle of law that for a transfer of value by a donor to a donee to be considered a gift at law, the transfer must be made voluntarily, and without consideration. The issue of whether the Donations constituted gifts at law depends on whether the Donors would be considered to have received a benefit or other consideration that would be inconsistent with the making of a gift at law. In particular, the Cassels Opinions note that one of the requirements for a valid gift is that the transfer of property be made "without expectation of return" and discuss this requirement in light of the arrangements made in connection with the Timeshare Program. In this regard the main issue was whether the distribution by the Trust of the Timeshare Weeks would invalidate the subsequent donation by the Donors.

The Cassels Opinions identify various differences between the facts surrounding the distribution of the Timeshare Weeks to the Donors, as compared with other situations in which the Courts had previously found a purported gift to be invalid on the basis that it was linked to a benefit received by the donor:

- The distribution to the Donors by the Trust was to occur before rather than after the making of the Donations[11];
- The Donors would be under no obligation or subject to any subtle pressures to make the Donations as a result of receiving the distribution, notwithstanding that there was an expectation that most Donors would in fact decide to make the Donations (The Cassels Opinions expressly state[12] that if property is acquired on condition that it be donated, the subsequent donation of the property may not be considered to be a gift.);
- The Donors retained no material benefit or advantage (other than the entitlement to the associated tax credit) as a result of making the Donations.

The Cassels Opinions point out that the Trustee "expects" that most of the Donors would donate the Timeshare Weeks received by them and states that if all or substantially all of the Donors decided to gift the Timeshare Weeks to the RCAAA Donee, the CRA "may be more inclined to challenge the arrangement", although the Cassels Opinions later refer to the

---

[11] Subsequent case law (unavailable to Cassels at the relevant time) has found that where a benefit is received, the timing of the receipt is not necessarily determinative if there is sufficient linkage between the benefit and the donation. See *Marechaux v The Queen,* [2009] DTC 1379 (TCC); [2010] DTC 5174 (FCA); leave denied 2011 Carswell Nat 1912 (SCC), in which the taxpayer received a 20-year interest-free loan and then made a charitable donation that was funded in part out of the loan proceeds. The Court found that there was no valid gift, on the basis that the interest-free loan was a benefit linked to the donation.

[12] For example, see the third full paragraph on page 7 of the October 6, 2000 Cassels Opinion.

"unlikely" success of such a challenge. However the Cassels Opinions also note that there was neither an obligation on the part of the Donors to make such a donation nor an understanding that a donation would in fact be made. The Cassels Opinions implicitly conclude that, had they existed, these would have been more relevant than the existence of an expectation by the Trustee.[13]

The Cassels Opinions note that the RCAAA Trust would not accept the donation of the Timeshare Weeks unless there was a concurrent donation of cash sufficient to retire the associated charge on the donated Timeshare Weeks. There was no requirement that the Donee use the cash for this purpose. The Cassels Opinions implicitly conclude that the existence of this restriction was not relevant to the question of whether the Donations of the Timeshare Weeks were gifts. In my opinion, this was a reasonable conclusion for Cassels to reach based on the case law that was available at the time that the Cassels Opinions were issued.

The Cassels Opinions also address the issue of whether the benefit to the Donors that arose from the tax credit should be taken into account in determining whether there was a gift. In this regard the Cassels Opinions expressly assume that the credit in relation to the donation of the Timeshare Weeks would be determined based on the fair market valuation of the Timeshare Weeks by independent professional appraisers (net of the amount of the assumed charges). The Cassels Opinions conclude that the tax credit should not be taken into account in determining whether there was a gift, and refer to the *Friedberg*[14] case as supporting this conclusion.

Friedberg is, and was at the various times that the Cassels Opinions were delivered, generally considered to be a leading case in this area. In *Friedberg*, the taxpayer donated to a museum two collections of textiles, referred to as the Abemayor collection (donated in 1978) and the Wilkinson collection (donated in 1979). Because the collections qualified as a particular type of cultural property, in addition to the potential tax credit for a valid gift, the taxpayer was not subject to capital gains tax on any gain otherwise realized on the charitable donation of these collections. The Tax Court found that the donations were gifts entitling the donor to such tax treatment. On appeal by the CRA, the Federal Court of Appeal found that one of the collections (the Abemayor collection) had not been donated by the taxpayer because the collection had been conveyed directly by the former owner to the museum, without ever having been owned by the taxpayer; however, the other collection (the Wilkinson collection) was considered to have been owned by the taxpayer and its conveyance by the taxpayer to the museum was found to be a

---

[13] See, for example, the discussion on pages 6 and 7 of the October 6, 2000 Cassels Opinion.

[14] *Friedberg v R*, (1991), 92 DTC 6031 (FCA).

valid gift by the taxpayer. The decision of the Federal Court of Appeal did not suggest that the nature of the donations as gifts was affected by the rather generous tax benefits provided for in the tax legislation. The Court also rejected the CRA's argument that, in light of the short holding period by the taxpayer, the taxpayer's purchase price of the collections was determinative of their fair market value at the time of the donation.

Further, the Court was not concerned with the taxpayer's motive for entering into the transaction and in fact made it quite clear that the fact that the tax credits might exceed the cost of the property did not affect the validity of the gift.

In my opinion, there was a reasonable analogy between the situation in *Friedberg* and the situation addressed by the Cassels Opinions insofar as the relevance of the tax credit is concerned. Therefore, in my opinion, based on the then available Canadian jurisprudence, the Cassels Opinions correctly concluded that the existence of the anticipated tax credit, in and of itself, was not relevant to the issue of whether the Donations were gifts at law.[15]

(i) Summary of my conclusions on "gift" opinion

The Cassels Opinions correctly identified the substantive issue regarding whether the donation of the Timeshare Weeks was a valid gift in law. Having done so, in my opinion, the Cassels Opinions carefully considered and analyzed the relevant issues and the leading jurisprudence, and reached a reasoned conclusion that reflected the degree of professional skill and judgement that would be expected of a reasonably competent tax lawyer in comparable circumstances. In my opinion, this conclusion was consistent with the weight of Canadian jurisprudence that was available at the time. Consequently, in my opinion, the Cassels Opinions met the standard of a competent solicitor on this issue, and were within a reasonable range of opinions that might have been given at the time.

(ii) My comments regarding the discussion of "Gift" in the opinion of Vern Krishna dated July 13, 2011 (the "**Krishna Opinion**")

The Krishna Opinion discusses the concept of a gift at law at some length. According to paragraph 42 of the Krishna Opinion, in order to have a valid gift, the donor must not receive any benefit or consideration, and the donor must be impoverished as a result of making the gift.

---

[15] This issue is discussed below further in connection with the Krishna Opinion, which takes the position that the existence of an "inflated" credit can negate the validity of a gift in certain situations.

The Krishna Opinion correctly notes that the expected tax credit is normally not sufficient to invalidate a gift but suggests, at paragraph 52, that if the taxpayer's sole motivation is to achieve a tax credit, this may invalidate the purported gift. In support of this view, paragraph 54 of the Krishna Opinion refers to the *Coombs*[16]decision. In my opinion, this decision is of little assistance, because it involves fraudulently issued receipts and there is no suggestion of fraud in the current situation. Furthermore, the *Coombs* decision was released well after the Cassels Opinions were delivered.

Paragraphs 55 through 60 of the Krishna Opinion discuss a number of cases dealing with the so-called ABLE Program. This program was conducted over several years and appears to have involved a number of slightly different variations. A number of the variations appear to have involved a subsequent benefit expected to be received by the taxpayer after making the donation. These were, not surprisingly, held to invalidate the gift despite the taxpayer signing self-serving documentation that there was no expectation of receiving a benefit in return for the donation. In another variation, the taxpayers were advised that they could claim a credit on the basis not only of the gift that they actually made themselves, but a further gift that was to have been made by a third party if the taxpayers made their gift. Not only was this advice wrong, but it turned out that the third party never made the conditional gift. In the end, the taxpayer was found not to have the requisite donative intent for his own donation. In my opinion, the situations in the ABLE line of cases are quite removed from the present situation and are of no assistance. In addition, these decisions were released after the Cassels Opinions were delivered and were therefore unavailable to Cassels at the relevant time.[17]

More recently, some courts have in fact stated that the size of a tax credit in relation to a donor's out of pocket costs may be taken into account in determining whether there is a valid gift. For example, such a position was taken in paragraphs 20 to 24 in the 2015 decision in *Mariano*[18]. These recent judicial statements are not universal and the law on this point still appears to be unsettled. Indeed, as recently as 2017, the Tax Court appears to take the contrary approach in *Cassan,* stating:

"The receipt of a charitable donation tax receipt in respect of property does not of itself constitute a benefit to the transferor even if the amount of the receipt is inflated."[19]

---

[16] [2008] TCC 289.

[17] See *McPherson v Queen,* [2006] TCC 648; *Webb v R,* [2005] TCC 619; *Doubinin v Queen,* [2004] TCC 438; aff'd [2005] [FCA] 298.

[18] 2015 TCC 244.

[19] *Cassan v The Queen,* 2017 DTC 1105 (TCC) at para. 298.

Two other cases mentioned in the Krishna Opinion are the *Dutil* case and the *Abouantoun* cases. *Dutil*[20] involved quite a different fact pattern from the situation considered by Cassels. Indeed, *Dutil* was found to have involved a "completely unrealistic and improbable" valuation and the taxpayer was found to be liable for additional penalties based on gross negligence. The Court went on to make further statements to the effect that quite apart from the valuation itself, the taxpayer may not have made a gift where "the taxpayer's sole motivation is clearly to enrich himself, not impoverish himself". At least one later case that was released well before the Cassels Opinions indicates that these statements in *Dutil* are both obiter and inconsistent with the later *Friedman* decision.[21] It is also to be noted that in the *Marechaux* case, another case involving tax receipts for donations (released just a few years after the Cassels Opinions were delivered), neither the Tax Court nor the Federal Court of Appeal based their decision on the fact that the value of the credit being sought was "inflated" because it exceeded the taxpayer's out of pocket cash expenditure.[22] The *Abouantoun* case involved cash kickbacks to the "donor" of 80% of the cash received by the charity and the issuance of false donation receipts for the full amount initially received. As such, in my opinion, this case is also very far removed from the situation addressed in the Cassels Opinions.[23]

The Krishna Opinion takes the position that there was no impoverishment of the Donors and instead there was enrichment. Mr. Krishna's reasoning is articulated in paragraphs 69 to 71 of the Krishna Opinion, in which he argues that the costs of continuing to hold the Timeshare Weeks were considerable and that the donor was in a much better economic position by donating the Timeshare Weeks than by retaining them. In my opinion, this reasoning implicitly assumes that the Timeshare Weeks were overvalued for the purposes of determining the amount of the purported gift. If the valuation was correct, it would of course follow that, from a purely economic perspective, the Donors would have been better off to sell the Timeshare Weeks for this value and forego the tax credit entirely, rather than donating them to the RCAAA Donee. In other words, the alleged benefit (in the form of an inflation of the receipt according to Mr. Krishna) seems to flow from a potential over-valuation. The Krishna Opinion in effect concedes this at paragraph 65, where it states, "The advantage flowed from the amounts at which the properties were valued". As discussed below, if there was an over-valuation, it was outside the scope of the Cassels Opinions. Nevertheless, at paragraphs 72 and 75, the Krishna Opinion concludes that the Donors were not impoverished by the Donations.

---

[20] *Dutil v Canada*, 95 DTC 281 (TCC). See footnote 21 of the Krishna Opinion.

[21] See *Gaetan Paradis v The Queen*, [1997] 2 CTC 2557, at footnote 6.

[22] *Marechaux v The Queen*, 2009 TCC 587; 2010 DTC 5174 (FCA); leave denied 2011 Carswell Nat 1912 (SCC).

[23] *Abouantoun v R*, [2002] DTC 3811 (TCC).

However, if instead it is assumed that the valuations were accurate, it would follow (as noted above) that the donors were in fact impoverished by making the Donations. This presumably assisted Cassels in coming to the view that it was unlikely that the CRA could successfully deny the tax credits claimed, given that the accuracy of the valuations was outside of the scope of the Cassels Opinions.

In summary, the Krishna Opinion acknowledges that the existence of a tax credit is normally not considered to be a benefit that affects the validity of an otherwise valid gift, but puts forward the proposition that an inflated tax credit may nonetheless render a purported gift invalid.[24] In my opinion, as at the time that the Cassels Opinions were delivered, leaving aside situations that involved fraud or near fraud, the Canadian case law had not established such a proposition.

Valuation

The Cassels Opinions discuss the valuation of the Timeshare Units. The Cassels Opinions point out the importance of obtaining a valuation in the case of a donation of property and the fact that the CRA had recently challenged certain gifts-in kind to charities on the basis of inadequate valuations. The Cassels Opinions indicate that Cassels had reviewed the valuations obtained but expressly refrain from taking any position on the correctness of these valuations. The Cassels Opinions state that valuations by accredited and experienced valuators familiar with the nature of the timeshare property and supported by contemporaneous transactions "should be accepted by a court as determinative". However, the Cassels Opinions go on to state that valuations proposed by either the taxpayer or the CRA are not binding on a court and therefore "there can be no assurance that the valuation will be determinative". The Cassels Opinions conclude on this subject by stating that Cassels are not valuators and "cannot provide any view as to the fair market value of the Timeshare Weeks".[25]

In my opinion, the discussion of the valuation considerations in the Cassels Opinions met the standard of care of a competent tax lawyer in the circumstances. In particular, in my opinion, as the Cassels Opinion expressly refrained from taking a view as to the fair market value of the Timeshare Weeks (and indeed to do so would have been beyond their expertise as lawyers), there was no need or reason for the Cassels Opinion to discuss the merits of the valuations in detail or to mention in detail the various arrangements that CAA had made in connection with the resale of the Timeshare Weeks.

---

[24] See paras. 50-60, inclusive.

[25] See for example the discussion under the heading Valuation at pages 10 and 11 of the October 6, 2000 Cassels Opinion.

At paragraph 76, the Krishna Opinion criticizes the Cassels Opinions for not informing the reader of the risks of a challenge by the CRA. In my view, as discussed in more detail below, this ignores the fact that the Cassels Opinions contain a number of references to tax risk and do in fact state that if all or substantially all of the Timeshare Weeks are donated this would increase the risk of a challenge by the CRA.

Disclosure of Tax Risk

The Cassels Opinions contain a number of qualifying statements that identify the fact that there are risks associated with participation by Donors in the Timeshare Program.

> This opinion is based on the current provisions of the Income Tax Act (Canada), the regulations thereunder, and our understanding of the current administrative practices of the CCRA.
>
> No assurances can be given that the proposed amendments will be enacted in the form proposed, or at all.
>
> Except for the proposed amendments, this summary does not take into account or anticipate any changes in law, whether by legislative, administrative or judicial decision or action.
>
> No advance tax ruling has been sought or obtained from the CCRA to confirm the tax consequences of any of the transactions described therein.
>
> The opinions expressed are based on certain factual assumptions and circumstances and if these facts and circumstances turn out to be different from what we have understood, our opinion may be different, in which event this letter should not be relied upon.

In addition, the Cassels Opinions contain other indications that investing in the program involved some degree of risk, including the following:

- On page 5, the Cassels Opinions assume that the transactions will be completed in accordance with the documents reviewed by Cassels;
- On page 7, the Cassels Opinions state that the likelihood of challenge by the CRA would be increased if all or substantially all of the Class A Beneficiaries donate their Timeshare Weeks;
- The Cassels Opinions decline to provide any view on the fair market value of the Timeshare Weeks.

Finally, the wording of the conclusion in the Cassels Opinions is not absolute or unqualified. Instead, the Cassels Opinions express that it is "unlikely" that the CRA could successfully deny the adjusted cost base or tax credits. The word "unlikely" indicates that there is an element of risk.

The Cassels Opinions deal with issues of general application to prospective investors, rather than addressing the specific circumstances of particular investors. In my opinion, a prudent person reading the Cassels Opinions would reasonably be expected to understand that investing in the program involved risk and that he or she should consider obtaining his or her own tax advice on making Donations.

Appropriateness of Providing Advice to Donors

The Amended Statement of Claim alleges that, given the fact that Cassels had been involved with the design of the structure, it was improper for them to be providing a tax opinion on the structure as they were in effect opining on their own work.[26] In my experience as a tax lawyer, it is normal for the designer of a structure to also provide a tax opinion on the tax consequences to participants. Indeed, Cassels as a firm and Saltman in particular would reasonably be expected to be very familiar with the details and nuances of the structure. As such, Cassels were well-positioned to give the tax opinions that were given. In addition, the Cassels Opinion itself was provided and addressed to CAA who were presumably well aware of Cassels' role, particularly as its representatives (Messrs. Elliott and Mintz) had worked with Cassels all along on the Timeshare Program.

The Amended Statement of Claim alleges that Cassels should have disclosed in the Cassels Opinions that they were taking instructions, directions and revisions from persons involved with the marketing of the donation program.[27] Based on my experience as a tax lawyer, it is not uncommon to receive comments on draft legal analysis from a range of persons. The receipt of such comments is not the same thing as taking instructions regarding the final opinion. It is often the case that another person may have suggestions that help to clarify the wording of opinions and it is not, in my opinion or experience, in any way inappropriate to receive and consider such suggestions, as long as the final decision on the wording of the opinion is made by the person delivering the opinion.

In a similar vein, the Amended Statement of Claim suggests in the same paragraph that there was an undisclosed joint retainer. There is no suggestion in the Cassels Opinions or

---

[26] See paragraph 7A.

[27] See for example paragraph 28A.

otherwise that Cassels was retained by the Plaintiff, notwithstanding that the Cassels Opinions may have been intended to be relied upon by the Plaintiff. Furthermore, as indicated in the previous paragraph, the Cassels Opinions on their face were addressed to its then client, CAA. The fact that there were discussions with other parties regarding the wording of the opinion does not establish a conflict of interest, for the reasons stated above.

In my experience as a tax lawyer, it is (and was at the time that the Cassels Opinions were issued) common for tax opinions to be given in circumstances that contemplate potential reliance on those opinions by third parties who are (or were) not clients of the opinion-giver. For example, in prospectus offerings, in my experience, it is common for tax opinions to be given to prospective investors by counsel to the issuer and counsel to the agents or underwriters, notwithstanding that neither typically acts for the investors. In other offerings that do not involve a prospectus, it is in my experience fairly common for a tax opinion to be provided by an advisor who is retained by either the issuer or a promoter of the transaction.[28]

In rendering an opinion in such circumstances, my understanding is that it is expected that the tax lawyer will render his own opinion, arrived at by an appropriate exercise of professional expertise. In this sense, any such opinion is expected to be formed by the tax lawyer on an independent basis. In his book on legal opinions, Wilfred Estey refers to there being a historical debate as to whether it is "appropriate or proper for counsel to one party (such as the borrower in a loan transaction) to give an opinion to the other party (the lender)." After canvassing the possible arguments and practical considerations, Estey concludes as follows;

> "There is something to be said for both sides of the debate. Nonetheless, as noted above, the giving of third-party legal opinion in commercial transactions is so enshrined in practice that it seems too late to address this rather fundamental issue unless as is the case in certain M&A transactions, the parties agree otherwise."[29]

In my experience, the foregoing statement is reflective of typical tax practice in Ontario. In other words, the rendering of third party tax opinions has been enshrined in day to day tax practice for a considerable period of time. These issues are discussed in further detail by Estey as follows:

> 1.59 It was at one time argued by some lawyers that it was contrary to ethical principles for a lawyer to render an opinion to a person who is not the lawyer's

---

[28] While in practice, the agents or underwriters typically protect the interests of potential investors, their interests are not fully aligned with those of the investors given the transaction fees payable on completion of a typical offering.

[29] Legal Opinions in Commercial Transactions (3d), p. 20 Wilfred M. Estey.

client and is the other party to a transaction with the lawyer's client. The reason it was argued, is that a lawyer owes an overriding duty of loyalty to his or her own client, and it would create a conflict of interest if the lawyer were to, in the same transaction, advise his client as to various aspects of the transaction and render an opinion to the other side. It is now accepted that this argument does not have merit, at least in the context of a commercial transaction where the parties are represented by separate counsel. Thus, it is permissible for the lawyer advising one party to render an opinion to the other party at closing, provided that doing so is consistent with the lawyer's retainer and with the client's best interests. Even if rendering a third party opinion were to give rise to a technical conflict of interest, in virtually all commercial transactions of the type under discussion here, the client will have consented to the giving of the opinion. That is because the client knows either that providing the third party opinion is a condition of closing in the principal transaction document, or that its lawyers will be providing such an opinion in any event, because the other party will not close without it.

1.60 Rendering a third party closing opinion does not create a solicitor-client relationship between the opinion giver and the opinion recipient. The opinion giver still owes fiduciary duties, including the duty of loyalty, exclusively to its own client. However, the opinion giver will be liable to the opinion recipient for any negligent misstatements in the opinion if the elements of the tort of negligent misrepresentation can be established. At all events, however, the opinion giver must ensure that in delivering the third party closing opinion it is not disclosing client confidential information without the client's consent. However, this is not usually a problem in rendering a third party closing opinion.[30]

A related point concerns the duty of a tax lawyer who is providing an opinion to render an objective view that represents the lawyer's honest assessment of the legal issues (as opposed to the theoretically different view that the lawyer's client may wish to be delivered to the third party). This is discussed in the following terms in a 1994 Article by David W. Smith, QC:

---

[30] Ibid, pp. 34-35.

> "Thus it is not appropriate to adopt an advocacy role in an opinion; an opinion should reflect in an objective manner what the opinion giver honestly believes to be the correct conclusion."[31]

Finally, the second edition of Estey refers to the following passage on third party opinions:

> When rendering opinions for the use of third persons, the lawyer likewise should assume an independent posture … In these capacities a lawyer should not act as a partisan; it is his duty to make a reasonable effort to ascertain the facts and make an independent, good faith determination as to what the ultimate decision of the court would probably be as to the applicable law. He should give a clean opinion, unless the matter is in such doubt that he must clearly indicate that his opinion is subject to qualifications."[32]

These statements are consistent with my understanding of the typical approaches taken by tax lawyers in Ontario who provide tax opinions to or for use by a person who is a party to a particular transaction but is not a client of the opinion giver. In particular, a tax lawyer would typically be expected to provide his or her opinion honestly and in good faith. In rendering a tax opinion, in my experience it is quite usual for a tax lawyer to discuss the proposed form of opinion with his own client. However, the opinion delivered must reflect the independent views of the lawyer on the underlying tax issues and this opinion must be exercised by the lawyer independently (i.e. without being subject to influence from his client).

Based on my review of the materials provided to me and my experience as a tax lawyer, in my opinion, the Cassels Opinions were appropriately independent.

Work performed by Parks and Saltman

You have asked me to review various internal memoranda and other correspondence exchanged between Parks and Saltman and comment on the role apparently played by Parks. From my review of the matters provided to me it is clear that

---

[31] David W. Smith, QC, "Dealing with Tax Risk in an Opinion", *Report of Proceedings of Forty-Sixth Tax Conference*, [1994] CR 38:1-23. At the time this article was written, Mr. Smith was a preeminent tax lawyer with the Toronto law firm of Davies, Ward & Beck.

[32] Estey (2d) p. 25, referring to Richard Jennings, "The Corporate Lawyer's Responsibilities and Liabilities in Pending Legal Opinions", (1975), 30 Bus. Law 73 (Special Issue) at 75.

Saltman had primary responsibility for the carriage of the matter and the issuing of the Cassels Opinions. Parks had little or no direct contact with the clients. His role was to provide a second level of review of the major issues that arose in connection with the Cassels Opinions, particularly the issue of whether there was a valid gift at law, including the issue of whether the validity of the gift was affected by the anticipated distribution from the Trust. From my review of the memos, it is clear that Parks not only analyzed the issues quite closely but also reviewed and commented on various drafts of the Cassels Opinions. In addition, it appears from the materials that I examined that the comments of Parks were reviewed and considered carefully by Saltman before the Cassels Opinions were issued. That is not to say that every such comment was necessarily adopted verbatim, as Saltman would be expected to exercise his own judgement in reviewing the comments, taking into account his greater familiarity with the facts. In my experience, the procedures followed by Parks, and the actions taken by Saltman to respond to the input he received from Parks, were typical of the second level of review that I would expect to see taken by a large Canadian law firm on a major opinion.

In summary, based on my review it is my opinion that Cassels exercised the standard of care that would be expected to be exercised by a competent tax lawyer in the circumstances.

Yours truly,

Edward A. Heakes

EAH

Schedule "A"

Curriculum Vitae

EDWARD A. HEAKES

Profile

Since May 1, 2020 he has practised as a sole practitioner under the name Edward Heakes Law.

From April, 2015, to April 30, 2020 Edward was a Partner at Dale & Lessmann LLP. (Counsel during 2020). His clients included businesses involved in a wide range of industries including renewable energy. He provided personal, corporate and international tax planning advice on a broad range of income tax issues including complex deal structuring, mergers and acquisitions, financings, including tax-driven financings, and reorganizations.

Previously, Edward was a Senior Partner of Norton Rose Fulbright LLP and, in 1994 was one of the founding partners of the Toronto Office of Macleod Dixon LLP. In 2011, Macleod Dixon was merged into Norton Rose Fulbright.

Prior to joining Macleod Dixon, Edward was a tax lawyer at Osler, Hoskin & Harcourt. He joined Osler as an associate in 1981 and was a partner from 1985 until his departure in 1994.

Edward was called to the Bar of Ontario in 1980. He received a Bachelor of Laws (LLB) degree in 1978 from the University of Western Ontario and an Honours Bachelor of Mathematics (B. Math.) degree in 1975 from the University of Waterloo.

In 2015, Edward completed the ICD Independent Director course and received the ICD.D designation from the Institute of Corporate Directors.

Career History

May 1, 2020 to Present	Sole Practitioner under the name Edward Heakes Law

April 2015 - April 30, 2020	Partner/Counsel, Dale & Lessmann LLP, Toronto
1994 - March 2015	Senior Partner, Norton Rose Fulbright Canada LLP (formerly Macleod Dixon LLP - Toronto)
1981 - 1994	Associate lawyer (1981-1985) and then Partner (1985-1994), Osler, Hoskin & Harcourt - Toronto
1980-1981	Associate Lawyer, Stitt, Baker & McKenzie - Toronto

Education

1975	• B. Math. (Hon. Applied), University of Waterloo
1980	• Called to the Bar of Ontario
1978	• LLB, University of Western Ontario
2015	• ICD.D, Institute of Corporate Directors

Professional Affiliations

1981 - Present	• Taxation Section, Canadian Bar Association (Ontario)
	• Member Canadian Tax Foundation
1988 - 1994	• Author: Canadian Income Taxation chapters in Rocky Mountain Mineral Law Foundation's: "American Law of Mining"
1994 - Present	• Member of Editorial Board of International Tax Planning (Federated Press)
2015 - Present	• Member of Institute of Corporate Directors

Personal

Business Address:	Edward Heakes Law 300 Chartwell Road, Oakville, ON L6J 3Z9
Contact Information:	(416) 948-8851 (cell) edheakes399@gmail.com
Personal Interests:	Hiking; playing hockey, golf and piano; amateur mathematics.

SCHEDULE "B"

Court File No. CV-09-376511-00CPA1

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEFFERY LIPSON

Plaintiff

and

CASSELS BROCK & BLACKWELL LLP

Defendant

and

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Edward Heakes. I live in the Town of Oakville, in the Province of Ontario.

2. I have been engaged by or on behalf of Cassels Brock & Blackwell LLP to provide evidence in relation to the above-noted court proceeding.

(c) to provide such additional assistance as the Court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date November 19, 2020

Signature

NOTE: This form must be attached to any expert report under subrules 53.03(1) or (2) and any opinion evidence provided by an expert witness on a motion or application.

SCHEDULE "C" – List of Materials Provided to E. Heakes

Tab	Date	Document Type	Document Description	BegDoc
October 6, 2016 Brief of Documents for Edward Heakes				
A 1	2016.02.12	Pleading	Amended Fresh as Amended Statement of Claim of Jeffery Lipson	
2	2016.07.18	Pleading	Amended Statement of Defence of Cassels Brock & Blackwell LLP	
3	2016.04.14	Pleading	Amended Third Party Claim	
4	2011.09.12	Pleading	Reply of the Plaintiff to the Statement of Defence in the Main Action	
5	2011.10.11	Pleading	Defence of the Third Parties, Gardiner Roberts LLP and Estate of Ronald J. Farano, deceased, to the Main Action	
6	2011.10.11	Pleading	Defence of the Third Party, Gardiner Roberts LLP and the Estate of Ronald J. Farano, deceased to the Third Party Claim	
7	2011.06.30	Pleading	Defence to the Third Party Claim of the Third Party, Glenn Ploughman	
8	2011.08.31	Pleading	Defence to the Third Party Claim of the Third Party, Deloitte & Touche LLP	
9	2016.05.12	Pleading	Amended Statement of Defence and Crossclaim of the Third Party, Mintz & Partners LLP, to the Third Party Claim	
10	2016.07.12	Pleading	Amended Third Party Defence of the Third Party, Prenick Langer LLP	
B 1	2000.10.06	Opinion Letter	Opinion Letter re: Donation of Biennial Timeshare Vacation Weeks	
2	2001.05.18	Opinion Letter	Opinion Letter re: Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	
3	2001.09.07	Opinion Letter	Opinion Letter re: Donation of One-Bedroom, Biennial Timeshare Vacation Weeks	
4	2002.05.13	Opinion Letter	Opinion Letter re: Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	
5	2002.11.08	Opinion Letter	Opinion Letter re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	
6	2003.04.08	Opinion Letter	Opinion Letter re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	
7	2003.12.15	Opinion Letter	Opinion Letter re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	
November 9, 2016 Brief of Documents for Edward Heakes				
A 1	2004.10.19	Letter	Letter from CCRA to Jeffrey Lipson re: Your Income Tax Returns for the 2000 Taxation Year	
2	2004.11.02	Letter	Letter from CCRA to Jeffrey Lipson re: Your Income Tax Returns for the 2001 and 2002 Taxation Years	
3	2004.11.09	Letter	Letter from CCRA to Jeffrey Lipson re: Your Income Tax Returns for the 2003 Taxation Year	

Tab	Date	Document Type	Document Description	BegDoc
4	2004.11.12	Tax Record	Notice of Reassessment for Jeffrey Lipson (2000 taxation year)	
5	2005.02.25	Tax Record	Notice of Reassessment for Jeffrey Lipson (2001 taxation year)	
6	2009.01.30	Tax Record	Notice of Reassessment for Jeffrey Lipson (2001 taxation year)	
7	2009.01.30	Tax Record	Notice of Reassessment for Jeffrey Lipson (2002 taxation year)	
8	2009.01.30	Tax Record	Notice of Reassessment for Jeffrey Lipson (2003 taxation year)	
B 1	2006.01.16	Pleading	Notice of Appeal (*Victor Peters v. Her Majesty the Queen*)	
2	2006.04.27	Pleading	Reply (*Victor Peters v. Her Majesty the Queen*)	
January 12, 2017 Brief of Documents for Edward Heakes				
1	0000.00.00	Information Sheet(s)	RCI Directory	CBB0000721
2	0000.00.00	Case Law	Dominion Tax Cases	CBB0000737
3	0000.00.00	Legal Document	Distribution of Capital	CBB0000964
4	0000.00.00	Questions and Answers	Athletic Trust of Canada	CBB0000974
5	0000.00.00	Book		CBB0001316
6	0000.00.00	Case Law	Haskett v. Insurance Corp. of British Columbia	CBB0001508
7	0000.00.00	Book	Chapter 3 - The Present Law and its Potential For Regulating TImesharing	CBB0004794
8	0000.00.00	Published Document	Direct Sales and Other Special Sales	CBB0004824
9	0000.00.00	Handwritten Note(s)	MCCR	CBB0004885
10	0000.00.00	Information Sheet(s)	Continuing Legal Education Index	CBB0004902
11	0000.00.00	Report	Tax Shelter Registration	CBB0005092
12	1974.07.04	Published Document	Her Majesty the Queen v John Zandstra	CBB0000749
13	1983.05.18	Published Document	Inter-vivos gifts of capital property to individuals directly or through trusts	CBB0000271
14	1990.00.00	Statutes	Business Practices Act	CBB0004836
15	1990.00.00	Statutes	Residential Complex Sales Representation Act	CBB0004849
16	1990.05.26	Published Document	Time Sharing	CBB0004917
17	1991.10.04	Published Document	A Buyer's Guide to Recreational Condominiums and Time Sharing and its Problems	CBB0004818
18	1991.12.05	Published Document	Her Majesty the Queen v. Albert D. Friedberg	CBB0000722
19	1992.07.14	Published Document	Canadian Reports to the 1990 International Congress of Comparative Law, Montreal	CBB0004887
20	1993.12.05	Published Document	Her Majesty the Queen v. Albert D. Friedberg	CBB0000733
21	1996.07.23	Published Document	Distribution of property by a non- resident trust	CBB0000536

Tab	Date	Document Type	Document Description	BegDoc
22	1996.07.29	Published Document	Distribution of property by a non- resident estate	CBB0000287
23	1997.05.22	Published Document	Charitable remainder trust - Cost of property to trust	CBB0000285
24	1997.07.00	Web Page(s)	Hiding Behind Borders	CBB0004852
25	1997.11.03	Published Document	Glen M. Woolner et al v Her Majesty the Queen	CBB0000741
26	1998.06.12	Web Page(s)	Assessment Act	CBB0004858
27	1999.10.21	Published Document	Woolner v The Attorney General of Canada	CBB0000621
28	2000.00.00	Deed	Deed of Gift	CBB0000069
29	2000.00.00	Deed	Deed of Trust	CBB0000095
30	2000.00.00	Application	Beneficiary Application	CBB0000357
31	2000.00.00	Deed	Deed of Gift	CBB0000359
32	2000.00.00	Deed	Deed of Gift	CBB0000360
33	2000.00.00	Legal Document	Class A Beneficiary	CBB0000363
34	2000.00.00	Legal Document	Distribution of Capital	CBB0000364
35	2000.00.00	Deed	Deed of Trust	CBB0000910
36	2000.00.00	Draft Deed of Trust	The Athletic Trust of Canada - Deed of Trust	CBB0005279
37	2000.01.31	Article(s)	The Canadian Taxpayer - Art Donations: Government Loses a Key Case	CBB0001556
38	2000.02.11	Published Document	John Aikman et al v Her Majesty the Queen	CBB0000759
39	2000.03.16	Memorandum	Re Canadian Amateur Sports Organizations	CBB0005295
40	2000.03.30	Summary	Sportshare Summary	CBB0005296
41	2000.04.26	Handwritten Note(s)	Instructions from Rick Angelson	CBB0004684
42	2000.05.01	Handwritten Note(s)	Real Estate Council of Ontario	CBB0004933
43	2000.05.02	Web Page(s)	P-064 Treatment of Timeshare	CBB0004854
44	2000.05.02	Web Page(s)	Analysis of Consumer Issues and Fraud in the Travel and Tourism Industry	CBB0004904
45	2000.05.02	Web Page(s)	Consumer Reports - Transcripts of Stories Aired on CTV	CBB0004911
46	2000.05.03	Handwritten Note(s)	Int Parks re Athletic Trust - Analysis	CBB0000561
47	2000.05.03	Handwritten Note(s)	Brian Schlatzhower	CBB0004886
48	2000.05.03	Web Page(s)	TRACEit	CBB0004916
49	2000.05.04	Web Page(s)	Brochures and Pamphlets	CBB0004789
50	2000.05.05	Letter	[SportShare, Inc. or Ruby Richman's Management Company?] Donations of SportShare Weeks	CBB0005276
51	2000.05.10	Memorandum	Project Benz	CBB0000562
52	2000.05.12	Handwritten Note(s)	[Illegible]	CBB0000557
53	2000.05.26	Memorandum	Athletic Trust Deal	CBB0000560
54	2000.05.31	Handwritten Note(s)	Timeshare Weeks	CBB0000539

Tab	Date	Document Type	Document Description	BegDoc
55	2000.06.01	Memorandum	International Parks & Recreation Re Trust - GAAR and Donation Issues	CBB0000529
56	2000.06.01	Memorandum	International Parks & Recreation Re Trust - GAAR and Donation Issues	CBB0000625
56	1999.07.24	Published Document	Jabs Construction Limited v Her Majesty the Queen	CBB0000632
56	1999.10.06	Published Document	Mai Tai Chan v her Majesty the Queen	CBB0000650
56	2000.04.00	Published Document	Jabs Construction Limited v The Queen	CBB0000660
56	2000.05.00	Published Document	Zelinski et al. v The Queen	CBB0000663
56	1999.12.10	Published Document	Her Majesty the Queen v Robert E. Zelinski, Ken A. Whent and Nicholas J. Pustina	CBB0000665
56	2000.02.11	Published Document	John Aikman et al v Her Majesty the Queen	CBB0000684
57	2000.06.02	Memorandum	International Parks & Recreation - Trust	CBB0000527
58	2000.06.02	Memorandum	International Parks & Recreation - Trust	CBB0000551
59	2000.06.07	Handwritten Note(s)	International Parks re Athletic Trust	CBB0000555
60	2000.06.07	Agreement	Biennial Club Membership Agreement	CBB0000715
61	2000.06.13	Handwritten Note(s)	International Parks re Athletic Trust	CBB0000553
62	2000.06.13	Memorandum	International Parks & Recreation	CBB0000782
62	1997.06.26	Case Law	Upper Mapleview Inc. v. Stolp Homes	CBB0000788
62	1992.03.26	Case Law	Clarke, Glen et. al v. Trustee of the estate of Technical Marketing Associates Ltd.	CBB0000796
62	0000.00.00	Case Law	Eansor v. Eansor et al.	CBB0000816
63	2000.06.14	Memorandum	Athletic Trust - SandyPort Information	CBB0000513
64	2000.06.14	E-Mail	cross border donation proposal	CBB0000514
65	2000.06.15	Memorandum	International Parks and Recreation re Trust - Valuation Issue	CBB0000522
66	2000.06.21	Published Document	Blacklaws et al v Morrow et al	CBB0004993
67	2000.06.23	Letter	Re: [No Subject]	CBB0005113
68	2000.06.26	Draft Letter	Re: Donation of Biennial Timeshare Resort Weeks	CBB0005269
69	2000.06.29	Letter	Re: Donation Biennial Timeshare Resort Weeks	CBB0005274
70	2000.06.30	Handwritten Note(s)	Int Parks re Athletic Trust	CBB0000578
71	2000.07.12	Facsimile	Int Parks re Trust	CBB0000260
71	2000.06.29	Letter	Donation of Biennial Timeshare Resort Weeks	CBB0000261
71	0000.00.00	Drawings/Diag rams	Athletic Trust	CBB0000270
72	2000.07.12	E-Mail	Re: Fwd: Voice Message from Mintz, Harley	CBB0000511
73	2000.07.12	Handwritten Note(s)	Int Parks re Trust	CBB0000581
74	2000.07.12	Draft Letter	Re: Donation of Biennial Timeshare Resort Weeks	CBB0005270

Tab	Date	Document Type	Document Description	BegDoc
75	2000.07.12	Letter	Re: Donation Biennial Timeshare Resort Weeks	CBB0005275
76	2000.07.13	Memorandum	Canadian Intersport Management Inc. - Your Draft Opinion	CBB0000240
76	2000.07.12	Letter	Donation of Biennial Timeshare Resort Weeks	CBB0000247
77	2000.07.13	Memorandum	Canadian Intersport Management Inc. - Your Draft Opinion	CBB0000515
78	2000.07.14	Handwritten Note(s)	Int	CBB0000239
79	2000.07.14	Handwritten Note(s)	Int Parks re Athletic Trust	CBB0000736
80	2000.07.26	E-Mail	Canadian Intersport Management	CBB0000509
81	2000.07.28	Memorandum	Athletic Trust Opinion	CBB0000236
81	0000.00.00	Drawings/Diag rams	SandyPort Developer	CBB0000238
82	2000.07.28	Memorandum	Athletic Trust Opinion	CBB0000506
83	0000.00.00	Drawings/Diag rams	SandyPort Developer	CBB0000508
84	2000.07.31	Memorandum	International Parks & Recreation - Trust	CBB0000232
85	2000.07.31	Handwritten Note(s)	Int Parks	CBB0000580
86	2000.08.02	Memorandum	Athletic Trust - SandyPort Appraisal	CBB0000965
86	2000.08.01	Letter	Appraisal Proposal - Proposed Timeshare Development - Sandyport Beaches Resort Nassau Bahamas	CBB0000966
87	2000.08.04	Letter	Donation of Biennial Timeshare Vacation Weeks	CBB0000494
88	2000.08.08	Letter	Draft Donation of Biennial Timeshare Resort Weeks	CBB0000220
89	2000.08.10	Memorandum	Canadian Intersport Management Inc. - Your Revised Draft Opinion: 8/8/00	CBB0000211
90	2000.08.10	Memorandum	Canadian Intersport Management Inc.	CBB0000485
91	2000.08.11	Letter	Donation of Biennial Timeshare Resort Weeks	CBB0000199
92	2000.08.11	Letter	Donation of Biennial Timeshare Resort Weeks	CBB0000473
93	2000.09.05	Memorandum	Athletic Trust Tax Opinion	CBB0000471
94	2000.09.11	Memorandum	Athletic Trust Tax Opinion	CBB0000190
95	2000.09.11	Memorandum	Athletic Trust Tax Opinion	CBB0000461
96	2000.09.18	Letter	Donation of Biennial Timeshare Vacation Weeks	CBB0000177
97	2000.09.18	Handwritten Note(s)	Int Parks re Trust	CBB0000577
98	2000.09.19	Memorandum	Athletic Trust	CBB0000459
99	2000.09.21	Letter	Steven Mintz and Stephen Elliott	CBB0000439
100	2000.09.21	Memorandum	Canadian Intersport Management Inc. - Your Revised Draft Opinion: 18/09/00	CBB0000441
100	2000.09.18	Letter	Donation of Biennial Timeshare Vacation Weeks	CBB0000446
101	2000.09.25	Memorandum	Tax Opinion	CBB0000421

Tab	Date	Document Type	Document Description	BegDoc
102	2000.09.25	Memorandum	Tax Opinion - Mintz Comments	CBB0000423
102	2000.09.22	Letter	Donation of Biennial Timeshare Vacation Weeks	CBB0000426
103	2000.09.26	Letter	Donation of Biennial Timeshare Vacation Weeks	CBB0000080
104	0000.00.00	Application	Beneficiary Application	CBB0000417
105	2000.00.00	Deed	Deed of Gift	CBB0000419
106	2000.09.28	Handwritten Note(s)	Int Parks re Trust	CBB0000576
107	2000.09.29	E-Mail	Re: e-mail address	CBB0000160
108	2000.10.00	Due Diligence	Due Diligence Book	CBB0002650
108	0000.00.00	Information Sheet(s)	Changes to Brochure	CBB0002652
108	0000.00.00	Information Sheet(s)	Changes to FAQ's	CBB0002654
108	2002.00.00	Application	Beneficiary Application - Year End 2002	CBB0002656
108	0000.00.00	Information Sheet(s)	Canadian Athletic Advisorys Ltd.	CBB0002659
108	2002.00.00	Deed	Deed of Gift - Timeshare Weeks	CBB0002662
108	2002.05.30	Agreement	Charge and Security Agreement	CBB0002664
108	2000.08.00	Legal Document	Rules of The Alexandra Resort and Spa	CBB0002669
108	2001.02.00	Statement(s)	A Public Offering Statement	CBB0002681
108	2002.10.00	Report	Appraisal Report	CBB0002696
108	0000.00.00	Report	Appraisal Report for Alexandra Resort & Spa	CBB0002742
108	2002.11.08	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0002744
108	2000.10.20	Deed	Deed of Trust	CBB0002770
108	2000.10.20	Deed	Deed of Gift	CBB0002794
108	2002.10.06	Agreement	Timeshare Bulk Purchase Agreement	CBB0002798
108	2002.00.00	Deed	Deed of Gift - 2002	CBB0002828
108	2002.00.00	Corporate Document	Distribution of Capital	CBB0002838
108	2002.00.00	Deed	Deed of Conveyance	CBB0002845
108	2002.10.06	Corporate Document	2002 Biennial Timeshare Interests Option	CBB0002855
108	2002.10.06	Agreement	Timeshare Marketing and Re-Sale Agreement	CBB0002873
108	2002.10.06	Agreement	Timeshare Marketing and Re-Sale Agreement - 2002	CBB0002887
108	2002.10.06	Agreement	Timeshare Marketing and Re-Sale Agreement - 2002	CBB0002901
108	2002.10.06	Agreement	Timeshare Marketing and Re-Sale Agreement - 2002	CBB0002915
108	2002.10.06	Agreement	Timeshare Marketing and Re-Sale Agreement - 2002	CBB0002929
109	2002.10.23	Memorandum	Alexandra Resort & Spa - Appraisal Report - HCI	CBB0002943
110	2002.10.29	Memorandum	Alexandra Tax Opinion - Supplementary Documents	CBB0003053

Tab	Date	Document Type	Document Description	BegDoc
111	0000.00.00	Statement(s)	Public Offering Statement	CBB0003077
112	2002.02.00	Corporate Document	Distribution of Capital	CBB0003108
113	2001.08.07	Agreement	Purchase Agreement	CBB0003152
114	0000.00.00	Corporate Document	Certificate of Ownership	CBB0003161
115	0000.00.00	Information Sheet(s)	Fact Sheet	CBB0003163
116	2001.02.00	Legal Document	Bylaws of Alexandra Resort & Villas Ltd.	CBB0003176
117	2000.10.02	Facsimile	Re: [Untitled]	CBB0000156
117	2000.10.00	Deed	Deed of Gift - Timeshare Weeks	CBB0000157
118	2000.10.03	Memorandum	Athletic Trust - Tax Opinion	CBB0000147
119	2000.10.03	Memorandum	Canadian Intersport Management Inc. The Athletic Trust of Canada	CBB0000149
120	2000.10.03	Handwritten Note(s)	Int Parks re Trust	CBB0000575
121	2000.10.03	Memorandum	Canadian Intersport Management Inc.	CBB0000933
122	2000.00.00	Deed	Deed of Trust	CBB0000940
123	2000.10.03	Letter	Portfolio Vacations International Ltd.	CBB0004707
123	2000.01.01	Agreement	Lease Agreement	CBB0004709
124	2000.10.03	Handwritten Note(s)	International Parks re: trust	CBB0004735
125	2000.10.04	Handwritten Note(s)	Int Park	CBB0000146
126	2000.10.04	Memorandum	International Parks & Recreation - Timeshare Units	CBB0004695
126	0000.00.00	Published Document		CBB0004696
126	2000.10.03	Letter	Real Estate Opinion for Timeshare Vacation Weeks in the Bahamas	CBB0004697
127	2000.10.04	Handwritten Note(s)	Discussion w/ Andrew Reback	CBB0004734
128	2000.10.05	Memorandum	Final Documents	CBB0000067
129	2000.10.05	Facsimile	Sportshare - Portfolio Vacations International Ltd.	CBB0000076
129	2000.10.03	Letter	Portfolio Vacations International Ltd.	CBB0000077
130	2000.10.05	Letter	Real Estate Opinion for Timeshare Vacation Weeks in the Bahamas	CBB0000132
131	2000.10.05	Letter	Real Estate Opinion for Timeshare Vacation Weeks in the Bahamas	CBB0000133
132	2000.10.05	E-Mail	Timeshare	CBB0000145
133	0000.00.00	Deed	Deed of Conveyance	CBB0000353
134	2000.10.05	Letter	Real Estate Opinion for Timeshare Vacation	CBB0004721
134	2000.00.00	Deed	Deed of Gift	CBB0004725
134	2000.00.00	Schedule	Schedule A - To A Deed of Gift	CBB0004728
135	2000.10.06	Handwritten Note(s)	Int Parks re Trust	CBB0000038
136	2000.10.06	E-Mail	FW: Opinion re: timeshare	CBB0000039
137	2000.10.06	Letter	Portfolio Vacations International Limited	CBB0000053
137	2000.01.01	Agreement	Lease Agreement	CBB0000055
138	2000.10.06	Facsimile	Sportshare - Portfolio Vacations International Ltd.	CBB0000130

Tab	Date	Document Type	Document Description	BegDoc
139	2000.10.06	Letter	Donation of Biennial Timeshare Vacation Weeks	CBB0000867
139	0000.00.00	Guidelines	Document Completion Guide	CBB0000880
139	2000.00.00	Deed	Deed of Gift	CBB0000881
140	2000.10.06	Letter	Donation of Biennial Timeshare Vacation Weeks	CBB0000883
140	0000.00.00	Guidelines	Beneficiary Guide	CBB0000896
140	2000.00.00	Application	Beneficiary Application	CBB0000906
140	0000.00.00	Legal Document	Canadian Athletic Advisors Ltd.	CBB0000908
141	2000.10.06	Letter	Real Estate Opinion for Timeshare Vacation Weeks in the Bahamas	CBB0004685
141	2000.10.06	Facsimile	Sportshare - Portfolio Vacations International Ltd.	CBB0004693
142	2000.10.06	Handwritten Note(s)	[Untitled]	CBB0004703
143	2000.10.06	Facsimile	Sportshare - Portfolio Vacations International Ltd.	CBB0004704
143	2000.10.06	Letter	Portfolio Vacations International Ltd.	CBB0004705
144	2000.10.06	Handwritten Note(s)	w/ Terry North	CBB0004720
145	2000.10.19	Handwritten Note(s)	Int Parks re Trust	CBB0000574
146	2000.10.20	Deed	Deed of Trust	CBB0000321
147	2000.10.20	Deed	Deed of Gift	CBB0000344
148	2000.10.30	Memorandum	Athletic Trust of Canada	CBB0000348
149	0000.00.00	Cheque(s)	Amount: $100.00	CBB0000350
150	2000.10.20	Deed of Trust	The Athletic Trust of Canada - Deed of Trust between Adrian Crosbie-Jones and Atlantis Fidiciary Services Inc.	CBB0005278
151	2000.10.30	Letter	The Athletic Trust of Canada	CBB0000413
152	2000.11.01	Letter	Year 2000 Donations	CBB0000388
153	2000.11.01	Due Diligence	Due Diligence Book	CBB0002251
153	2000.00.00	Guidelines	Beneficiary Guide - Fall 2000	CBB0002254
153	2000.00.00	Guidelines	Beneficiary Guide - Frequently Asked Questions	CBB0002258
153	2000.00.00	Application	Application to the Trustee	CBB0002262
153	2000.00.00	Deed	Deed of Gift - Class A Beneficiary	CBB0002266
153	0000.00.00	Agreement	Charge and Security Agreement	
153	0000.00.00	Regulations	Timeshare Rules and Regulations	CBB0002277
153	2000.09.13	Report	Final Appraisal Report	CBB0002280
153	2000.08.18	Report	Final Appraisal Report	CBB0002386
153	0000.00.00	Letter	Legal Opinion Letter	CBB0002524
153	2000.10.20	Deed	Deed of Trust	CBB0002539
153	2000.10.20	Deed	Deed of Gift	CBB0002564
153	2000.10.12	Agreement	Timeshare Purchase Agreement	CBB0002571
153	2000.00.00	Deed	Deed of Gift	CBB0002595
153	2000.00.00	Corporate Document	Distribution of Capital	CBB0002601
153	0000.00.00	Deed	Deed of Conveyance	CBB0002604

Tab	Date	Document Type	Document Description	BegDoc
153	2000.10.12	Agreement	Option to Purchase and Marketing Agreement	CBB0002609
153	2000.10.18	Agreement	Timeshare Marketing and Re-Sale Agreement	CBB0002624
154	2000.11.22	Handwritten Note(s)	Int Parks re Athletic Trust	CBB0000572
155	2000.12.14	Handwritten Note(s)	Int Parks re Athletic Trust	CBB0000570
156	2000.12.18	Letter	Donation of Biennial Timeshare Vacation Week	CBB0000032
157	2000.12.18	Memorandum	Athletic Trust of Canada	CBB0000412
158	2000.12.18	Handwritten Note(s)	Int Parks re Trust	CBB0000571
159	2000.12.18	Letter	Donation of Biennial Timeshare Vacation Weeks	CBB0000585
160	2000.12.18	Memorandum	Athletic Trust of Canada	CBB0000586
161	2001.00.00	Due Diligence	Due Diligence Book	CBB0001804
161	2001.00.00	Guidelines	Beneficiary Guide - Spring 2001	CBB0001806
161	2001.00.00	Guidelines	Benefit Guide - Frequently Asked Questions	CBB0001810
161	2001.00.00	Application	Beneficiary Application - Spring 2001	CBB0001814
161	0000.00.00	Information Sheet(s)	Descriptive Material	CBB0001818
161	2001.00.00	Guidelines	Document Completion Guide - Spring 2001	CBB0001822
161	2001.00.00	Deed	Deed of Gift to RCAAA - Two Bedroom Timeshare	CBB0001826
161	2001.00.00	Agreement	Charge and Security Agreement	CBB0001829
161	0000.00.00	Regulations	Sandyport Beaches Resort - Two Bedroom Timeshare Week	CBB0001837
161	2000.08.18	Report	Valuation of Sandyport Beaches Resort Timeshare Development	CBB0001840
161	2000.12.22	Report	Update Appraisal of Sandyport Beaches Resort Timeshare Development	CBB0001954
161	2000.12.00	Report	Appraisal Report	CBB0001998
161	2001.05.18	Letter	Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0002111
161	2000.10.20	Deed	Deed of Trust	CBB0002127
161	2000.10.20	Deed	Deed of Gift	CBB0002152
161	2001.03.27	Agreement	Timeshare Purchase Agreement	CBB0002157
161	2001.00.00	Deed	Deed of Gift - 2002	CBB0002179
161	2001.00.00	Resolution	Distribution of Capital - Two Bedrooms Weeks	CBB0002185
161	2001.00.00	Deed	Deed of Conveyance - Two Bedroom Weeks	CBB0002189
161	2001.03.27	Agreement	Option to Purchase and Marketing Agreement	CBB0002195
161	2001.03.27	Agreement	Timeshare Pooling Agreement	CBB0002210
161	2001.03.27	Agreement	Timeshare Marketing and Re-Sale Agreement 2001	CBB0002225

Tab	Date	Document Type	Document Description	BegDoc
161	2001.03.27	Agreement	Timeshare Marketing and Re-Sale Agreement 2001	CBB0002238
162	2001.02.09	Letter	The Athletic Trust of Canada	CBB0000393
163	2001.02.21	Memorandum	Athletic Trust Marketing Material	CBB0000395
164	2001.05.18	Letter	Re: Opinion dated May 18, 2001 in connection with Donation of Two-Nedroom, Biennial Timeshare Vacation Weeks	CBB0005216
165	2001.05.18	Letter	Re: Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0005217
166	2001.08.31	Table of Contents	Athletic Trust of Canada Fall 2001 One Bedroom Donations Supplementary Documents	CBB0003212
166	2001.00.00	Deed	Deed of Gift	CBB0003214
166	2001.00.00	Agreement	Charge and Security Agreement	CBB0003216
166	2001.03.27	Agreement	Timeshare Purchase Agreement	CBB0003223
166	0000.00.00	Deed	Deed of Gift - One Bedroom Timeshare Weeks	CBB0003243
166	2001.00.00	Corporate Document	Distribution of Capital - One Bedroom Weeks	CBB0003247
166	2001.00.00	Deed	Deed of Conveyance	CBB0003250
166	2001.07.09	Agreement	Option to Purchase and Marketing Agreement	CBB0003254
166	2001.08.28	Agreement	Timeshare Marketing and Re-Sale Agreement - 2001	CBB0003268
166	2001.12.31	Report	Market/Economic Study and Appraisal - Letter Update Report	CBB0003281
166	2001.12.12	Report	Timeshare Development - Sandyport Beaches Resort	CBB0003325
167	2001.09.07	Letter	Re: Opinion dated September 7, 2001 in connection with Donation of One-Bedroom, Biennial Timeshare Vacation Weeks	CBB0005177
168	2001.09.07	Letter	Re: Donation of One-Bedroom, Biennial Timeshare Vacation Weeks	CBB0005180
169	2001.11.28	Memorandum	Re: General Anti-Avoidance Rule	CBB0005179
170	2001.12.14	Memorandum	Re: Sportshare re Donors to Athletic Trust - CCRA Inquiry re Gift of Timeshare Weeks	CBB0005176
171	2001.12.19	Letter	Re: Donation of One-Bedroom, Biennial Timeshare Vacation Weeks	CBB0005178
172	2001.12.20	Published Document	7222540 Ontario Inc., Novopharm Limited v. Her Majesty the Queen	CBB0001642
173	2002.01.24	Responses	Draft responses to CCRA Questionnaire re Farano Amendments - Prenick Clients	CBB0005299
174	2002.04.30	Published Document	Hill v Canada	CBB0001657

Tab	Date	Document Type	Document Description	BegDoc
175	2002.05.13	Letter	Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001026
176	2002.05.13	Draft Letter	Re: Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0005093
177	2002.05.13	Note and Draft Letter	Re: Donation of Two-Bedroom, Biennial Timesahre Vacation Weeks	CBB0005185
178	2002.05.13	Letter	Re: Opinion dated May 13, 2002 in connection with Donation of Two-Bedroom Biennial Timeshare Vacation Weeks	CBB0005221
179	2002.05.13	Letter	Re: Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0005222
180	2002.07.09	Published Document	Water's Edge Village Estates Ltd v Her Majesty the Queen	CBB0001591
181	2002.07.31	Published Document	Imperial Oil Limited v Her Majesty the Queen	CBB0001616
182	2002.09.27	Memorandum	Athletic Trust Tax Question	CBB0001580
183	2002.10.04	E-Mail	FW: Athletic Trust of Canada	CBB0001586
183	0000.00.00	E-Mail	Athletic Trust Question	CBB0001590
184	2002.10.15	E-Mail	Athletic Trust Memo	CBB0001575
184	2002.10.15	Memorandum	Athletic Trust of Canada	CBB0001576
185	2002.10.16	E-Mail	RE: Athletic Trust of Canada	CBB0001571
186	2002.10.16	E-Mail	RE: Athletic Trust of Canada	CBB0005181
187	2002.10.21	Memorandum	Athletic Trust of Canada - Alexandra Due Diligence Book	CBB0001344
188	2002.10.23	Memorandum	Alexandra Resort & Spa - Appraisal Report - HCI	CBB0001343
189	2002.10.28	Facsimile	Athletic Trust re Alexandra Resort & Spa	CBB0001337
190	2002.10.28	Handwritten Note(s)	Sportshare re Alexandra Resort	CBB0001386
191	2002.10.29	Memorandum	Alexandra Tax Opinion - Supplementary Documents	CBB0001333
192	2002.10.30	Facsimile	Re: [Untitled]	CBB0001010
192	0000.00.00	Declaration	Declaration of Vacation Ownership Plan-weeks	CBB0001011
193	2002.10.31	Letter	Alexandra Resort & Spa - Timeshare Week Acquisition	CBB0001328
194	2002.11.01	Handwritten Note(s)	Sportshare re Alexandra Trust	CBB0001385
195	2002.11.05	Handwritten Note(s)	Sportshare re Alexandra	CBB0001384
196	2002.11.06	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001484
197	2002.11.07	Memorandum	Alexandra Tax Opinion	CBB0001320
198	2002.11.08	Letter	Re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare	CBB0005097
199	2002.11.11	E-Mail	FW: Alexandra Resort and Spa - Timeshare Week Application	CBB0001317

Tab	Date	Document Type	Document Description	BegDoc
200	2002.11.11	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001460
201	2003.01.07	Memorandum	Athletic Trust of Canada - 2003	CBB0001315
202	2003.02.06	Handwritten Note(s)	Sportshare re Alexandra Resort	CBB0001383
203	2003.03.03	Handwritten Note(s)	Sportshare re Alexandra	CBB0001382
204	2003.04.01	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001284
205	2003.04.01	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001346
206	2003.04.07	Memorandum	2003 Tax Opinion Comments	CBB0001281
207	2003.04.08	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001134
208	2003.04.08	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001254
209	2003.04.08	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001409
210	2003.04.08	Letter	Re: Donation of One-Bedroom and Two-Bedroom. Biennial Timeshare Vacation Weeks	CBB0005106
211	2003.04.28	Draft Letter	Re: Donation of Studio Biennial Timeshare Vacation Weeks	CBB0005091
212	2003.09.03	Email	Athletic Trust Response to CCRA Letter, with attachments	CBB0005300
213	2003.10.15	E-Mail	CCRA Newsletter - gifts with speculative value	CBB0001560
213	2003.10.12	Web Page(s)	Registered Charities Newsletter	CBB0001561
214	2003.11.17	E-Mail	Alexandra Resort Inventory 2003	CBB0001222
215	2003.11.17	Memorandum	Athletic Trust of Canada - Alexandra Resort & Spa	CBB0001223
216	2003.11.20	Handwritten Note(s)	Cdn Athletic re Alexandra	CBB0001380
217	2003.11.24	Handwritten Note(s)	Cdn Athletic re Alexandra	CBB0001379
218	2003.11.24	Memorandum	Research for Case Law re Valuation of Time Share Building	CBB0001528
218	2001.03.02	Article(s)	Valuation of hotel properties raises complex issues	CBB0001553
219	2003.11.25	Handwritten Note(s)	Cdn Athletic re Alexandra	CBB0001377
220	2003.11.26	Memorandum	Canadian Athletic Advisors Ltd. - Research for case law dealing with the valuation of a building that has not yet been built	CBB0001526
221	2003.11.28	Handwritten Note(s)	Cdn Athletic re Alexandra	CBB0001376

Tab	Date	Document Type	Document Description	BegDoc
222	2003.07.24	Memorandum	Athletic Trust	CBB0001516
223	2003.00.00	Information Sheet(s)	Canada Customs and Revenue Agency Tax Shelter Donation Arrangements	CBB0001521
224	2003.12.07	Memorandum	Cdn Athletic re Alexandra Resort - Proposed Amendments December 5, 2003	CBB0005105
225	2003.12.08	Memorandum	Charitable Donation Legislation	CBB0001212
226	2003.12.10	Handwritten Note(s)	Cdn Athletic re Alexandra	CBB0001374
227	2003.12.15	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001160
228	2003.12.15	Letter	Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	CBB0001175
229	2003.12.15	Letter	Re: Donation of One-Bedroom and Two-Bedroom Biennial Timeshare Vacation Weeks	CBB0005109
230	2003.12.16	Handwritten Note(s)	Cdn Athletic	CBB0001373
January 19, 2017 – Stand-Alone Records via Email				
a)	2015.08.18	Transcript	Transcript of the Examination for Discovery of Lorne Saltman on behalf of Cassels Brock & Blackwell LLP	
b)	2015.10.27	Transcript	Transcript of the Examination for Discovery of Lorne Saltman on behalf of Cassels Brock & Blackwell LLP	
c)	2015.10.28	Transcript	Transcript of the Examination for Discovery of Lorne Saltman on behalf of Cassels Brock & Blackwell LLP	
d)	2015.10.29	Transcript	Transcript of the Examination for Discovery of Lorne Saltman on behalf of Cassels Brock & Blackwell LLP	
e)	2015.11.05	Transcript	Transcript of the Examination for Discovery of Lorne Saltman on behalf of Cassels Brock & Blackwell LLP	
f)	2016.10.12	Letter	Letter from counsel for Cassels Brock & Blackwell LLP providing discovery transcript corrections	
g)	2016.10.14	Transcript	Transcript of the Examination for Discovery of Lorne Saltman on behalf of Cassels Brock & Blackwell LLP	
May 2, 2017 Brief of Documents for Edward Heakes				
1	2000.12.22	Opinion Letter	Opinion letter from Ronald J. Farano to Gerald I. Prenick re: Due Diligence — Athletic Trust of Canada	GR00000027
2	2004.04.08-21	Email	Email exchange between Ronald J. Farano and Paul J. Gibney (Thorsteinssons LLP)	GR00000076
3	2007.11.20	Opinion Letter	Opinion letter from Thorsteinssons LLP re: Athletic Trust of Canada Program (CBB0005301)	
4	2002.12.03	Opinion Letter	Opinion letter from Aikins, MacAulay & Thorvaldson LLP	
5	2010.06.07	Expert Report	Expert Report of Vern Krishna re: Lipson v. Cassels Brock & Blackwell LLP	

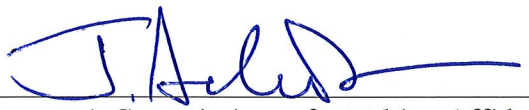
Tab	Date	Document Type	Document Description	BegDoc
6	2011.07.13	Expert Report	Expert Report of Vern Krishna re: Lipson v. Cassels Brock & Blackwell LLP	
7	2011.10.13	Transcript	Transcript from Cross-Examination of Vern Krishna	
January 29, 2018 Brief of Documents for Edward Heakes (UAR Chart and Answers of Lorne Saltman)				
	2018.01.19	Chart	Undertakings/Advisements/Refusals, with Answers, from the Examination for Discovery of Lorne Saltman (Cassels Brock & Blackwell LLP) taken 18 Aug. 2015; 27/28/29 Oct. 2015; 5 Nov. 2015 & 14 Oct. 2016	
1	2000.05.15	Form(s)	New Matter File Opening	CBB0000978
2	2002.10.23	Form(s)	New Matter File Opening	CBB0000983
3	2001.03.05	Form	Matter File Change	CBB0005111
4	2017.05.17	Financial Record	CBB Info Only Proforma 028741_00001_001	CBB0005305
5	2017.05.17	Financial Record	CBB Info Only Proforma 028741_00002_001	CBB0005306
6	2017.05.17	Financial Record	CBB Invoice History for 28741-2	CBB0005307
7	2017.05.17	Financial Record	CBB Invoice History for 28741-1	CBB0005308
8	2004.11.02	Letter	UT 24 - Ltr to St-Denis Re CCRA 01_12_18	CBB0005310
9	2017.11.27	Manual	CBB Policy Manual	CBB0005311
April 4, 2019 – Stand-Alone Records via Email				
	2015.11.05	Transcript	Excerpt of Transcript of Lorne Saltman	
May 10, 2019 Brief of Documents for Edward Heakes				
A 1	2000.07.12	Opinion Letter	Markup of Draft Opinion Letter	CBB0000247
2	2000.07.13	Memo	Memo from James M. Parks	CBB0000240
3	2000.08.08	Opinion Letter	Markup of Draft Opinion Letter	CBB0000220
4	2000.08.10	Memo	Memo from James M. Parks	CBB0000211
5	2000.09.21	Memo	Memo from James M. Parks	CBB0000441
6	2000.10.03	Memo	Memo from James M. Parks with Markup by Lorne Saltman	CBB0000933
7	2000.10.03	Memo	Memo from James M. Parks	CBB0000149
8	2000.11.14	Memo	Memo from James M. Parks	CBB0000005
9	2003.10.15	Email	Email from James M. Parks	CBB0001560
B 1	2000.08.18	Appraisal Report	Cane Appraisal Report	CBB0002386
2	2000.12	Appraisal Report	Cane Appraisal Report	CBB0001840
3	2000.12.12	Appraisal Report	Cane Appraisal Report	CBB0001954
4	2001.12.12	Appraisal Report	Cane Appraisal Report	CBB0003325
5	2002.10	Appraisal Report	Cane Appraisal Report	CBB0002696
6	2000.09.13	Appraisal Report	HCI Appraisal Report	CBB0002280
7	2000.12	Appraisal Report	HCI Appraisal Report	CBB0001998
8	2001.12.31	Appraisal Report	HCI Appraisal Report	CBB0003281
9	2002.10.23	Appraisal Report	HCI Appraisal Report	CBB0002943

Tab	Date	Document Type	Document Description	BegDoc
C 1	2001.11.20	Tax Record	Notice of Assessment for Jeffrey Lipson re: 2000	
2	2002.05.27	Letter	Letter from CCRA to Jeffrey Lipson re: Your 2001 Income Tax Return	
3		Tax Record	Schedule of Charitable Donations as at December 31, 2003	
4		Tax Record	Schedule re: Calculation of Donation Tax Credits for Jeffrey Lipson (2000-2003)	
5	2004.08.24	Letter	Letter from J. DeGuilio to Jeffrey Lipson re: Athletic Trust of Canada – Donation of Timeshare Interests	
6	2004.08.31	Letter	Letter from Jeffrey Lipson to J. DeGuilio re: Athletic Trust of Canada	
7	2004.10.19	Letter	Letter from CCRA to Jeffrey Lipson re: Your Income Tax Returns for the 2000 Taxation Year	
8	2004.10.20	Tax Record	CCRA Request for Online RAP re: Jeffrey Lipson	
9	2004.11.02	Letter	Letter from CCRA to Jeffrey Lipson re: Your Income Tax Returns for the 2001 and 2002 Taxation Years	
10	2004.11.09	Letter	Letter from CCRA to Jeffrey Lipson re: Your Income Tax Returns for the 2003 Taxation Year	
11	2004.11.12	Tax Record	Notice of Reassessment for Jeffrey Lipson (2000 taxation year)	
12	2005.01.12	Tax Record	CCRA Request for Online RAP re: Jeffrey Lipson	
13	2005.02.04	Letter	Letter from CRA to Jeffrey Lipson re: Your objection for the 2000 taxation year	
14	2005.02.25	Tax Record	Notice of Reassessment for Jeffrey Lipson (2001 taxation year)	
15	2005.03.15	Letter	Letter from Jeffrey Lipson to Chief of Appeals for Canada Revenue Agency re: 2001 Taxation Year	
16	2005.03.15	Letter	Letter from Jeffrey Lipson to Chief of Appeals for Canada Revenue Agency re: 2002 Taxation Year	
17	2005.04.18	Letter	Letter from Carl Sears to Jeffrey Lipson re: Your objection for the 2001 and 2002 taxation years	
18	2005.06.06	Tax Record	Notice of Assessment for Jeffrey Lipson (2003 taxation year)	
19	2005.06.09	Letter	Letter from Jeffrey Lipson to Chief of Appeals for Canada Revenue Agency re: 2003 Taxation Year	

Tab	Date	Document Type	Document Description	BegDoc
20	2005.07.15	Letter	Letter from Frank Baltutis to Jeffrey Lipson re: Your objection for the 2003 taxation year	
21	2008.07.31	Tax Record	Waiver of Right of Object or Appeal for 2000/2001/2002/2003 Taxation Years	
22	2008.10.21	Letter	Letter from Richard Grisé to Jeffrey Lipson re: Your correspondence dated June 17, 2008	
23	2008.10.22	Letter	Letter from Richard Grisé to Jeffrey Lipson re: Correspondence received from your representative dated June 17, 2008	
24	2009.01.30	Tax Record	Notice of Reassessment for Jeffrey Lipson (2001 taxation year)	
25	2009.01.30	Tax Record	Notice of Reassessment for Jeffrey Lipson (2002 taxation year)	
26	2009.01.30	Tax Record	Notice of Reassessment for Jeffrey Lipson (2003 taxation year)	
27	2001.11.02	Letter	Correspondence from Canada Revenue Agency re: Taxpayer Relief Request for 2000, 20001, 2002 and 2003 Taxation Years	
May 10, 2019 – Stand-Alone Record via Email				
1	2019.05.01	Expert Report	Opinion of Gavin MacKenzie	
April 29, 2020 – Stand-Alone Records via Email				
1	2011.10.12	Transcript	Revised Transcript of Cross-Examination of Jeffrey Lipson	
2	2015.08.17	Transcript	Transcript of Examination for Discovery of Jeffrey Lipson	
August 8, 2020 – Stand-Alone Record via Email				
1	2020.05.06	Transcript	Transcript of Second Examination for Discovery of Jeffrey Lipson	
November 6, 2020 – Stand-Alone Record via Email				
1	2020.11.02	Chart	Answers to Written Questions on Examination for Discovery of Gardiner Roberts LLP and the Estate of Ronald J. Farano (submitted by Jeffrey Lipson), with: Tab 1 - 2001.01.31 Account of Gardiner Roberts LLP rendered to Gerald Prenick; and Tab 2 - Communications and Handwritten Notes in answer to Q.12.	
November 18, 2020 – Brief of Documents and Stand-Alone Record for Edward Heakes				
	2000.10.06	Letter	Letter from Alexiou, Knowles & Co. to Cassels Brock & Blackwell LLP re: Portfolio Vacations International Limited	CBB0000053
1	2011.10.28	Chart	UAR Chart and Answers re 2011.10.12 Cross-Exam of Jeffrey Lipson	
2	2017.10.03	Chart	UAR Chart and Answers re 2015.08.17 EFD of Jeffery Lipson	
3	2018.05.16	Chart	Supp. Records in Answer to 2015.08.17 EFD of Jeffrey Lipson	

Tab	Date	Document Type	Document Description	BegDoc
4	2019.11.15	Chart	Further Answers to Refusals to 2015.08.17 EFD of Jeffrey Lipson	
5	2020.05.21	Chart	UAR Chart re 2019.05.06 EFD of Jeffrey Lipson	
6	2020.11.02	Chart	Submitted by Jeffrey Lipson - Qs & As to Plaintiff's Written EFD of Gardiner Roberts and Estate of R.J. Farano	

This is Exhibit "P5" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022



A Commissioner for Taking Affidavits.

November 19, 2020

Peter E. S. Jewett
324 Durham Regional Road 8
Uxbridge ON L9P 1R1
pesjewett@gmail.com
416-723-2373

Mr. Peter Griffin
Lenczner Slaght LLP
130 Bay Adelaide St W
Suite 2600
Toronto ON
M5H 3P5

Dear Mr. Griffin:

Re: Lipson v. Cassels Brock & Blackwell LLP, Court File No. CV-09-376511

Professional Background

I practiced corporate law for 45 years at Torys LLP from 1972 until my retirement from active practice at the end of 2017. I joined Torys LLP in 1972 after graduating from the University of Toronto Faculty of Law as the Gold Medalist. During my time at Torys LLP, I became a partner, senior partner, and then senior counsel of Torys LLP specializing in corporate finance, mergers & acquisitions, securities law, corporate governance, and corporate/commercial law in general. At various times I was the head of Torys LLP's corporate department and its corporate finance, and mergers and acquisitions, specialty groups. I have been recognized as a leading corporate finance, mergers and acquisitions, corporate governance, and securities law expert by many legal publications, have frequently spoken at conferences and to law school classes on corporate finance, merger and acquisition, corporate governance, and securities law topics, and for three years taught the securities regulation course at the University of Toronto Faculty of Law. A short CV is attached hereto as Schedule "A".

During my career I worked on several hundred transactions including many of Canada's largest and most complex financings, mergers, acquisitions, privatizations, and corporate reorganizations. Almost all of those transactions involved legal opinions, including opinions about the tax consequences of the transactions, and often, the opinions disclosed in the transaction documents were intended to be relied on by various parties to the transaction. Based on my professional experience, I am very familiar with acceptable practices relating to the form and role of legal opinions provided in transactions, including tax opinions.

Overview

You have asked me to provide you with my opinion as to whether Cassels Brock & Blackwell LLP ("Cassels") met the standard of care of a reasonably competent solicitor concerning independence and disclosure when providing its written opinions (the "Tax Opinions") in the years 2000-2003 in respect of the Timeshare Program, as described below, which is the subject of the claims in the above referenced action.

You have also asked me to comment, in addressing the above question, on the opinion of Gavin MacKenzie, dated May 1, 2019, provided to the plaintiffs' counsel in the above action and opining on the same issue.

In addressing the above issue, I will also consider whether a reasonably competent solicitor in the position of a partner of Cassels would have considered that the firm was in a conflict of interest in rendering the Tax Opinions by virtue of its role in assisting with the structuring of the Timeshare Program, and whether the standard of care of a reasonably competent solicitor at the time would have been to disclose to the Donors under the Timeshare Program the details of Cassels relationship with other parties involved in the Timeshare Program.

In my opinion, Cassels met the standard of care of a reasonably competent solicitor concerning independence, disclosure, and conflict of interest when providing the Tax Opinions.

Documents Reviewed

In considering these questions I have reviewed the documentation listed in Schedule "B" hereto.

Acknowledgment of Experts Duty

I acknowledge that it is my duty to provide opinion evidence in relation to this proceeding that is fair, objective, and non-partisan and that is related only to matters that are within my area of expertise. I also acknowledge that it is my duty to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Attached hereto in Schedule "C" is a signed copy of Form 53, Acknowledgement of Expert's Duty, with respect to the rendering of this opinion.

Assumptions & Factual Background.

(a) Cassels' Retainer Relating to the Timeshare Program

Cassels was retained to provide legal advice on the structure and design of the Timeshare Program[1] as well as to provide a legal opinion on the Canadian tax consequences to the Donors in the Timeshare Program (the Tax Opinions).[2]

While Cassels was initially retained by promoters of the Timeshare Program (Stephen Elliott and Steven Mintz),[3] the Tax Opinions were ultimately addressed to the attention of the President of the Canadian Athletic Advisors Ltd. ("CAA").[4] CAA paid Cassels' accounts.[5]

Mr. Saltman testified that the client identity evolved over time. The initial clients were Mr. Elliott and Mr. Mintz. The client then became CAA, once that entity had been created.[6]

Mr. Saltman also testified that Mr. Elliott and Mr. Mintz provided input on the October 2000 opinion provided to CAA, which CAA was aware of. Mr. Saltman understood that Mr. Elliott and Mr. Mintz were representing CAA during the time that CAA was Cassels' client.[7]

The precise nature of the retainer between CAA, the promoters, and Cassels does not affect my opinion as to whether Cassels met the standard of care.

(b) Description of the Timeshare Program

My general description of the Timeshare Program below is based on the factual assumptions made by Cassels in its Tax Opinions, and I have assumed those facts to be true.

1. Under the Timeshare Program, a Trust was created to administer a programme of support for Canadian amateur athletics.[8] It was intended that the Settlor of the Trust would acquire biennial timeshare weeks for a Bahamas resort from a corporation called Portfolio Vacations International Inc.. The Settlor would then gift the timeshare weeks to the Trustee of the Trust.[9]

---

[1] Transcript of Lorne Saltman, P. 223, Q. 793 [Saltman Transcript].
[2] Saltman Transcript, P. 223, Q. 794.
[3] Saltman Transcript, P. 114, Q. 375, P. 121, Q. 397-398.
[4] Saltman Transcript, P. 121, Q. 399; Opinion Letters dated October 6, 2000, May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002, April 8, 2003. Note: the Opinion dated December 15, 2003 addresses a separate question (i.e. impact of proposed new legislation on the structure).
[5] Saltman Transcript, P. 139, Q. 481-482.
[6] Saltman Transcript, P. 121, Q. 399, P. 135, Q. 458.
[7] Saltman Transcript, P. 135, Q. 462, P. 138, Q. 474-475, P. 139, Q. 478, P. 149, Q 518.
[8] Cassels Legal Opinion dated October 6, 2000, Section 1(a) [October Opinion].
[9] October Opinion, Section 1(c), (f).

2. The Trustee would then distribute the timeshare weeks to individuals (the "Donors") who had expressed an interest in supporting Canadian Amateur sport.[10]

3. Although not required, it was expected that most of the Donors would donate their timeshare weeks to certain Registered Canadian Amateur Athletic Associations ("RCAAAs"),[11] together with a cash amount to discharge liens against the timeshare weeks.[12]

4. When the Donors made a gift to a RCAAA, they were to receive charitable tax receipts from the RCAAA (one for the cash donation and one for the Timeshare week donation).[13]

I note that in rendering this opinion I am not opining as to the correctness or reasonableness of the Tax Opinions. I am not a tax expert and the correctness or reasonableness of the Tax Opinions is a separate matter from the questions I have been asked to address. With respect, many of the details of the Timeshare Program set out in Mr. MacKenzie's opinion, including the fact that the Canadian Revenue Agency successfully challenged the tax credits claimed by the Donors, seem designed to add colour to the Timeshare Program but are not relevant to the issues addressed by Mr. MacKenzie in his opinion, and by me in this opinion. Whether those details are relevant to the correctness or reasonableness of the Tax Opinions is not for me, or Mr. MacKenzie (who is also not a tax expert) to say, as he acknowledges.

(c) Purpose and Use of the Tax Opinions

The Tax Opinions opined as to the Canadian income tax consequences relating to the donation of Timeshare Weeks for individual Canadian resident taxpayers.[14] While the Tax Opinions are addressed to CAA, it was clear on the face of the Tax Opinions that one purpose was to advise "potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property" on the Canadian income tax consequences. Specifically, five of the six Tax Opinions state that "This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion".

Comments on Factual Assumptions and Conclusions in Report of Gavin MacKenzie

I have reviewed the expert report of Mr. MacKenzie dated May 1, 2019. I will not attempt to respond to every aspect of Mr. MacKenzie's report with which I disagree. However, below are key factual assumptions or conclusions that I wish to comment on.

[10] October Opinion, Section 1(a), (g).
[11] October Opinion, Section 1(i).
[12] October Opinion, Section 1(j)
[13] October Opinion, Section 1(l).
[14] October Opinion, Page 1.

Starting on page 8 of Mr. MacKenzie's report, he addresses the question of whether lawyers can assume a duty to a class of non-clients. As Mr. MacKenzie expressly notes, this is a question which must be determined by the Court. However, Mr. MacKenzie continues his analysis on this question and concludes that in his opinion, Cassels owed a duty to Donors reading the Tax Opinions.

In reaching this conclusion, Mr. MacKenzie relies on three key facts:

1. Cassels believed it was providing an independent opinion evaluating the structure of the Timeshare Program and expected non-client readers to similarly believe it was independent;

2. Cassels specifically directed the Tax Opinions to be relied upon by donors for the purpose of participating in the Timeshare Program; and

3. Cassels did not disclose its continuing solicitor-client relationship with the promoters.[15]

Items 1 and 3 relate to what Mr. MacKenzie describes as "independence". Item 2 relates to "reliance". I will address each factor in turn.

(1) Reliance

Mr. MacKenzie notes that the Tax Opinions expressly stated that they:

a) were "specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property"; and

b) "may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion".

He relies on these statements to conclude that Cassels specifically directed the Tax Opinions to be relied upon by donors for the purpose of participating in the Timeshare Program.

In my opinion, only the second statement is a reliance statement. The first statement is a limiting statement. The purpose of the first sentence is to make it clear that a Donor who is not an individual or who does not acquire and hold the Timeshare Weeks as capital property should not rely on the Tax Opinions, presumably because the Canadian income tax consequences would not be as described in the Tax Opinions which address the Canadian income tax consequences only for the group of Donors who are both individuals and acquire and hold the Timeshare Weeks as capital property.

[15] Report of Gavin MacKenzie dated May 1, 2019, page 9 of 10, last paragraph [MacKenzie Report].

(2) Independence

In his report, Mr. MacKenzie also discusses the concept of 'independence'. In doing so, Mr. MacKenzie relies on certain evidence from Mr. Saltman's examination for discovery, where Mr. Saltman stated that he believed he was providing an "independent opinion".[16]

Mr. MacKenzie later concludes that Cassels could not provide an 'independent opinion' to the Donors because it simultaneously owed a duty of loyalty to the promoters and CAA.[17] He goes on to state that disclosure of Cassels' solicitor-client relationship with the promoters and CAA would not necessarily have cured the lack of independence.[18]

To the extent that Mr. MacKenzie assumes that Mr. Saltman's evidence regarding independence relates to independence in the manner which he attributes it (i.e. Cassels' independence from the promoters), I disagree with that factual assumption. In my opinion, Mr. Saltman's evidence quoted by Mr. MacKenzie on this point is not consistent with that assumption.

Mr. Saltman testified that he believed, when preparing the October 2000 opinion, that he was preparing an independent opinion on the evaluation of the structure of the program.[19] In the same line of questioning, when asked whether he was concerned about the fact that the "independent" Tax Opinions were now commenting on the advice he previously gave on the structure, Mr. Saltman stated that it did not trouble him and that "it did not reduce [his] independence".[20] Based on my review of the evidence cited by Mr. MacKenzie, in my opinion Mr. Saltman's testimony regarding independence relates to his ability to provide an objective opinion on the tax consequences of the Timeshare Program when he was also involved in advising on its structure. It does not relate to the question of independence vis-a-vis the Donors and promoters.

With respect to Mr. MacKenzie's comments regarding independence, it should also be noted that the Tax Opinions do not state that they are being provided by counsel who is independent (independence in the sense that counsel has no relationship or connection with the promoters) of the promoters of the Timeshare Program. In my experience it would not be expected that in a transaction like this, the Tax Opinions would be provided by counsel independent of the promoters in the foregoing sense. The Tax Opinions were not held out to be independent legal advice to the Donors: they were not addressed to the Donors, and the marketing brochures used in marketing the Timeshare Program expressly state that Cassels was retained by CAA, not by the Donors.

The Tax Opinions were provided as part of the marketing materials in order to explain the Canadian income tax consequences of participating in the Timeshare Program. In my experience,

[16] MacKenzie Report, P. 9, paragraph 1, citing to Q. 865 of the Saltman Transcript.
[17] MacKenzie Report, P. 10.
[18] MacKenzie Report, P. 10.
[19] Saltman Transcript, P. 239, Q. 865.
[20] Saltman Transcript, P. 242, Q. 880.

most of the marketing of a tax related proposal such as the Timeshare Program would be aimed not at the potential Donors directly but at financial advisors and accountants with a view to encouraging those advisors to recommend the Timeshare Program to their clients. In circumstances such as this, it would not be uncommon for potential Donors, or more likely their agents or professional advisors, to check the provided opinion with independent tax counsel (i.e. counsel completely unrelated to the promoters of the proposed program). In fact, I understand from Mr. Lipson's discovery that he relied in this way on his accountant, and asked his accountant about the Canadian income tax consequences of participating in the Timeshare Program.

Questions to Consider

#1) Would a reasonably competent solicitor conclude that a solicitor/client relationship was formed between the Donors and Cassels as a result of the reliance statement in the Tax Opinions?

In my opinion, the simple answer to this question is no.

The Tax Opinions are not addressed to the Donors but rather to CAA, there was never any direct communication between the Donors and Cassels, Cassels was not compensated by the Donors, and the marketing brochures make it clear that Cassels was retained by CAA and was being compensated by CAA.

The general understanding is that a legal opinion cannot be relied upon by anyone to whom the opinion is not addressed. If it is intended, notwithstanding the general rule, that certain parties may rely on an opinion even though it is not addressed to those parties, the opinion must so state, as the Tax Opinions did in this case. It is not uncommon for a legal opinion given in connection with a commercial transaction to contain reliance language permitting non-client participants in the transaction (often the opposing party in the transaction) to rely on the opinion. In my experience, no one involved in the transaction would reasonably think that that language creates a solicitor/client relationship with those non-client participants.

In my opinion, Cassel's conclusion at the time of the transaction that there was no solicitor/client relationship between Cassels and the Donors was within the norms of corporate finance law practice and within the standard of care of reasonably competent solicitors.

It is not clear to me whether Mr. MacKenzie is asserting that there was a solicitor/client relationship between Cassels and the Donors. In his opinion he sets out at some length the Law Society of Ontario rules with respect to conflicts of interest and the duty of loyalty. These rules and duty apply however only in the context of a relationship with a client or a potential client. If there was not a solicitor/client relationship between Cassels and the Donors, then these conflict of interest rules and the duty of loyalty do not apply between those parties. Mr. MacKenzie appears to accept this as he immediately moves on to considering whether lawyers can assume a duty to a class of non-clients.

#2) Would a reasonably competent solicitor conclude that there was no conflict of interest in rendering the Tax Opinions?

In my experience, there was nothing unusual, nor improper, about Cassels assisting with the structuring of the Timeshare Program and also providing the Tax Opinions. In the context of the Timeshare Program, Cassels' advice on the structure would be directed at producing the desired Canadian income tax results as described in the Tax Opinions. It was normal and appropriate for the promoters to seek Cassels' assistance in designing the detailed terms of the Timeshare Program in an effort to ensure those tax results.

I note that Mr. MacKenzie reaches a slightly different conclusion on conflict of interest. In Mr. MacKenzie's report, he states that Cassels was in a conflict of interest upon assuming a duty to the Donors because the Donors' interests diverge from those of the promoters and CAA. With respect, I disagree with Mr. MacKenzie's conclusion in this regard.

In my opinion, while the promoters and the Donors benefited from the Timeshare Program in different ways, all parties had a common interest in the tax consequences to the Donors being, in fact, as set out in the Tax Opinions. The promoters of the Timeshare Program intended from the outset to have the program operate on a multiyear basis. They had an acute interest in each instalment of the Timeshare Program having the beneficial tax consequences for the Donors as set out in the Tax Opinions. In my experience, promoters would not disregard the tax consequences for the Donors because the promoters earned commissions or fees from the sale of the timeshare weeks to the Donors. To do so would seriously jeopardize the promoters' ability to market further tax related programs in the future.

In light of this common interest in the tax consequences of the Timeshare Program, in my opinion, Cassels' proceeding on the basis that there was not a conflict of interest in assisting with the structuring of the Timeshare Program so that it would produce the intended tax consequences and/or in rendering the Tax Opinions, and inviting the Donors to rely on the Tax Opinions, was within the standard of care of reasonably competent solicitors. This is so notwithstanding that different parties involved in the Timeshare Program were benefitting from the Timeshare Program in different ways.

#3) Should the Tax Opinions have been provided by independent counsel?

Mr. MacKenzie appears to assume that the Tax Opinions should have been provided by counsel completely independent of the Timeshare Program and its promoters. In fact, as discussed above, he asserts that the Tax Opinions were held out to be independent opinions in that sense. I have not seen any evidence of this holding out. The Tax Opinions certainly do not state that they are being provided by counsel completely independent of the promoters and acting on behalf of the Donors. They are in fact addressed to CAA, not the Donors, and it is clear from the marketing materials that CAA is involved in the Timeshare Program.

In any event, it would not have been the practice in transactions of this nature at the time to provide an opinion from counsel completely independent of the promoters. In my experience, legal opinions tendered by a party to a transaction which are permitted to be relied on by other parties are often authored by the tendering party's lawyer and such situations do not require that the author of the legal opinion be independent from all parties.

In my experience, opinions from completely independent counsel are typically used to deal with a conflict of interest situation. As noted above, it was, in my opinion, reasonable for Cassels to act on the basis that the Donors were not their clients and that there was no conflict in this case between the promoters and the Donors with respect to the Canadian income tax consequences of participating in the Timeshare Program. Having reasonably proceeded on the basis that there was not a solicitor/client relationship nor a conflict, it follows that Cassels would see no need for a completely independent opinion.

It was also clear that any Donor, and/or the Donor's professional advisors, were perfectly free to seek their own second tax opinion from completely independent counsel should they wish. In my experience, seeking a second tax opinion in tax related transactions was not, and is not, unusual. It is a frequent part of professional advisors' own due diligence before suggesting or recommending such a transaction to their clients.

#4) Was it the standard of practice to include in the Tax Opinions disclosure regarding independence?

Mr. MacKenzie also asserts that Cassels had a duty to expressly inform the Donors in the Tax Opinions, or elsewhere, that Cassels was not completely independent of the promoters and that it was not acting for the Donors. I respectfully disagree. As noted, the marketing brochures for the Timeshare Program made it clear that Cassels was retained by CAA and the Tax Opinions are addressed to CAA. That makes it clear that Cassels did not consider the Donors to be Cassels' clients and that Cassels was not completely independent of the other parties involved in the Timeshare Program. Inclusion of a reliance statement does not, in my opinion, impose such a duty on Cassels.

As I noted above, in my opinion, Cassels' acting on the basis that the Donors were not Cassels' clients was within the standard of care of reasonably competent solicitors. It follows that Cassels considered that the normal duties a solicitor owes to the solicitor's clients, such as the disclosure of the nature of Cassels' relationships to other parties to the Timeshare Program, did not arise vis-a-vis the Donors.

In his opinion, Mr. MacKenzie appears to accept that the Donors were not clients of Cassels, or that there is at least significant doubt on that matter, when he asks the question on page 8 of his opinion "Can lawyers assume a duty to a class of non-clients by authoring an opinion upon which

the class members will foreseeably rely?". Mr. MacKenzie concludes that there is a duty in such circumstances.

A reasonably competent solicitor would agree that, having invited the Donors to rely on the Tax Opinions, there was a duty owed to the Donors, but that duty was for Cassels to render tax opinions the substantive contents of which were within the standard of care of a reasonably competent tax lawyer in similar circumstances. Mr. MacKenzie appears to agree with that conclusion when he says at the top of page 9 of his opinion that "They can be held responsible for negligent professional advice provided to a third party who foreseeably and reasonably relied on the advice". Whether or not Cassels met that standard is a question of tax law practice and is beyond the scope of this opinion.

Mr. MacKenzie goes on at the bottom of page 9 to conclude that Cassels owed a broader duty relating to disclosure to the Donors for three reasons:

(1) the Donors believed they were receiving an independent opinion,

(2) the Donors were told expressly they could rely on the Tax Opinions, and

(3) there was no express disclosure in the Tax Opinions that Cassels had an ongoing client relationship with other parties to the Timeshare Program.

In my opinion it was well within the standard of care of a reasonably competent solicitor to not draw Mr. MacKenzie's conclusions from the above three assertions. Referring to Mr. MacKenzie's three assertions:

(1) I fail to see why it would be reasonable for the Donors to believe that the Tax Opinions were independent (in the "completely independent" sense used by Mr. MacKenzie) when they were not addressed to the Donors but to CAA,

(2) the reliance language in the Tax Opinions was exactly what it was stated to be and it was reasonable for a solicitor to conclude that this did not create a solicitor/client relationship between Cassels and the Donors, and

(3) the Tax Opinions were addressed to CAA, not the Donors, and the marketing brochures made it clear that Cassels was retained by CAA, and therefore clearly had an ongoing client relationship with other parties to the Timeshare Program.

In my opinion, it was not the usual practice at the time in transactions such as the Timeshare Program to include express language in opinions such as the Tax Opinions that the solicitor rendering the opinion was not acting for the parties, in this case the Donors, to whom the opinion was not addressed but who were invited to rely on the opinion. Particularly in light of the marketing materials making it clear that Cassels was retained by CAA, and the Tax Opinions were

addressed to CAA, in my opinion it was within the standard of care of reasonably competent solicitors in the circumstances for Cassels not to include further disclosure in the Tax Opinions that Cassels was not acting as the Donors' counsel and had relationships with other parties to the Timeshare Programs.

This opinion is based on the documentation I have reviewed. I reserve the right to supplement or change my opinion should new facts or documents come to my attention of which I am not currently aware.

Yours truly,

Peter E. S. Jewett

PETER E. S. JEWETT

Contact Information: 324 Durham Regional Road 8
Uxbridge ON L9P 1R1
pesjewett@gmail.com
416-723-2373

Education: LLB (Gold Medalist), 1972, University of Toronto Faculty of Law

BA Honours, 1969, Queen's University

Bar Admission: Ontario 1974

Work Experience: Torys LLP, 1972-2017.

Retired from Torys LLP in 2017 as Senior Counsel having been a Partner and then Senior Partner from 1980 – 2012. At various times was the head of the Torys Mergers and Acquisitions Group and the Capital Markets Group, and Chair of the Corporate Department.

Expertise: Mergers and Acquisitions
Corporate Finance and Capital Markets
Board Advisory and Governance
Corporate and Commercial Transactions
Securities Regulation

- practised a wide range of corporate and securities law, including mergers and acquisitions, capital markets transactions and corporate/commercial transactions

- has a particular expertise in advising senior management and boards of directors of major public, private and not-for-profit corporations and organizations on a broad range of topics, including current issues of corporate governance

- experienced with domestic and international mergers and acquisitions and corporate finance

- participated in many of Canada's largest acquisitions and divestitures, including privatizations of major federal and provincial enterprises

- served on numerous committees investigating securities and corporate law for the Ontario Securities Commission and the Canadian Bar Association

Representative Work:

1970's – Abitibi Paper's acquisition of Price
- Tomson acquisition of Hudson Bay Company
- Edper acquisition of Brascan (now Brookfield)

1980's - Petro-Canada acquisition of BP Canada
- Petro-Canada acquisition of Gulf Canada
- Petro-Canada's Income Debenture acquisition financings
- Multiple Term Preferred Share financings, including the initial use term preferred shares
- Petro-Canada's privatization
- Multiple Euro Dollar financings
- Multiple Canadian Crown corporation US financings
- Wardair Aircraft financings (Aircraft Financing Journal Deal of the Year in 1987)
- Echo Bay Gold Purchase Warrant financing

1990's - Royal Trust acquisition by Royal Bank
- JDS Fitel's $3.25 billion merger with Uniphase
- novel restructuring of Coors/Molson brewing arrangements
- restructuring of Brascan/Brookfield group
- Fishery Products International's proxy contest

2000's - Petro-Canada's $43.3 billion merger with Suncor Energy
- Indigo Book's acquisition of Chapters

- negotiation of gaming revenue sharing arrangements between the Ontario First Nations and Ontario involving $3.5 billion of revenues

2010's - Loblaw's $12.4 billion acquisition of Shoppers Drug Mart
- proxy contests involving Sherritt International and Enercare
- restructuring of Weston/Loblaw real estate holdings

Recognition:

Chambers & Partners' *Chambers Canada* – Leading lawyer in Canada, corporate/commercial (2016)

Best Lawyers' *Best Lawyers in Canada* – Leading lawyer in corporate. M&A, and securities (2008-2016)

Law Business Research's *Who's Who Legal* – M&A (2008-2010) and capital markets (debt and equity)(2015)

Chambers and Partners' *Chambers Global: World's Leading Lawyers for Business, The Client's Guide* – Leading lawyer in corporate/M&A ("a distinguished M&A veteran") (2008-2016)

Law Business Research's *Who's Who Legal Canada* – Capital markets and M&A (2010-2014) and corporate governance (2010. 2013-2015)

The Legal 500 Canada – Leading lawyer in corporate and M&A (2014-2016)

Lexpert/American Lawyer's *Guide to the Leading 500 Lawyers in Canada* – Leading lawyer in corporate commercial law, and in M&A (2010-2015)

Lexpert/Thomson Reuters' *Canadian Legal Lexpert Directory* – Leading lawyer in corporate commercial law, M&A, corporate finance and securities (2007-2014)

Law Business Research's *International Who's Who of Corporate Governance Lawyers* – Leading Canadian lawyer (2013)

Practical Law Company's *Which Lawyer?* – Leading Canadian lawyer in corporate/M&A (2012)

Lexpert's *Special Law Inserts* appearing in The Globe and Mail's *Report on Business Magazine* – Most frequently recommended lawyer in corporate commercial, and corporate finance and securities (2011)

Legal Media Group/Euromoney's *IFLR1000 Guide to the World's Leading Financial Law Firms* – Leading Canadian lawyer in M&A ("Tory's star M&A lawyer") (2011)

Lexpert's *Cross-Border Guide to the Leading U.S./Canada Cross-Border Corporate Lawyers in Canada* – Leading cross-border practitioner in M&A (2009-2010)

Practical Law Company's *Which Lawyer? Yearbook* – Leading Canadian lawyer in corporate/M&A and directors duties and liabilities (2010)

Real Time News' *LawDay* – Leading lawyer in corporate law (2009)

Practical Law Company's *Which Lawyer? Yearbook* – Leading Canadian lawyer in corporate/M&A; recognized Canadian lawyer in corporate governance (2007 and 2009)

Lexpert/American Lawyer's *Guide to the Leading 500 Lawyers in Canada* – Leading lawyer in corporate commercial, corporate finance and in M&A (2008-2009)

Thomson/Carswell's *Guide to the Leading U.S./Canada Cross-Border Corporate Lawyers in Canada* – M&A (2008)

Euromoney Institutional Investor PLC's *IFLR 1000, Guide to the World's Leading Financial Law Firms* – Leading lawyer in M&A (2008)

Legal Media Group and IFLR's *Guide to the World's Leading M&A Lawyers* – Pre-eminent practitioner (2006)

Lexpert/Thomson Canada's *Guide to the Top 100 Industry Specialists in Canada* – Leading lawyer in corporate finance (2006)

Lexpert/Thomson Canada's *Guide to the 100 Most Creative Lawyers in Canada* – Leading lawyer in corporate, corporate finance and in M&A (2006)

Legal Media Group's *Guide to the World's Leading Corporate Governance Lawyers* – Leading lawyer in Canada (2005)

Lexpert-Thomson-Findlaw's *Guide to the Lweading 100 Canada/U.S. Cross-Border Corporate Lawyers in Canada* – Leading practitioner in M&A (2005)

Professional Involvement:

- taught Securities Regulation at the University of Toronto Faculty of Law in the 1970's

- frequent speaker and panelist at conferences on securities law, corporate law and legal opinions

- conducted orientation sessions on governance for new chairs and chairs of independent schools, and orientation sessions for school governors at several CAIS (Canadian Accredited Independent Schools) schools

- chaired the CAIS Governance Steering Committee that oversaw the creation and publication of the CAIS Governance Guide

- former Chair of AcSOC (the Canadian Accounting Standards Oversight Council)

Community Involvement:

- former Chair of St Clements School Board of Governors
- former Chair of CAIS
- current Chair of the Shaw Festival Board of Directors

SCHEDULE "B" – List of Materials Provided to P. Jewett

Tab		Date	Document Type	Document Description	BegDoc
I.		**Via 2019.06.13 Brief of Documents**			
A	1	2016.02.12	Pleading	Amended Fresh as Amended Statement of Claim of Jeffery Lipson	
	2	2016.07.18	Pleading	Amended Statement of Defence of Cassels Brock & Blackwell LLP	
	3	2016.04.14	Pleading	Amended Third Party Claim	
	4	2011.09.12	Pleading	Reply of the Plaintiff to the Statement of Defence in the Main Action	
	5	2011.10.11	Pleading	Defence of the Third Parties, Gardiner Roberts LLP and Estate of Ronald J. Farano, deceased, to the Main Action	
	6	2011.10.11	Pleading	Defence of the Third Party, Gardiner Roberts LLP and the Estate of Ronald J. Farano, deceased to the Third Party Claim	
	7	2011.06.30	Pleading	Defence to the Third Party Claim of the Third Party, Glenn Ploughman	
	8	2011.08.31	Pleading	Defence to the Third Party Claim of the Third Party, Deloitte & Touche LLP	
	9	2016.05.12	Pleading	Amended Statement of Defence and Crossclaim of the Third Party, Mintz & Partners LLP, to the Third Party Claim	
	10	2016.08.03	Pleading	Amended Third Party Defence of the Third Party, Prenick Langer LLP	
B	1	2000.10.06	Opinion Letter	Opinion Letter re: Donation of Biennial Timeshare Vacation Weeks	
	2	2001.05.18	Opinion Letter	Opinion Letter re: Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	
	3	2001.09.07	Opinion Letter	Opinion Letter re: Donation of One-Bedroom, Biennial Timeshare Vacation Weeks	
	4	2002.05.13	Opinion Letter	Opinion Letter re: Donation of Two-Bedroom, Biennial Timeshare Vacation Weeks	
	5	2002.11.08	Opinion Letter	Opinion Letter re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	
	6	2003.04.08	Opinion Letter	Opinion Letter re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	
	7	2003.12.15	Opinion Letter	Opinion Letter re: Donation of One-Bedroom and Two-Bedroom, Biennial Timeshare Vacation Weeks	
C	1	2019.05.01	Expert Report	Expert Report of Gavin MacKenzie	
	2	2019.05.01	CV	CV of Gavin MacKenzie	
D.A	1	2015.08.18	Transcript Excerpt	Questions 9-14 from Transcript of Examination of L. Saltman	
	2	2015.08.18	Transcript Excerpt	Questions 60-63 from Transcript of Examination of L. Saltman	
	3	2015.08.18	Transcript Excerpt	Questions 387-391 from Transcript of Examination of L. Saltman	
	4	2015.08.18	Transcript Excerpt	Questions 397-434 from Transcript of Examination of L. Saltman	

Tab	Date	Document Type	Document Description	BegDoc
5	2015.08.18	Transcript Excerpt	Questions 443-451 from Transcript of Examination of L. Saltman	
6	2015.08.18	Transcript Excerpt	Questions 524-533 from Transcript of Examination of L. Saltman	
D.B 1	2015.10.27	Transcript Excerpt	Questions 548-612 from Transcript of Examination of L. Saltman	
2	2015.10.27	Transcript Excerpt	Questions 630-938 from Transcript of Examination of L. Saltman	
3	2015.10.27	Transcript Excerpt	Questions 955-980 from Transcript of Examination of L. Saltman	
4	2015.10.27	Transcript Excerpt	Questions 1001-1080 from Transcript of Examination of L. Saltman	
5	2015.10.27	Transcript Excerpt	Questions 1285-1292 from Transcript of Examination of L. Saltman	
D.C 1	2015.10.28	Transcript Excerpt	Questions 1409-1412 from Transcript of Examination of L. Saltman	
2	2015.10.28	Transcript Excerpt	Questions 1447-1538 from Transcript of Examination of L. Saltman	
3	2015.10.28	Transcript Excerpt	Questions 1597-1601 from Transcript of Examination of L. Saltman	
4	2015.10.28	Transcript Excerpt	Questions 1872-1876 from Transcript of Examination of L. Saltman	
D.D 1	2015.10.29	Transcript Excerpt	Questions 2252-2254 from Transcript of Examination of L. Saltman	
2	2015.10.29	Transcript Excerpt	Questions 2423-2442 from Transcript of Examination of L. Saltman	
3	2015.10.29	Transcript Excerpt	Questions 2515-2519 from Transcript of Examination of L. Saltman	
D.E 1	2015.11.05	Transcript Excerpt	Questions 2670-2867 from Transcript of Examination of L. Saltman	
2	2015.11.05	Transcript Excerpt	Questions 2873-2903 from Transcript of Examination of L. Saltman	
3	2015.11.05	Transcript Excerpt	Questions 2916-2934 from Transcript of Examination of L. Saltman	
4	2015.11.05	Transcript Excerpt	Questions 2946-2972 from Transcript of Examination of L. Saltman	
5	2015.11.05	Transcript Excerpt	Questions 2978-2998 from Transcript of Examination of L. Saltman	
6	2015.11.05	Transcript Excerpt	Questions 3010-3022 from Transcript of Examination of L. Saltman	
7	2015.11.05	Transcript Excerpt	Questions 3030-3034 from Transcript of Examination of L. Saltman	
8	2015.11.05	Transcript Excerpt	Questions 3042-3053 from Transcript of Examination of L. Saltman	
9	2015.11.05	Transcript Excerpt	Questions 3084-3118 from Transcript of Examination of L. Saltman	

Tab	Date	Document Type	Document Description	BegDoc
10	2015.11.05	Transcript Excerpt	Questions 3127-3157 from Transcript of Examination of L. Saltman	
D.F 1	2016.10.14	Transcript Excerpt	Questions 2645-2828 from Transcript of Examination of L. Saltman	
2	2016.10.14	Transcript Excerpt	Questions 2862-2863 from Transcript of Examination of L. Saltman	
II.	**Via 2019.07.02 Brief of Documents**			
1	2000.00.00	Guide	Beneficiary Guide Athletic Trust of Canada, Fall 2000	CBB0002254
2	2000.00.00	FAQs	Frequently Asked Questions Athletic Trust of Canada, Fall 2000	CBB0002258
3	2000.00.00	Application	Application to the Trustee Athletic Trust of Canada by Potential Class A Beneficiary Fall 2000	CBB0002262
4	2000.00.00	Deed of Gift	Deed of Gift Class A Beneficiary to a Registered Canadian Amateur Athletic Association Sandyport Timeshare Week	CBB0002266
5	2000.10.30	Agreement	Charge and Security Agreement USD $3,200 Secured by a Sandyport Timeshare Week	CBB0002269
6	0000.00.00	Terms and Conditions	Sandyport Beaches Resort Timeshare Rules and Regulations	CBB0002277
7	2000.09.13	Appraisal Report	Sandyport Beaches Resort Final Appraisal Report Hotel Consulting International, September 13, 2000	CBB0002280
8	2000.08.18	Appraisal Report	Sandyport Beaches Resort Final Appraisal Report Michael Cane Consulting, August 18, 2000	CBB0002386
9	2000.10.06	Letter	Legal Opinion Letter to Canadian Athletic Advisors Ltd. by Cassels Brock & Blackwell LLP	CBB0002524
10	2000.10.20	Deed of Trust	Athletic Trust of Canada Deed of Trust	CBB0002539
11	2000.10.20	Deed of Gift	Athletic Trust of Canada Initial Deed of Gift From Settlor	CBB0002564
12	2000.10.12	Agreement	Sandyport Beaches Resort Timeshare Purchase Agreement Between Portfolio Vacations International Inc. and Settlor	CBB0002571
13	2000.00.00	Deed of Gift	Sandyport Beaches Resort Deed of Gift of Timeshare Weeks Between Settlor and Athletic Trust of Canada	CBB0002595
14	2000.00.00	Corporate Record	Athletic Trust of Canada Resolution Re: Capital Distribution of Timeshare Weeks to Class A Beneficiaries	CBB0002601
15	0000.00.00	Conveyance	Athletic Trust of Canada Conveyance of Timeshare Weeks to Class A Beneficiaries	CBB0002604

Tab	Date	Document Type	Document Description	BegDoc
16	2000.10.12	Agreement	Timeshare Remarketing Agreement Between Canadian Athletic Advisors Ltd. And Portfolio Vacations International Inc.	CBB0002609
17	2000.10.18	Agreement	Timeshare Pooling Agreement Between Canadian Athletic Advisors Ltd. and Registered Canadian Amateur Athletics Associations	CBB0002624
III.	**Via 2020.04.30 Email**			
1	2011.10.12	Transcript	Revised Transcript of Cross-Examination of Jeffrey Lipson	
2	2015.08.17	Transcript	Transcript of Examination for Discovery of Jeffrey Lipson	
IV.	**Via 2020.10.29 Email**			
1	2020.05.06	Transcript	Transcript of Examination for Discovery of Jeffrey Lipson	
V.	**Via 2020.11.06 Email**			
1	2020.11.02	Chart	Answers to Written Questions on Examination for Discovery of Gardiner Roberts LLP and the Estate of Ronald J. Farano (submitted by Jeffrey Lipson), with: Tab 1 - 2001.01.31 Account of Gardiner Roberts LLP rendered to Gerald Prenick; and Tab 2 - Communications and Handwritten Notes in answer to Q.12.	

Court File No. CV-09-376511-00CPA1

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JEFFERY LIPSON

Plaintiff

and

CASSELS BROCK & BLACKWELL LLP

Defendant

and

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Peter Jewett. I live at the Township of Uxbridge, in the Province of Ontario.

2. I have been engaged by or on behalf of Cassels Brock & Blackwell LLP to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

(c) to provide such additional assistance as the Court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date NOV. 19, 2020

Signature

NOTE: This form must be attached to any expert report under subrules 53.03(1) or (2) and any opinion evidence provided by an expert witness on a motion or application.

511

JEFFERY LIPSON	-and-	CASSELS BROCK & BLACKWELL LLP	-and-	MINTZ & PARTNERS et al.
Plaintiff		Defendant		Third Parties

Court File No. CV-09-376511-00CPA1

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

ACKNOWLEDGMENT OF EXPERT'S DUTY

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Peter H. Griffin (19527Q)
Tel: (416) 865-2921
Fax: (416) 865-3558
Email: pgriffin@litigate.com
Shara N. Roy (49950H)
Tel: (416) 865-2942
Fax (416) 865-3973
Email: sroy@litigate.com
Amy Sherrard (70456B)
Tel: (416) 865-2923
Fax (416) 865-2978
Email: asherrard@litigate.com
Jessica Kras (77700K)
Tel: (416) 865-3718
Fax (416) 865-6773

Email: jkras@litigate.com

Lawyers for the Defendants

This is Exhibit "P6" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

Phone: 416-847-7300 | Fax: 1-866-285-6527 | Email: info@taxchambers.ca
155 University Avenue, Suite 300, Toronto, ON M5H 3B7
taxchambers.ca | Toll Free: 1-855-847-7300

September 30, 2021

Reply To: Vern Krishna, CM, QC
E-mail: vern.krishna@taxchambers.ca
Telephone: (416) 847-7300

By Email

Roy O'Connor LLP
1920 Yonge Street
Suite 300
Toronto, Ontario
M4S 3E6

Attn: David F. O'Connor & J. Adam Dewar

Dear Messrs:

Re: Lipson v. Cassels Brock and Blackwell LLP
Court File No: CV-09-376511

A. PURPOSE & SCOPE OF OPINION

1. You have retained me to provide a "fair, objective and non-partisan" supplementary Opinion in the context of litigation in respect of certain proceedings under the *Class Proceedings Act* (1992).

2. You have asked for my Opinion on Mr. Heakes' Report as it relates to his analysis of Cassels Brock's Opinions during the Relevant Period on the following matters:

   (a) Gift Analysis;

   (b) Valuation Analysis;

   (c) Tax Risks; and

   (d) Tax Counsel Roles.

3. My Opinion relates to the years 2000 to 2003 inclusive (the "**Relevant Period**") and is supplemental to my original Opinion of March 18, 2011. This Opinion addresses questions pertaining to the opinion of Mr. Edward Heakes that you asked me to consider in your letter of July 8, 2021.

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

B. SUMMARY OF MY OPINIONS

4. **With respect:**

   (a) the Heakes' Opinion does not adequately consider that a reasonable expectation within the program that the Donors would donate their Timeshare Weeks to the Donee would be considered a material advantage that negates the transfer as a gift under the common law.

   (b) The Heakes' Opinion that Canadian case law during the Relevant Period had not established that an "inflated tax credit" would render a purported gift invalid misstates the law and is not supported by the jurisprudence.

   (c) Mr. Heakes misconstrues the common law in respect of gifts and the *ratio* of the decision of the Federal Court of Appeal in *Friedberg*.

5. **In my Opinion, the Cassels Brock's Opinions do not adequately analyse the crucial links between the expectation of "material benefits", "impoverishment" of the taxpayer and the Donors' "donative intent" in the Timeshare Program. The guaranteed net cash tax credit built into the Program, which substantially exceeded the taxpayer's cash outlays, negated the existence of a gift and invited the risk of an assessment by the CRA.**

6. **In my Opinion, the structure of the Timeshare Program provided the Class A Beneficiaries an assured immediate profit of approximately 32 percent on their cash outlay, which enriched them from their donations. This effectively impaired the integrity of the donations as a gift for income tax purposes.**

7. **In my Opinion, the put option would have had a significant impact in lowering the valuation of the Timeshare Weeks and should have been disclosed.**

8. **In my Opinion, Mr. Heakes does not adequately evaluate the Cassels Brock Opinions in the context of the CRA's administrative position, which is the basis upon which it reviews taxpayer filings, such as the Program, in issuing its assessments. As structured, the Timeshare Program and Class A Beneficiaries were at substantial risk of being assessed.**

9. **In my Opinion, there was a substantial risk that the parties in the Timeshare Program were not factually at arm's length with each other as they were not independent and were intimately involved with each other. Hence, there was an even greater risk to the Donors that the CRA would closely scrutinize and challenge the valuation of the transactions and Timeshare Weeks.**

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

10. **In my Opinion, Cassels Brock should have disclosed in their Opinions to the Donors the exceptionally high risk of CRA income tax assessments and the inherent costs of dispute resolution and proceedings in the Tax Court of Canada to challenge the assessments. This exceptional risk and associated dispute resolution costs would have been particularly relevant to potential Donors and should have received heightened disclosure in the Opinions.**

11. **I do not agree with Mr. Heakes' Opinion that what applies in commercial transactions, applied to the roles of Cassels Brock and their Opinions to the Donors. I do not understand how Mr. Heakes concluded that the Opinions of Cassels Brock were "appropriately independent".**

12. **Overall, in my Opinion, as a tax lawyer having dealt with numerous tax plans in 45 years of legal practice in Canada (Nova Scotia, Alberta, and Ontario), Cassels Brock did not meet the standard of care of a prudent tax solicitor in issuing their Legal Opinions and the inherent risks to the Donors of CRA assessments.**

C. OVERVIEW OF FACTS

13. Cassels Brock and Lorne H. Saltman ("**Saltman**"), a Partner at Cassels Brock, prepared a series of Legal Opinions for Canadian Athletic Advisors Ltd. ("**CAA**") in connection with a timeshare donation program (the "**Timeshare Program**") that Athletic Trust of Canada ("**Athletic Trust**") operated and promoted.

14. The Cassels Brock Opinions are dated October 6, 2000, May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002, and April 8, 2003.

15. The Legal Opinions were also targeted to potential donors in the Timeshare Program. For example, the Legal Opinion of October 6, 2000, stated: "This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property.

16. Similarly, the Legal Opinion of May 18, 2001, stated: "This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion." There were similar statements in the Opinions of May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002, and April 8, 2003.

17. The Timeshare Program was packaged to support amateur athletes and reduce the tax liability of individuals who participated in the Program by providing tax credits under the *Income Tax Act* (Canada) (the "**Act**").

18. The arrangement was structured in a series of interconnected transactions.

19. Mr. Adrian Crosbie-Jones ("**Settlor**"), a resident of the Bahamas, settled a trust in Ontario (AT) with a gift of $100.

20. The Trust had Class A and Class B Beneficiaries.

21. The Class A Beneficiaries were entitled to the capital of AT; the Class B Beneficiaries to its income.

22. The Class A Beneficiaries were Canadian resident individuals. A numbered corporation (1443372 Ontario Inc.) was the Class B Beneficiary.

23. In 2000, the Settlor acquired biennial Timeshare Weeks from a Bermuda corporation, Portfolio Vacations International Ltd. ("**PVIL**"), which was established under the laws of Bermuda, for the lesser of US$9,000 or the fair market value of each Timeshare Week.

24. The purchase price was payable as follows:

Cash	US$5,800
Lien	$3,200
Total	US$9,000

25. There were similar Timeshare transactions in 2001 to 2003 for approximately similar values.

26. During the taxation years 2000-2003 (inclusive), individuals who qualified as Canadian Resident Donors (Class A Beneficiaries) received Timeshare Weeks from the Athletic Trust.

27. Each Timeshare Week distributed to the Class A beneficiaries was subject to a Lien.

28. The Lien was a limited recourse charge against the property. There was no right of further recovery of any deficiency against any owners of the Timeshare Weeks.

29. The Class A Beneficiaries signed a promissory note for C$4,600 to C$9,700 (Canadian dollar equivalents) payable on demand with interest accruing at 12 percent per year payable annually, in arrears.

30. The principal on the note was to accrue until such time that a demand was made and was to be added to the principal amount annually. Interest would compound at an annual rate of 12 percent.

31. In the event of a default in payment, the entire amount outstanding would become due and all amounts paid prior to default would be forfeited as "liquidated damages."

32. The Lien taken back by PVIL would be registered in the Bahamas against the title of each Timeshare Week.

33. Donors could discharge their Liens by paying C$4,600 to C$9,700 (approximately the equivalent of the US amount of $3,200).

34. The Settlor advised the Vendor of the Timeshare Interest that he intended to gift the properties to the Athletic Trust as a settlement of capital property.

35. The Trustee of the Athletic Trust was to select "qualified beneficiaries in Canada" who would be entitled to receive capital distributions from the Athletic Trust.

36. The contract provided that it was the "expectation of the Athletic Trust that the Canadian Beneficiaries will gift their Timeshare Interests as charitable donations" to registered Canadian Amateur Athletic Associations ("**RCAAAs**").

37. The Donors would donate the Timeshare Weeks plus a cash donation of C$4,600 to C$9,700 per Timeshare Week to the **RCAAAs**.

38. The cash payments of C$4,600 to C$9,700 removed the Liens on the Timeshare Weeks.

39. The Canadian dollar amounts were equivalent of the US dollar amounts based on then current exchange rates.

40. Two professional appraisers valued the Timeshare Weeks.

41. Through a marketing arrangement with the **CAA**, the developers could acquire (call options), and were required to acquire (put options), the Timeshare Weeks for a price that was either 60 percent below the appraised fair market value of the Weeks, or (if more than 100 units purchased) between US$1,000 to US$1,100 per week.

42. The developers would purchase (or be required to purchase) the property at a price substantially below the appraised fair market value of the properties, which ranged between US$13,275 and US$28,600.

43. The Donors received charitable donations receipts from the **RCAAAs**.

44. The RCAAAs issued two charitable receipts to the Class A Beneficiaries as follows:

    (a) A receipt for C$4,600 to C$9,700 with respect to the cash donation used to discharge the Lien; and

    (b) A receipt for the then fair market value of the donated Timeshare Weeks *less* the amount of any Lien registered against the property (if any) of between

(approximately) C$13,275 and C$28,600 per Week.

45. The tax credit benefit on the receipts at the highest marginal rate would be equal to approximately C$6,100 to C$13,100.

46. The net effect of the series of transactions was that the **Settlor** paid nothing, the developers got back the property, and the Donors received net tax credits for more than their cash outlay.

47. The Trustee had the sole legal title to all of the property comprising the Trust Fund and also had exclusive management and control of all Trust property.

48. The Beneficiaries did not have any right or power to alienate or otherwise encumber the Timeshare Interests.

49. The Trustee had the absolute power, notwithstanding any rule of law to the contrary, to purchase Trust assets at fair market value on such terms, conditions and price as the Trustee in its absolute and uncontrolled discretion considered advisable. The Trustee's decision in this regard was final, absolute and binding without any other approval whatsoever (Article 2.4, Schedule 3, Athletic Trust of Canada).

50. The Class A Beneficiaries were required to complete an application in which they indicated whether they had supported, or intended to support in the future, amateur athletics in Canada.

51. The application stated that the Beneficiary was under no obligation whatsoever to donate any or all such Timeshare Weeks to a registered Canadian amateur athletic association, or any other charitable organization.

52. The Timeshare Interests were valued by an appraiser (Michael Cane Consultants) on October 25, 2000, as follows:

One bedroom unit	US$15,000
Biannual one bedroom unit	US $9,000

53. The Valuation Report stated that the values were fair market value estimates without any discount for bulk sales or marketing costs and sales commissions.

54. The Report explicitly exonerated Michael Cane Consultants from giving testimony or attending in any court by reason of the appraisal.

(1) Gift Analysis

(a) Meaning of "Gift"

55. The Act does not define the term "gift" and, therefore, we start with dictionary definitions:

> *Halsbury Laws of England*, 3rd ed, Vol 18, 364 at 365:
>
> "A gift *inter vivos* may be defined shortly as the transfer of any property from one person to another *gratuitously* while the donor is alive and not in expectation of death."
>
> *Black's Law Dictionary*, 7th ed. (St. Paul, Minnesota: West Group, 1999), at p. 696: A voluntary transfer of property to another without consideration."
>
> *Shorter Oxford Dictionary*: "A transfer of property in a thing, voluntarily and without any valuable consideration".

56. The common theme in each of these definitions is that a gift is the voluntary transfer of property from a donor to a donee for which the donor receives no benefit or consideration and is a transfer without expectation of economic reward or material return.[1]

(b) The Common Law

57. The essential ingredients of a legally valid gift are as follows:

> (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration;
>
> (2) an acceptance of the gift by the donee; and
>
> (3) a sufficient act of delivery or transfer of the property to complete the transaction [*Cochrane v. Moore* (1890), 25 Q.B.D. 57 (C.A.), at p. 72-73].

58. Canadian courts at various levels have considered the concept of "gift" as have courts in other common law jurisdictions.

i. Supreme Court of Canada

59. The Supreme Court of Canada described "gift" in *Peter v. Beblow*, [1993] 1 S.C.R. 980, per McLachlin J. as follows:

> The central element of a gift [is the] intentional giving to another without expectation of remuneration" [at p. 991-92. The donor must, in effect, impoverish himself or herself by the transfer.[2]

[1] See *The Queen v. Friedberg*, 92 D.T.C. 6031 (F.C.A.) at 6032; [1992] 1 C.T.C. 1 (F.C.A.), which is considered the leading decision on the meaning of "gift" — see: *Berg v. R.*, 2014 FCA 25; *Maréchaux v. The Queen*, 2010 FCA 287; and *Kossow v. Canada*, 2013 FCA 283.
[2] *Berg v. R.*, 2014 FCA 25.

ii. Federal Court of Appeal

60. The Federal Court of Appeal considered the meaning of "gift" in the context of charitable donation credits in several decisions prior to the Relevant Period.

Friedberg, 92 DTC 6031 (FCA); [1993] 4 SCR 285

61. There were two major issues in *Friedberg*. The first was whether there had been a proper transmission of title and whether the Associate Chief Justice (at trial) erred in holding that two collections of ancient textiles (the Abemayor Collection and the Wilkinson Collection) were 'gifts' to the Royal Ontario Museum (ROM) that qualified as deductions for tax purposes. On this issue, Justice Linden concluded:

> With respect, this conclusion was based on an error of law, in that the Trial Judge failed to appreciate the importance of the 'document purporting to pass title'…, which legally transferred the title of the Abemayor Collection to the ROM, not to the taxpayer. No such transfer document to the ROM existed in the case of the Wilkinson Collection, and, hence, he was incorrect in holding them to be similar transactions, but he was correct in so far as his characterization of the Wilkinson gift was concerned.

62. Justice Linden recognized the possibility that *in certain circumstances* a donor may make a "profit" from a donation if he acquires property at a low cost and donates it to qualified donee when its fair market value ("FMV") has increased.

> It is clear that it is possible to make a 'profitable' gift in the case of *certain cultural property*. Where the actual cost of acquiring the gift is low, and the fair market value is high, it is possible that the tax benefits of the gift will be greater than the cost of acquisition. A substantial incentive for giving property of cultural and national importance is thus created through these benefits. But not every gift will be found to benefit from these provisions. It all depends on how the transaction is characterized, for one cannot give what one does not own.

63. And at page 6032:

> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for *which no benefit or consideration* flows to the donor (see Heald, J. in *The Queen* v. *Zandstra* [74 DTC 6416] [1974] 2 F.C. 254, at p. 261.) The tax advantage which is received from gifts is *not normally* considered a 'benefit'.

64. Justice Linden's comment on profitable gifts and what he meant by "not normally" should be read in the context of the facts of the case. As Lord Halsbury said in *Quinn* v. *Leathem*:[3]

[3] [1901] A.C. 495 at 506.

> Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are qualified by the particular facts of the case in which such expressions are to be found.

65. Mr. Saltman's referral to *Friedberg* in his Legal Opinions is unqualified: "The courts have held that a tax advantage (that is a tax credit for an individual) is not considered to be a benefit within this test (citation)". When asked at discovery, Mr. Saltman stated that it was not necessary in his view to refer to the qualifier "not normally" in his Opinion [Questions 1155 – 1157].

66. In *Dutil* v. *Canada*, [1991] T.C.J. No. 654, the Tax Court of Canada seriously doubted whether there was a gift at all or whether *Friedberg* could be argued to apply when the taxpayer's motivation in making the so-called gift was to enrich, and not impoverish, himself.

> However, it could be argued, as solicitor for the respondent did, that the official recognition of a gift of $5,500 by the Musée Louis-Hémon was sufficient consideration to disqualify the transfer from being a real gift for the purposes of para. 110(1)(a) of the Act. Our tax system provides for the deduction of a charitable gift within the limits determined by the Act, when such a gift is made to a recognized body. It may thus be regarded as a normal consequence intended by the legislature in order to encourage such gifts. However, it may be seriously doubted whether such a gift even exists in the true sense when the taxpayer's sole motivation is clearly to enrich himself, not impoverish himself. If Friedberg (supra) is used as authority for the argument that this may nevertheless be the result of a gift, it is still true that it is the exception and not the rule.

67. Justice Linden's comment that "the tax advantage which is received from gifts is *not normally* considered a 'benefit'" refers to the fact that the tax credit does not normally detract from the validity of the gift. That is because the tax credit is always only a percentage of the gift, which the *Income Tax Act* specifically provides for as an incentive for specified worthwhile causes.

68. As the Supreme Court of Canada has said: the donor must, in effect, impoverish himself or herself by the transfer.[4]

69. Mr. James Parks recognized this interpretation of Justice Linden's comments and the limitations of the *Friedberg* decision in his Memo (July 13, 2000), where he said:

> I think that *Friedberg* establishes only that a person who makes a gift of $10,000 and receives a tax credit has nonetheless made a gift of $10,000. It does not establish

[4] *Peter v. Beblow*, [1993] 1 S.C.R. 980

> that the person is not better off financially than by not having made the gift, particularly where the property being donated was acquired in a bargain sale situation;

(c) Expectation of a Material Advantage

70. An expectation that the donor will receive a material advantage from his or her donation is sufficient to contaminate a "gift" even in the absence of a contractual commitment. In *Woolner* v. *A.G. of Canada et al.*[5] the Federal Court of Appeal had to determine whether parents who contributed to a Church derived a benefit or advantage of a material nature for the purposes of the gift rules. The parents were not under any contractual obligation to contribute to the Church for their child to receive a bursary. However, they were *highly expected* to contribute. Indeed, a report by the Student Aid Committee stated: "It is assumed that the student and/or parents will contribute as much as they are able to the fund". The FCA followed *Zandstra*[6] in holding that their contributions constituted a material benefit to the taxpayers.

71. While a parent could theoretically not pay any money to the Church for their child to receive a bursary, all parents would also presumably understand that if each and every parent refused to donate money to the Church, there would be insufficient money available to provide students with bursaries.

72. Similarly, in *Hudson Bay Mining and Smelting Co. Ltd.* v. *The Queen*, 86 DTC 6244 (FCTD):

> Obviously, where something is given in return for some benefit or advantage it is not a true gift.

73. Donations may not be regarded as gifts even where taxpayers are not under a legal obligation to make the payments. See, for example, the Federal Court of Appeal's decision in *McBurney* :[7]

> I cannot accept the argument that because the respondent may have been under no legal obligation to contribute, the payments are to be regarded as "gifts". The securing of the kind of education he desired for his children and the making of the payments went hand-in-hand. Both grew out of the same sense of personal obligation…

74. The essence of these decisions is that even in the absence of a contractual obligation or guarantee, a reasonable expectation of a material advantage or economic benefit in exchange for the donation is sufficient to taint it as a gift. There is no requirement of absolute certainty.

---

[5] 99 DTC 5722; [2000] 1 CTC 35 (FCA).
[6] *The Queen* v. *Zandstra* [74 DTC6416] [1974] 2 F.C. 254, at p. 261.)
[7] 99 DTC 5722; [2000] 1 CTC 35 (FCA) at para. 14 and page 5436.

75. The Saltman Opinion of June 26, 2000 (at paragraph 3, CBB0005269/2) acknowledged the *ratio* in *McBurney* [8]:

> If a taxpayer acquires property on condition that it must be donated, then the donation may not be considered a gift, as the taxpayer is donating not out of his or her own volition, but due to requirements imposed by contract.

Discoveries of Saltman beginning at Q. 1679

76. Saltman's discoveries disclose his concerns about the Class A Beneficiaries being under an express or implied obligation to pledge their interests. See, for example:

> Q. 1680: On page 2 in item B one of the additions is to the sentence which reads:
>
> " ... A Trust has been settled by the settlor for the benefit of a class of individuals, both residents of Canada and non-residents of Canada, who indicate a willingness to support amateur athletics by agreeing to pledge $(bullet) to Canadian registered amateur athletic associations ... ".
> Do you see that?
>
> A. Yes.
>
> Q. 1681: At that time it was, to your knowledge, intended that the beneficiaries would execute a pledge of the timeshare units that they received, and pledge them to the Athletic Associations. Is that fair?
>
> A. It talks about a pledge with a dollar figure, and I don't recall what would be the subject of that pledge. Would they be pledging a dollar amount, property?
>
> Q. 1682: I see what you are saying, but in any event, you were aware that it was intended, at least as of June 26th, 2000, that the beneficiaries would be pledging a donation to the Athletic Association?
>
> A. Yes,
>
> Q. 1683: Did that ever change?
>
> A. Yes. I don't think a pledge was required.
>
> Q. 1684: Why wasn't it required? Or why was it removed?
>
> A. I don't recall precisely, but it probably wasn't necessary.
>
> Q. 1685: Do you have any greater understanding of why the agreement to make a pledge was removed from the opinion?
>
> A. *There is always a question when you are making a gift, is it voluntary, and not subject to a contractual obligation. By putting a pledge there, you raise a specter; is*

[8] 99 DTC 5722; [2000] 1 CTC 35 (FCA).

there a contract that is requiring you to make the donation? By removing the pledge you remove that argument [emphasis added].

Q. 1686: You remove the argument about a contractual obligation?

A. Correct.

Q. 1687: But as of the date that you prepared this draft, June 26th, 2000, you understood that there was going to be a pledge?

A. What I put in here is my understanding of what was being proposed. This was still very much in draft form. I can't say anything more than that.

Q. 1688: Well, I think you can tell me whether as of the date of the memo ... that you

prepared this draft that you indeed understood that the beneficiaries would agree to pledge something to the Athletic Association? That is what you understood at the time?

A. This draft opinion reflects what was my understanding of what was being proposed at the time.

Q. 1689: All right. And your understanding was that part of the program would involve a pledge by the beneficiaries?

A. Yes.

Q. 1690: And on page 3 of the opinion one of the changes you have made at the top relating to the timeshare weeks is that the beneficiaries could choose to retain the weeks, and use them for their own vacations. Is that fair?

A. Yes.

Q. 1691: And why was that necessary to add to the opinion?

A. We did not want to have anybody compelled to make a donation. It was critical to have discretion in the hands of the donor whether to donate. And we knew that these were attractive resorts that people would want to keep. Some people may want to keep the timeshares and use them. So, if that is the reality it is very helpful to be able to put that in there to show that there was true discretion, and no compulsion.

Q. 1692: So, you said it was critical. What was critical about putting that in there?

A. No, to make sure that the gift would be accepted as a valid gift for tax purposes. If it is a transfer that is compelled, it won't work. If there is discretion whether or not to transfer, you are in a much better position to say it is a valid gift.

Q. 1693: If you could turn to Cassels Brock Bates 5274.

Q. 1695: And it is a quick question. Are you aware ... is this somehow a clean copy of the June 26th version we have just looked at, somehow dated three days later?

We understand that there is no obligation of any nature on any of the Class A Beneficiaries to donate any Timeshare Weeks at any time.

77. There is considerable further discussion of the role of a "pledge" in the structure of the offering in questions 1750 to 1849.

78. Mr. Saltman did not fully address the issue of "reasonable expectations" and contractual obligations in the context of the prevailing Canadian law. Specifically, Mr. Saltman draws a distinction between the legal effect of a pledge and an expectation, which was contrary to the *Woolner* and *McBurney* decisions of the Federal Court of Appeal, which applied during the Relevant Period.

79. See, for example:

> Q. 1839: Do you agree with Mr. Parks' view that ... as he sets out in his memo at item 7:
>
> " ... It seems to me there is a very clear understanding that none of this would be happening at all if the donor were not at least expected to make a donation of the timeshare weeks? ..."
>
> A. Yes, that is right. After all, the settler is creating this trust to support RCAAAs, and choosing to have a trustee make the determination, based on whatever criteria there would be, as to who should be put in a position to support these charities, by making the RCAAAs, by making the donations. So, clearly, from the settler's point of view when he is setting up this arrangement, he would like the RCAAAs to benefit. It doesn't mean that that is a certainty.
>
> Q. 1840: But that is the understanding?
>
> A. That is an expectation without the understanding that it will be the case. There is a distinction.
>
> Q. 1841: So, you don't think there is a very clear understanding that none of this would be happening at all if the donor were at least not expected to make a donation of the timeshare units?
>
> A. I think that is fair, *that they would be expected but not required*, and it ... clearly, there would be the discretion not to make the donation [emphasis added].

80. In effect, Timeshare Program allowed the Donors to receive property *without cost* but with a liability attached in the form of a Lien on the property.

81. The Lien was due on demand and carried interest at a market rate payable in arrears. The Donors could pay the Lien and extinguish their liability for US$3,200 by donating the property and obtain a tax advantage based on a US$10,000 donation or Canadian dollar equivalents.

82. The Donors received charitable receipts for the donated Timeshare Weeks of between (approximately) C$13,275 and C$28,600 per Week.

83. The receipts allowed the Donors to claim tax credits that exceeded their cash outlay.

84. The arrangement clearly troubled James Parks (Memo, July 13, 2000, at para. 3):

> …while you can say that there is no material advantage obtained because the "donor" retains no property, the fact is that the donor does receive a clear tax benefit. Notwithstanding *Friedberg*, which held only that the tax advantage received from the tax credit does not disqualify the "gift", there clearly is a monetary advantage in paying $4,000 and receiving credit for having made a $10,000 donation.

85. At Q. 1849 of Mr. Saltman's discoveries, Counsel put an extract of Mr. Parks' comments:

> ... I am not convinced the smell test would be met if the matter were litigated. As we have also discussed, it is a simple matter for Revenue Canada to challenge the arrangement and force the donors to support their position. If they do not have the stomach for a fight, they clearly should not be undertaking this type of planning. The letter should address this, even if it detracts from the marketing aspect ...

Breaking that down. Were you concerned when Mr. Parks said that he wasn't convinced that the smell test would be met if the matter were litigated?

A. Yes.

Q. 1850: And is the answer to that concern removing the requirement for a pledge?

A. As well as properly drafting the documents in the opinion.

86. Taking out the pledge does not actually address the problem.

(d) CRA's Administrative Position

87. CRA addressed gifts in Document Number 9334415 (August 30, 1994), which is supported by *Woolner v. The Queen*, 99 DTC 5722 (FCA), *The Queen v. McBurney*, 85 DTC 5433 (FCA), *Burns v. MNR*, 88 DTC 6101 (FCTD) and *The Queen v. Zandstra*, 74 DTC 6416 (FCTD)), all during the Relevant Period:

> It is the Department's position that a 'gift' for the purposes of section 118.1 of the Act must be regarded as such at common law. In this regard, it is our view that such a gift is a voluntary transfer of real or personal property from a donor, who must freely dispose of his or her property to a donee, who receives the property given. The transaction must not result directly or *indirectly in a right, privilege, material benefit or advantage to the donor* or to a person designated by the donor. To qualify, the donation must be in the form of an outright gift. Any legal obligation (i.e., a direction with respect to the use of the funds) imposed on the donee would cause the transfer to lose its status as a gift. *Further, in order for an expenditure to be considered a gift it must be made without conditions, from a detached and disinterested generosity, and out of affection, respect, or charity like impulses, and not*

> *from the constraining forces of any moral or legal duty.* The donee must have an unfettered right to use a donation as it wishes [emphasis added].

(e) The "Impoverishment" Test

88. The impoverishment test speaks to another aspect of the requirements for a valid gift at law. The essence of the test is that the donor is expected to be impoverished by his donation and not enriched by it or receive a material advantage.

89. In *Burns*[9], for example, the taxpayer contributed to the Canadian Ski Association. The Tax Court determined that the contributions were not gifts, as the taxpayer made them to secure a material advantage for the taxpayer, namely, to train his daughter as a skier. At para. 28:

> I would like to emphasize that one essential element of a gift is an intentional element that the Roman law identified as *animus donandi* or liberal intent (see *Mazeaud, Leçon de Droit Civil*, tome 4ième, 2ième volume, 4ième édition, No. 1325, page 554). The donor must be aware that he will not receive any compensation other than pure moral benefit; he must be willing to grow poorer for the benefit of the donee without receiving any such compensation.

90. Similarly, in *Tite v. M N R.*, [1986] 2 C.T.C. 2343, 86 DTC 1788 (TCC):

> The essence of a gift is that it is a transfer without *quid pro quo*, a contribution motivated by detached and disinterested generosity."[10] The donor of a gift must intend to benefit the recipient charity and cannot expect any benefit in return. Hence, the concept of "impoverishment" and donative intent are closely linked.

91. A gift that is part of a series of transactions is determined in the context of the entire series or predetermined arrangements. A series of transactions is one that is preordained such that the steps constitute a composite.[11] At common law, the phrase means a sequence of transactions where "each transaction in the series is pre-ordained to produce a final result.[12]

92. We see this in *Woolner* v. *A.G. of Canada et al.* where the Federal Court of Appeal determined that taxpayer contributions to a Church were reviewed together with the expectation that their children would receive a bursary from the Church. [13]

---

[9] *The Queen v. Burns*, 88 D.T.C. 6101 (F.C.T.D.); aff'd. 90 D.T.C. 6335 (F.C.A.).
[10] *Tite v. M N R.*, [1986] 2 C.T.C. 2343, 86 DTC 1788 (TCC).
[11] See, for example, *Furness (Inspector of Taxes) v. Dawson*, [1984] 1 All E.R. 530 (UK HL); *W.T. Ramsey v. IRC*, [1982] A.C. 300 (HL).
[12] *OSFC Holdings Ltd. v. The Queen*, 2001 FCA 260.
[13] 99 DTC 5722; [2000] 1 CTC 35.

(f) Other Common Law Jurisprudence

i. Australia

93. The jurisprudence on gifts in other common law countries is similar to Canadian law. In Australia, for example, in *Commissioner of Taxation of the Commonwealth v. McPhail*:

> But it is, I think, clear that to constitute a "gift," it must appear that the property transferred was transferred voluntarily and not as the result of the contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return.[14]

94. The Federal Court of Canada quoted *McPhail* with approval in *The Queen v. Zandstra*, 74 DTC 6416, at 6419 @ para. 21.

95. Similarly, in *Hodges v. Deputy Commissioner of Taxation*,[15] the Tribunal said that the concept of a gift in tax law means:

> …that the relevant transfer is by way of well doing in that the recipient will be advantaged, in a material sense and without any countervailing material detriment arising from the circumstances of the transfer to the extent of the property transferred to him.
>
> Thus, the concept involves a net increase in the worth of the donee, corresponding with a net decrease in the worth of the donor, but without any detriment arising to the donee from the transfer of property.

ii. United States

96. American courts adopt a similar approach to donations under their *Internal Revenue Code*, which has provisions comparable to the Canadian charitable donation law. For example, in *DeYoung v. United States*, the court said:

> The value of a gift may be excluded from gross income only if the gift proceeds from a detached and disinterested generosity or other of affection, admiration, charity or like impulses and must be included if the claimed gift proceeds primarily from "the constraining force of any moral or legal duty or from the incentive of anticipated benefit of an economic nature."[16]

---

[14] *Commissioner of Taxation of the Commonwealth v. McPhail* (1967-1968), 41 ALJR 346 p. 348
[15] *Hodges v. Deputy Commissioner of Taxation*, No. NT 96/405, AAT No. 12314(1997), citing *Leary v. Federal Commissioner of Taxation* (1980), 80 A.T.C. 4438.
[16] *DeYoung v. United States*, 309 F.2d 373 (CIR 1962), p. 379.

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

Heakes' Analysis of Gifts

97. Mr. Heakes states at page 14 of his Opinion:

> In summary, the Krishna Opinion acknowledges that the existence of a tax credit is normally not considered to be a benefit that affects the validity of an otherwise valid gift, but puts forward the proposition that an *inflated tax credit* may nonetheless render a purported gift invalid. In my opinion, as at the time that the Cassels Opinions were delivered, leaving aside situations that involved fraud or near fraud, the *Canadian case law had not established such a proposition.* [emphasis added]

98. Mr. Heakes' Opinion (at page 3) proceeds on the assumption that the Donors were expected to donate their Timeshare Weeks to the eligible RCAAA Donees as part of the arrangement, which, in fact, is what happened in most cases:

> The distributions by the Trust to the Donors were made with no conditions attached; however it was expected that the Donors would in fact donate the Timeshare Weeks along with sufficient cash to retire the corresponding limited recourse charges on the Timeshare Weeks to one or more registered Canadian amateur athletic associations (each of which is referred to herein as an "RCAAA Donee").

99. In most but not all cases, the Donors made the expected donations ("Donations") and claimed a tax credit in respect of the cash donated and the appraised fair market value of the Timeshare Weeks that they had donated (net of the amount of the assumed charge).

100. Separate receipts were issued to the Donors in respect of the cash Donations and the in-kind Donations. Mr. Heakes notes in his Opinion (at pages 9 and 10):

> The Cassels Opinions point out that the Trustee "expects" that most of the Donors would donate the Timeshare Weeks received by them and states that if all or substantially all of the Donors decided to gift the Timeshare Weeks to the RCAAA…, the CRA "may be more inclined to challenge the arrangement", although the Cassels Opinions later refer to the "unlikely" success of such a challenge. However the Cassels Opinions also note that there was neither an obligation on the part of the Donors to make such a donation nor an understanding that a donation would in fact be made. The Cassels Opinions implicitly conclude that, had they existed, these would have been more relevant than the existence of an expectation by the Trustee.

101. Mr. Heakes does not analyse the expectation criterion further in the context of the *Woolner* and *McBurney* decisions. These decisions clearly establish that a reasonable expectation is sufficient to negate a gift even in the absence of a legal contractual obligation. This is a serious omission in the context of gift analysis.

102. Merely removing "pledge" from the documents did not alter the substance of the Timeshare Program. The reasonable expectation of a material advantage from the structure negated the gift. In this context, Mr. Parks was rightly concerned about the "smell test" of the structure in respect of the "expectation" of the Donors making the donation.

103. **In my Opinion, the Cassels Brock's Opinions do not adequately analyse the crucial links between the expectation of "material benefits", "impoverishment" of the taxpayer and the Donors' "donative intent" in the Timeshare Program. The guaranteed net cash tax credit built into the Program, which substantially exceeded the taxpayer's cash outlays, negated the existence of a gift and invited the risk of an assessment by the CRA.**

104. **In my Opinion, the structure of the Timeshare Program provided the Class A Beneficiaries an assured immediate profit of approximately 32 percent on their cash outlay, which enriched them from their donations. This effectively impaired the integrity of the donations as a gift for income tax purposes.**

Arm's Length

105. The concept of arm's length describes the relationship between parties who act in their own self-interest and without undue control or influence of one of the parties of a transaction over the other.[17]
106. The arm's length concept depends upon legal and factual "control" that a person has over another.[18]

Legal Control

107. Related persons are deemed not to be at arm's length with each other even if they act independently and without undue influence.[19] Similarly, a taxpayer and a personal trust are generally not at arm's length with each other if the taxpayer has a beneficial interest in the trust.

Factual Control

108. It is a question of fact whether unrelated persons are dealing with each other at arm's length at any time.[20] Individuals, or entities, are at arm's length with each other if they are independent and one does not have undue influence over the other.

[17] See, for example, S1-F5-C1 "Related Persons and Dealing at Arm's Length" (June 9, 2015).
[18] *Income Tax Act*, para. 251(1)(b).
[19] *Income Tax Act*, para. 251(1)(a).
[20] *Income Tax Act*, para. 251(1)(c)., *R. v. McLarty*, 2008 SCC 26.

109. Control may arise by virtue as a matter of fact, regardless of the relationship of the parties.[21] There are three principal criteria in determining non-arm's length relationships: [22]

(1) the existence of a common mind that directs the bargaining for both parties to the transactions;

(2) parties to a transaction acting in concert without separate interests; and

(3) *de facto* control.

110. In *Gestion Yvan Drouin Inc. v. The Queen*,[23] Justice Archambault consolidated these three tests into one: "is there control of one party by the other?"

> It is a question of fact whether parties are dealing arm's length.[24] The essence of the test is to determine whether the parties transacted at fair market values and on normal commercial terms by reference to objective third party evidence in the commercial market. [25]

111. The relationship of the parties must be determined in the context of the entire transaction, and not merely at the time of the purchase and sale. Non-arm's length valuations require particular care as they are vulnerable to distortion.

The Timeshare Program

112. The Timeshare Program was arranged in a series of transactions that were interconnected and preordained. The parties were connected with each other and did not operate in independent silos. See, for example, Mr. Saltman's discoveries.

Excerpts from Discoveries

> Q. 1498: Was CAA intended to be independent from the Trust?
>
> A. CAA was a separate entity from the Trust, but they were administering the whole program for the Trust, for the trustee, for the donors and so on. *So, they were intimately involved* [emphasis added].
>
> Q. 1506: CAA's only interest, as I understand it, was in getting donations to the RCAAAs.

---

[21] See generally: *Peter Cundill & Associates v. The Queen*, [1991] 1 C.T.C. 197 (F.C.T.D.); aff'd [1991] 2 C.T.C. 221 (F.C.A.).
[22] *McNichol v. Canada*, 97 D.T.C. 111.
[23] *Gestion Yvan Drouin Inc. v. The Queen* (2000), [2001] 2 C.T.C. 2315 (T.C.C.).
[24] *R. v. McLarty*, 2008 SCC 26, para. 45.
[25] *McCoy v. The Queen*, 2003 D.T.C. 660, para. 66.

> A. No. *That is the front end. They were also involved in the back end*. They represented the RCAAAs with the developer to try to realize proceeds, as well. *They were involved in the whole program, therefore* [emphasis added].
>
> Q. 1507: Well, they were involved in the back end of the program, but did CAA have any involvement in the initial settling of the Trust, and the distribution of the units from the Trust to the beneficiaries and donors?
>
> A. I am not aware that they were involved in the initial settlement, but I think they, as administrator, were keeping records of who the donors were, what distributions were made to the donors and what the donors gifted to the RCAAA. *So, that is why they are ... I say they are involved in the whole program* [emphasis added].

113. James Parks of Cassels Brock expressed his concerns about pricing the Timeshare Program in his memo to Lorne Saltman on Wednesday, June 14, 2000, 9:14 AM:

> "Lorne
>
> Do you think s. 247(2) could be relevant to the distribution from the trust or the gift where ANY parties in the series are not dealing at arm's length on a particular transaction in the series and Revenue argues that arm's length parties would not have entered into the same transaction?
>
> This may just be another way of using s. 69 or questioning FMV, and I have not really thought it through.
>
> Jim"

114. **In my Opinion, there was a substantial risk that the parties in the Timeshare Program were not factually at arm's length with each other as they were not independent and were intimately involved with each other. This increased the risk, described further below, to the Donors that the CRA would closely scrutinize and challenge the valuation of the transactions and Timeshare Weeks.**

(2) Valuation Analysis

115. A key element of charitable donations is the value of the gift. A donation qualifies as a gift only if it meets all the requirements as discussed above and is appropriately valued.

(a) Fair Market Value

116. Paragraph 69(1)(b) of the Act *deems* the disposition of a gift to any person, or a trust that does not result in a change of beneficiary ownership, to occur at its fair market value.

117. The "fair market value" ("FMV") of an asset is the highest price that it "might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question, in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell."[26]

118. The determination of FMV assumes that the market is efficient, normal, at arm's length, and between knowledgeable buyers and sellers. See, for example, *Henderson Estate and Bank of New York v. M.N.R.* 73 D.T.C. 5471 per Cattanach J. at 5476:

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

119. This definition has been part of Canadian jurisprudence for several decades. See, for example, Estey J. in *Attorney General of Alberta* v. *Royal Trust Co*., at p. 288 [S.C.R.]:

> It is not suggested that the Commissioner has overlooked any factor that ought properly to have been taken into account in determining the value of the property. He had to determine the market value and when, as in this case, no market exists, it is the task of the Commissioner, so far as he can, to construct a normal market and to determine the value by taking into account all the factors which would exist in an actual normal market — a market which is not disturbed by factors similar to either boom or depression, and where vendors, ready but not too anxious to sell, meet with purchasers ready and able to purchase.

[26] *Henderson v. M.N.R.*, [1973] C.T.C. 636, 73 D.T.C. 5471 (F.C.T.D.); affd. [1975] C.T.C. 485, 75 D.T.C. 5332 (F.C.A.).

120. See also: Untermyer v. Attorney General of British Columbia, [1929] S.C.R. 84, [1929] 1 D.L.R. 315; Montreal Island Power Co. v. Laval, [1935] S.C.R. 304, [1936] 1 D.L.R. 621; Re Leiser Forman and Fowkes v. Minister of National Revenue, 51 B.C.R. 368, [1937] 2 W.W.R. 428, [1937] 2 D.L.R. 341 (C.A.) ; Attorney General of Alberta v. Royal Trust Co., [1945] S.C.R. 267, [1945] 2 D.L.R. 274; Smith and Rudd v. Minister of National Revenue, [1950] S.C.R. 602, [1950] C.T.C. 247; Semet-Solvay Co. v. Deputy Minister of National Revenue, [1959] Ex. C.R. 172, 20 D.L.R. (2d) 663.

121. The FMV of an asset is its exchange value.[27] The "highest price" available assumes that the buyer and seller will transact only at a price and on terms that each considers fair.

122. Where there is a regular and efficient market for the asset (for example, widely held shares on a stock exchange), its trading price is probably the best, though not necessarily the only, measure of its fair market value.[28] Where there is no efficient market for the asset, it is necessary to determine fair market value through other valuation criteria, such as, earnings value, liquidation value, replacement value, and contract stipulations.

123. The Act does not prescribe a specific method of valuation for charitable donations. Hence, valuators generally employ methodologies in accordance with the Practice Standards of the Canadian Institute of Chartered Business Valuators ("Practice Standards"). The business valuator must act independently and objectively in arriving at his or her valuation.

124. Practice Standard No. 110, section 13.2 B requires that the valuator set out the key assumptions that he or she makes in arriving at the valuation conclusion. Further, section 13.3 A requires the valuator to describe how he or she arrived at the significant components of the valuation calculations, and the rationale for each component and the matters considered.

(b) Intrinsic Value

125. Where there is no actual active market for a property, valuators must determine the intrinsic value of the property at the transaction date. Intrinsic value is a notional value based on rates of return required by investors in the context of known business conditions existing at the valuation date.

126. Notional FMV implies that transactions between parties are at arm's length prices with each other.

[27] See generally, *Re Mann*, [1972] 5 W.W.R. 23; affd. [1973] 4 W.W.R. 223; affd. [1974] 2 W.W.R. 574 (S.C.C.) [B.C.].
[28] *Re Mann*, *ante*, at 27.

(d) Financing and Discounting

127. Valuation of assets depends upon the time value of money. The economic value of an asset is principally a function of its future cash flows, compounded or discounted, at the appropriate rate to their future or present values.

128. A dollar today is worth more than a dollar tomorrow because it can be compounded to a higher value. Conversely, a dollar tomorrow is worth less than a dollar today because it must be discounted to its present value.

129. Cash flow, and not accounting earnings, is the principal determinant of economic value. Accounting profit is a function of numerous accounting policies, such as depreciation, amortization, leases, and inventory costing methods. The key to value is *future* cash flows.

i. Valuing Donations

130. Discounting is the act of estimating the present value of a future payment or a series of future cash flows. The discount rate is the rate of return that one uses to convert a monetary sum payable in the future into its present value.

131. Taxpayers can donate cash, or they can finance their donations through debt. For cash donations, the tax credit is based on the cash value of the donation in Canadian dollars. For gifts in kind, the amount donated is the FMV of the property at the time of the donation.

132. Debt financing allows the taxpayer to leverage his or her donation with minimal immediate cash outlay. Where there is no actual active market for a property, valuators must estimate the intrinsic value of the property *at the transaction date*.

133. Debts must be legitimate. The legitimacy of a debt depends upon its terms and conditions as measured against comparable terms in arm's length transactions. The significant terms are the rate of interest payable on the debt, the conditions for repayment, the discount rate for future cash flows, and any recourse sanctions upon default of repayment. Each of these elements is a question of fact.

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

ii. Put Options

134. A put option is a contract to sell financial assets at an agreed price on or before a particular date. The option represents the right (but not the requirement) to sell a property at a pre-determined 'strike price' before the option reaches its expiration date.

135. The present value of a put option depends upon a prediction of its cash flows, the time horizon to maturity, and the applicable discount rate. The rate is determined in the context of comparable market rates and the risk involved. An artificial rate will distort the net present value of future cash flows and can produce abnormal results.

136. The principle of discounting cash flows to determine the present value of put option contracts applies in tax law. In 1980, in *Leary*,[29] for example, the taxpayer paid $10,000 to a benevolent institution by borrowing $8,500. The debt had various repayment options, one of which allowed the taxpayer to buy back the loan (put option) of $8,500 from the lender on the same day as his donation at its then discounted "current cash value", which was only $17. The Federal Court of Australia held that the taxpayer did not gift $10,000, as he received a benefit in the form of a favourable loan arrangement and the terms for its repurchase. In fact, he donated virtually nothing. Justice Dean stated:

> It is contrary to both ordinary language and reality to suggest that the taxpayer made a gift of $10,000 to the Order or that the Order received a gift of $10,000 from the taxpayer. Humpty Dumpty, for whom words meant what he chose them to mean, might have described the payment as a gift of $10,000 to the Order. Ordinary language and reality would see the outlay of $10,000 as being made by the taxpayer so that he might enjoy the benefit of being entitled to redeem the $8,500 loan for some $17 while obtaining the anticipated advantage of a tax deduction of the full amount of $10,000.[30]

137. The Federal Court of Appeal of Canada quoted *Leary* with approval in *M.N.R. v. McBurney*, [1985] C.T.C. 214, 85 D.T.C. 5433 (F.C.A.); see also: *Commissioner of Taxation of the Commonwealth v. McPhail* (1967–68), 41 ALJR 346 at 347.

138. *Marechaux*[31], albeit decided after the Relevant Period, applied the same underlying principle in valuing "leveraged donation" arrangements with put options. The essence of the arrangement was a cash expenditure of $30,000 to a registered charity, and an interest free loan of $80,000 repayable in twenty years. The taxpayer had a put option on the debt. The taxpayer paid $10,000 of his $30,000 cash outlay to the lender for a security deposit, an insurance policy, and the lender's fees. The taxpayer received a charitable donation tax receipt for $100,000, for which he claimed a tax credit of $44,218. He then exercised his

[29] *Leary v. Commissioner of Taxation of the Commonwealth of Australia* (1980), 32 A.L.R. 221 (Federal Court of Australia).
[30] *Leary v. Commissioner of Taxation of the Commonwealth of Australia* (1980), 32 A.L.R. 221 (Federal Court of Australia).
[31] *Marechaux v. The Queen*, 2010 FCA 287.

"put option" under the policy to assign the security deposit to the lender. The "put" fully discharged his loan. The charities retained a small amount of the cash to advance their purposes.

139. Applying the same principle, Justice Woods found the taxpayer derived a significant benefit from the $80,000 interest-free loan and the put option. The donation and its financing were inextricably tied together by the relevant agreements. Further, even without the put option, the financing provided a significant benefit. As Justice Woods said:

> It is self-evident that an interest-free loan for 20 years provides a considerable economic benefit to the debtor. I would also note that the $8,000 security deposit could not reasonably be expected to accrete to anywhere near $80,000 in 20 years.[32]

140. *Kossow*[33] similarly involved a leveraged charitable donation program for the purchase of art for a registered charity. Pursuant to the terms of a donation program, the taxpayer funded her payments to a registered charity by 20 per cent cash and 80 per cent from a 25-year, *interest-free* loan. She also paid fees to the promoters for processing her loans and organizing the program.

141. The Federal Court of Appeal followed *Marechaux* and held that Ms. Kossow received a significant financial benefit as the recipient of long-term, interest-free loans. The interest-free loan and the donation were two components of an arrangement consisting of a series of interconnected transactions.

142. The common thread in these cases is that courts apply established financial principles (discounted value of leveraged financing) to value donations in the absence of commercial financial terms underlying the interest free loans.

143. Under the Timeshare Program, the developers could acquire (call options), and were required to acquire (put options), for the Timeshare Weeks for a price that was either 60 percent below the appraised fair market value of the Weeks, or (if more than 100 units purchased) between US$1,000 to US$1,100 per week.

144. Hence, the developers could purchase (or be required to purchase) the property at a price substantially below the appraised fair market value of the properties, which ranged between US$13,275 and US$28,600.

145. The put option was a significant factor in determining the value of the Timeshare Weeks and Cassels Brock were aware of its role in valuation. Cassels Brock should have disclosed the put option, its relevance as a factor affecting valuation and, more particularly, its impact on the reduction used in the valuations.

---

[32] *Marechaux v. The Queen*, 2009 TCC 587.
[33] *Kossow v. Canada*, 2013 FCA 283.

Q.1037: Were you aware of the "put option"?

A. Yes.

Q.1038: Can you tell me what you understood the put option to be?

A. It was in one of the documents that was part of the package. It was the marketing and sales agreement, I think it was called.

Q. 1039.: I think that's right.

A. And that basically gave the RCAAAs an opportunity to get early cash if they didn't want to wait for the time-shares they had acquired to be marketed in the normal course. Sometimes it would take months or even years. This way, if the option were exercised and cash would be paid right away, they wouldn't have to wait. So it gave them early liquidity.

Q. 1040: The put option could be exercised in the manner you're describing for a price of between $1,000 and $1,100, is that what you understood?

A. That's my understanding.

Q. 1041: And that was dramatically below what was being put forward as the fair market value of the time-share units?

A. *It was below but it was in accordance with the industry standards at the time.* [emphasis added]

Q. 1042: Did you expect before finalizing your opinion in October of 2000, that all of the RCAAAs who received time-share units would exercise the put option?

A.I think that was a discretionary right, it was up to them. I didn't particularly

have a view one way or another if they were going to wait or exercise their option.

Q. 1043: Were you aware after the fact whether any RCAAAs did or did not exercise the put option?

A. Some of them were very happy with having generated revenue from exercising the put option. Rugby Canada would be one example. And I remember one meeting one of the members of the working group told me that one or more of the RCAAAs were quite content with the revenue that they were deriving. Something like 20 percent of their revenue was coming out from this particular source and they were pleased with it.

146. **In my Opinion, the put option would have had a significant impact in lowering the valuation of the Timeshare Weeks and should have been disclosed as set out above.**

iii. Tax Risks

147. As noted above, all of the Legal Opinions were specifically targeted to potential Donors in the Timeshare Program.

148. As, in part discussed above, the expectation that the Class A Beneficiaries would donate their Timeshare Weeks was a particularly vulnerable tax issue considering established Canadian jurisprudence. See, for example, *Woolner v. The Queen*, 99 DTC 5722 (FCA), discussed above. The issue clearly concerned Saltman and Parks to the extent that they wished to remove the requirement of a "pledge" and substitute it with an "expectation". Mr. Parks alluded to this aspect in terms of the "smell test".

149. Mr. James Park expressed his reservations in his memo (July 13, 2000) at para. 18:

> finally, the opinion is based on an "assumption" that a beneficiary receives a distribution and subsequently makes a "voluntary and complete donation". This really begs the question. The real question is whether the transactions involve a voluntary transfer that is a gift. As noted above, *I am not yet convinced that there is a "gift", given all of the linkage, particularly in light of Woolner* [emphasis added].

150. James Parks also addressed the various pitfalls in his memo (July 13, 2000) about the risks associated with the Program and the link between the "pledge" and "expectation" of donating the Timeshare Weeks. At paras. 1 and 2:

> It seems to me that:
>
> 1. an individual would not be considered as a potential Class A beneficiary unless he or she is prepared to agree to make a "pledge" to support a "worthy cause";
>
> 2. sophistry aside, there is clearly an understanding if not a legal requirement that any property received by the beneficiary from the trust will find its way to the COA, at no monetary cost to the donor. It is no coincidence that every "donor" will have received a "free" distribution….
>
> 3. …Notwithstanding *Friedberg*, which held only that the tax advantage received from the tax credit does not disqualify the "gift", there clearly is a monetary advantage in paying $4,000 and receiving credit for having made a $10,000 donation.
>
> 4. …

5. I doubt very much that we can state positively in the opinion that there is no clear understanding that a Class A beneficiary will be expected, although not legally required, to make a donation of the Timeshare Weeks that are received from the trust;

151. The Cassels Opinions did state that the likelihood of challenge by the CRA would increase if "all or substantially" all the Class A Beneficiaries donated their Timeshare Weeks but that such a challenge would likely be unsuccessful. However, the structure of the Timeshare Program and its viability was based on the very expectation that "all or substantially all" of the Timeshare Weeks would in fact be donated. Heakes refers to this in his Opinion at pages 9-10:

> The Cassels Opinions point out that the Trustee "expects" that most of the Donors would donate the Timeshare Weeks received by them and states that if all or substantially all of the Donors decided to gift the Timeshare Weeks to the RCAAA Donee, the CRA "may be more inclined to challenge the arrangement", although the Cassels Opinions later refer to the "unlikely" success of such a challenge. However the Cassels Opinions also note that there was neither an obligation on the part of the Donors to make such a donation nor an understanding that a donation would in fact be made. The Cassels Opinions implicitly conclude that, had they existed, these would have been more relevant than the existence of an expectation by the Trustee.
>
> The Cassels Opinions note that the RCAAA Trust would not accept the donation of the Timeshare Weeks unless there was a concurrent donation of cash sufficient to retire the associated charge on the donated Timeshare Weeks. There was no requirement that the Donee use the cash for this purpose.

152. The requirements of the concurrent donation of cash combined with the exercise of the put option substantially elevated the risk of a CRA attack on the structure of the Timeshare Program. Cassells Brock were aware of the implications and risks on the marketing program contemplated at the time.

> Q. 1871: Did you discuss with Mr. Parks that your letter, your opinion would ultimately use, or be used by the promoter or others, as part of the marketing program for this trust?
>
> A. Yes.
>
> Q. 1872: What did you discuss with Mr. Parks in that regard?
>
> A. I don't remember the precise details, but we had to identify who the recipients of the opinion would be, the donors and their professional advisors, CAA. *And we understood that the package of documents that was being provided to the participants and their professional advisors included our opinion.* So, from that point of view it was part of the package, the marketing package that the promoters were putting together [emphasis added].

153. The Timeshare Program was structured to provide the Donors with tax credits that substantially enriched them. This was contrary to the policy and rationale of the donation tax credits in the ITA, as outlined in CRA's administrative Folio S7-F1-C1 at 1.2:

> Generally, for purposes of sections 110.1 and 118.1, a gift under common law is made if a taxpayer has donative intent, and all three of the following conditions are satisfied:
>
> - there must be a voluntary transfer of property to a qualified donee;
> - the property transferred must be owned by the donor; and
> - *no benefit or consideration must flow to the donor*.

154. The Cassels Opinions show that they were aware of the risk of a CRA audit concerning the expectation that most of the Donors would donate their Timeshare Weeks to the Trustee. "If all or substantially all of the Donors decided to gift the Timeshare Weeks to the RCAAA Donee, the CRA "may be more inclined to challenge the arrangement". The Donors would face substantial costs in the event of a CRA audit and assessment. Cassels Brock recognized that the Donors needed "the stomach for a fight".

> Q. 1865: Mr. Parks indicates that: " ... If the donors don't have the stomach for a fight they clearly should not be undertaking this type of planning ... " Do you know what he meant by that?
>
> A. In the previous sentence, he is talking about Revenue Canada challenging it. In this sentence he is saying there is going to be a fight, potentially, and the donors have to be ready for a fight, if the structure is as it is and Revenue Canada does challenge it.

155. The CRA audits according to its administrative policies in reviewing taxpayer arrangements.

156. The Timeshare Program also raised the potential of an audit and assessment under the General Anti Avoidance Rule (GAAR)[34], which would have been onerous and expensive for the Donors if the CRA invoked the provision. Although the CRA did not ultimately assess under section 245 and chose, instead, to proceed by way of a direct challenge under the gifting rules, the risk to the potential Donors was real and present in the structure of the Program. James Parks was concerned about this risk and discussed it in his memo (July 13, 2000) at para. 6:

> The analysis with respect to GAAR is wrong in my view when it states that there isno "tax benefit". I think clearly there <u>is</u> a tax benefit within the meaning in section 245, and this is quite a different concept from the issues addressed in *Friedberg*, which dealt only with whether there was a "gift". In my view there can be a gift, notwithstanding

[34] Section 245 ITA.

> the charitable tax credit, and still be a "tax benefit" for GAAR purposes;…
> to some extent, there is an element of a "smell" test, as you and I have discussed. I am not convinced the smell test would be met if the matter were litigated. As we have also discussed, it is a simple matter for Revenue Canadato challenge the arrangement and force the donors to support their position. *If they do not have the stomach for a fight, they clearly should not be undertaking this type of planning. Our letter should address this, even if it detracts from the "marketing" aspect;* [emphasis added]

157. James Parks again raised his concerns about the "unreality of the entire arrangement" of the Program in his memo (September 21, 2000):

> (Para. 3) As we have discussed, this is one area where there is an element ofunreality in the entire arrangement, if we are taking the position that the Settlor is really doing all of this in order to improve amateur athletics and not to provide taxbenefits;

158. He also reiterates his concerns about GAAR:

> (Para. 13) on page 12, in the punch line dealing with GAAR, I am still a little bit uneasy, and I think we should qualify this by expressly stating that our opinion is based on the foregoing (this may be implicit, but it probably does not hurt to state it) and I think we should also make it clear that our comments relate to the donation of property and not of cash.

159. Cassels Brock knew that their Opinions were a part of the substrata for the marketing of the Timeshare Program and that potential Donors to whom the Opinions were targeted would place substantial reliance upon them as emanating from a prestigious law firm. As Mr. Parks said:

> (Para. 13) Finally, as we discussed the other day, I think we cannot be under any illusions that our opinion is being used strictly as a marketing document and it will be referred to as a form of "blessing" on the street.

160. Although with the benefit of hindsight, the CRA did not invoke GAAR and proceeded on alternate grounds on the validity of the gifts, its potential application was a substantial risk for Donors and they should have been apprised of the consequences and costs, if invoked, during the marketing program.

161. Mr. Parks was sensitive to the consequences that might flow from the "concocted" Program:

> (At page 5) We could well be in the first line of fire if CCRA decides to make an example out of professionals who are "concocting" tax arrangements that it feels are totally inappropriate.

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

162. **In my Opinion, Mr. Heakes does not adequately evaluate the Cassels Brock Opinions in the context of the CRA's administrative position, which is the basis upon which it reviews taxpayer filings, such as the Program, in issuing its assessments. As structured, the Timeshare Program and Class A Beneficiaries were at substantial risk of being assessed.**

163. **In my Opinion, Cassels Brock should have disclosed in their Opinions to the Donors the potential of CRA income tax assessments and the inherent costs of dispute resolution and proceedings in the Tax Court of Canada to challenge the assessments.**

iv. Role of Tax Counsel

164. The Legal Opinions were targeted to the **CAA** and also to the potential Donors in the Timeshare Program. Each of the Opinions contained language such as: "This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property.

165. Cassels Brock was actively involved in designing the **Timeshare Program** and in its structure. They were also aware of the risks associated with the structure of the Program and the risks to the Donors of a CRA assessment resulting from the gifting rules and the issues concerning the valuation of the Timeshare Weeks.

166. James Parks was concerned with the appearance of the structure of the program and the expectation that it created that the recipients would donate their time shares. He characterized his concerns in terms of a "smell test" about the structure.

167. James Parks was fully aware of and concerned with the risks of the use of the Legal Opinions in marketing the Program to potential Donors. In his Memo of July 13, 2000:

> I remain very concerned that the opinion will be used as a marketing tool and even if we are not liable for negligence or breach of contract or on a "Hedley Byrne" basis, we will certainly not be thanked if we have not pointed out all of the risks and if the arrangements are attacked. I suspect we will be identified as having "blessed" the arrangements, even if we qualify our advice. I think the disclosure requires further discussion about the practicalities of defending an assessment, even if Revenue Canada is not successful. This could be very expensive and it would not be that difficult in my view for Revenue Canada to assess by raising at least some of the arguments I have mentioned above, if not others.

168. In commercial transactions where sophisticated parties are represented by their own counsel, a party may rely on the opinions of the counter parties' counsel in full knowledge of their respective roles. That is not the situation with the Donors in this case to whom the Timeshare Program was marketed.

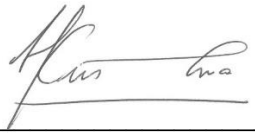
TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

169. I am not aware of any reason that the Donors would have been aware of the role of Cassels Brocks in the design and structure of the Timeshare Program.

170. **I do not agree with Mr. Heakes' Opinion that what applies in commercial transactions, as set out above, applied to the roles of Cassels Brock and their Opinions to the Donors. I do not understand how Mr. Heakes concluded that the Opinions of Cassels Brock were "appropriately independent".**

171. **Overall, in my Opinion, as a tax lawyer having dealt with numerous tax plans in 45 years of legal practice in Canada (Nova Scotia, Alberta, and Ontario), Cassels Brock did not meet the standard of care of a prudent tax solicitor in issuing their Legal Opinions and the inherent risks to the Donors of CRA assessments.**

TaxChambers LLP



Vern Krishna, CM, QC
Of Counsel

This is Exhibit "P7" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

MacKenzie BARRISTERS

Gavin MacKenzie
416-304-9293
gavin@mackenziebarristers.com

Law Clerk: Denise Berton
416-304-9295
denise@mackenziebarristers.com

MacKenzie Barristers P.C.
Richmond-Adelaide Centre
120 Adelaide St. W., Suite 2100
Toronto, Ontario
M5H 1T1

Fax: 416-304-9296

www.mackenziebarristers.com

October 1, 2021

David O'Connor
J. Adam Dewar
Roy O'Connor LLP
200 Front Street
Suite 2300
Toronto, ON M5V 3K2

Dear Mr. O'Connor and Mr. Dewar:

Re: Lipson v. Cassels Brock & Blackwell LLP—Superior Court File # CV-09-376511

Reply Report

At the request of counsel for the plaintiffs I prepared an expert report in this action dated May 1, 2019. I have reviewed my report and the report of Peter Jewett dated November 29, 2020, which has been delivered on behalf of the defendants. I am providing this report in reply to Mr. Jewett's report. I have used the same defined terms as in my initial report.

I continue to be of the view that the defendant Cassels Brock acted in circumstances in which it had a conflict of interest when it provided the Legal Opinions.

I agree with Mr. Jewett that, having invited the donors to rely on the Legal Opinions, Cassels Brock owed a duty of care to the donors. Lawyers can be held responsible for negligent professional advice provided to individuals who foreseeably and reasonably rely on that advice.

My disagreement with Mr. Jewett centres on his opinion that there was no conflict of interest between the promoters of the program, on the one hand, and the donors, on the other. Mr. Jewett says (at page 9 of his report) that: "In my experience, opinions from completely independent counsel are typically used to deal with a conflict of interest situation." In my opinion Cassels Brock *was* required to deal with a conflict of interest situation.

Mr. Jewett justifies his conclusion that Cassels Brock did not have a conflict of interest on the basis that it was in the interests of both the promoters and the donors that they realize the beneficial tax consequences referred to in the Legal Opinions. He acknowledges, however, that the promoters and donors "would benefit in different ways". Similarly, as mentioned at page 5 of my initial opinion, Lorne Saltman of Cassels Brock acknowledged on his examination for discovery that each of the CAA, the promoters, and the donors had different interests.

The hallmark of a conflict of interest in the legal profession is the differing interests of parties to whom the lawyer owes duties.

The promoters benefitted by realizing fees and commissions from the sale of time share weeks to donors. Cassels Brock knew that the Legal Opinions would be used by the promoters as part of the marketing package for the Timeshare Program, and that the promoters would benefit financially from the sale of timeshare weeks. The potential benefit the donors hoped to realize if the opinion was correct would have been in the form of tax credits if charitable donation receipts issued to them were considered lawful by the CRA.

The different, conflicting interests of the promoters and donors are starkly demonstrated because the opinion turned out to be incorrect. CRA denied most of the tax credits claimed by donors. The donors did not realize the potential benefit of the tax credits that motivated them to invest. The promoters did not lose the benefit of the fees and commissions they realized by having induced the donors to invest.

In my opinion, the interests of the donors and the promoters conflicted in a material way. A lawyer cannot purport to provide an independent opinion intended to be relied upon by individuals whose interests differ from those of his client in a matter that materially benefits the client.

I also disagree with Mr. Jewett about the importance of the fact that donors were free to obtain a second opinion from tax counsel of their choosing. It is always the case that a party may obtain a second (or third, or fourth) opinion. That cannot cure a conflict of interest.

Yours truly,

MacKenzie Barristers P.C.

Per:

Gavin MacKenzie

Gavin MacKenzie

This is Exhibit "P8" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Edward Heakes Law
300 Chartwell Road
Oakville, ON L6J 3Z9

Telephone: 416-948-8851 (Cell)
Email: edheakes399@gmail.com

December 15, 2021

Lenczner Slaght Royce Smith Griffin LLP
130 Adelaide Street West
Suite 2600
Toronto, Ontario M5H 3P5

Attention: Mr. Peter Griffin

Dear Sirs:

Re: Lipson v Cassels Brock and Blackwell LLP (Court File No: CV-09-376511): Reply of Edward A. Heakes

This is in response to your firm's letter of November 16, 2021 requesting that I respond to the Report of Mr. Vern Krishna dated September 30, 2021 (the "**2021 Krishna Report**"), including Mr. Krishna's comments on my report of November 19, 2020 (the "**Heakes Report**"). Unless otherwise indicated, terms that are defined in the Heakes Report have the same meaning in this letter. I confirm that I continue to be bound by the Acknowledgement attached as Schedule B to the Heakes Report.

This letter responds to the following matters arising from the 2021 Krishna Report:

(a) Claims in the 2021 Krishna Report that the Heakes Report misconstrues the common law in relation to gifts, the ratio of the Friedberg decision and the effect of an "inflated" tax credit:
   (i) The relevant law at the time the Cassels Opinions were issued;
   (ii) Comments on particular cases relied upon by Mr. Krishna;
   (iii) Further comments on the use of the word "normally" in Friedberg ; and
   (iv) The significance of the order and effect of transactions undertaken by Donors;

(b) The claim in 2021 Krishna Report that the Heakes Report does not adequately address the issue of whether a reasonable expectation that the Donors would donate their Timeshare Weeks would affect the validity of the donations as gifts;

(c) The discussion in the 2021 Krishna Report regarding internal discussions at Cassels;

(d) The claims in the 2021 Krishna Report that there should have been a more extensive disclosure in the Cassels Opinions. In particular:
   (i) The claim that there was a substantial risk that the parties involved in the Timeshare Program may not have been not factually dealing at arm's length with each other and that:
      A. Cassels ought to have known and disclosed in the Cassels Opinions that, as a result, the CRA was more likely to challenge the valuation of the transactions and the Timeshare Weeks; and
      B. The transactions were interconnected and preordained.
   (ii) The claim that there should have been more extensive disclosure of the tax risks to the Donors;
   (iii) The claim that the put option should have been disclosed in the Cassels Opinions because it affected the valuation of the Timeshare Weeks; and

(e) The basis for the statements in the Heakes Report that the Cassels Opinions were appropriately independent.

(a) <u>The law in relation to gifts, Friedberg ratio and "inflated"[1] credits</u>

With respect, I disagree with Mr. Krishna and stand behind the analysis and opinions contained in the Heakes Report, in which I expressed the opinion that the Cassels Opinions met the standard of care of a competent solicitor on this issue, and were within a reasonable range of opinions that might have been given at the time.[2]

---

[1] At page 12, the Heakes Report refers to "inflated tax credits" as this term is used, for example, in the 2015 decision in Mariano and the 2017 Cassan decision. At the time that the Cassels Opinions were delivered, the applicable case law more commonly used the term "profitable gift". Therefore, this Reply refers to "profitable gifts".

[2] See Heakes Report, page 11.

In summary, as explained in more detail below, the Cassels Opinions are consistent with the relevant and applicable case law that was available at the time that the Cassels Opinions were rendered, including the Friedberg case and certain other cases that had clarified and expanded on the Friedberg decision. Mr. Krishna has relied on other decisions that, in my opinion, are less relevant to the situation considered by the Cassels Opinions. In addition, in one instance (the Dutil case), he has relied on a case that, at the time the Cassels Opinions were issued, had been considered by other courts to be inconsistent with the higher level Friedberg decision.

(i) The relevant law on gifts as at the time of the Cassels Opinions

When the Cassels Opinions were delivered, the Federal Court of Appeal decision in Friedberg[3] was a leading decision on the validity of gifts for income tax purposes. As stated by Linden JA in that case:

> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (see Heald J. in The Queen v. Zandstra *[1974] 2 F.C. 254*, at p. 261.) The tax advantage which is received from gifts is not normally considered a 'benefit' within this definition, for to do so would render the charitable donations deductions unavailable to many donors.[4]

The decision in the Friedberg case does not elaborate on possible exceptions to the general principle that a tax advantage does not "normally" constitute a benefit for the purposes of determining whether there has been a gift. The case itself involved an acquisition and donation of certain Koptic textiles[5], in such a way that the taxpayer made a profitable gift, in the sense that the amount of the tax advantages associated with the gift exceeded the cost of the acquisition of the textiles.

In particular, paragraph 9 of the Federal Court of Appeal Decision reads as follows:

> It is clear that it is possible to make a 'profitable' gift in the case of certain cultural property. Where the actual cost of acquiring the gift is low, and the fair market value is high, it is possible that the tax benefits of the gift will be greater than the cost of acquisition. A substantial incentive for giving property of cultural and national importance is thus created through these benefits.

---

[3] Friedberg v R (1991), 92 DTC 6031 (FCA); affirming 89 DTC 5115 (FCTD).

[4] Supra at p. 6032.

[5] Referred to in the case as the Wilkinson collection.

Mr. Krishna implies at paragraph 62 of the 2021 Krishna Report that the Cassels Opinions (and my analysis in the Heakes Report) are incorrect because, in his view, a profitable gift could only be a valid gift in situations where the fair market value of the gifted property has increased in value between the time of acquisition and the time of donation. With respect, setting aside the fact that the relevant question is not whether the Cassels Opinions turned out to be "correct", this is not an accurate reading of the Friedberg decision. The reasons for decision indicate that the Trial Court and the Court of Appeal accepted that the taxpayer's cost of the property in question is not necessarily determinative of the fair market value of that property at the time of the donation, even where the donation occurs shortly after the acquisition. Instead, the fair market value of the donated property should be determined under general principles. The trial judge described this in the following terms:

> The above conclusions lead to the necessity of determining the fair market value of each of the collections for income tax deduction purposes. Counsel for the Minister argues that the purchase price can be taken as the fair market value, however such an approach is not supported by the jurisprudence. In Conn v. M.N.R., (1986), 86 D.T.C. 1669 (T.C.C.), after a lengthy review of the authorities the Judge stated at page 1677:
>
> > Fair market value does not seem to pay any attention to cost of acquisition, only what might be obtained in the market at the time of disposition. Costs of acquisition can vary greatly, as has been illustrated, even for the same item, and such a cost or an adjusted cost base might affect income tax but in my opinion does not affect fair market value.
>
> In an article on fair market value determinations, Richard M. Wise [Footnote: "Fair Market Value Determinations - A Few More Requirements", 32 C.T.J. 337, at 337 and 338.] writes that for interpreting the provisions of the Income Tax Act that require a determination of fair market value, the Courts have accepted the following definition of such value:
>
> > The highest price, expressed in terms of money or money's worth, obtainable in an open and unrestricted market between informed and prudent parties, acting at arm's length, neither party being under any compulsion to transact, as the maximum price for which a willing vendor could sell the property to a willing buyer.[6]

---

[6] See 89 DTC 5115, at paragraph 20.

In the Friedberg decision, nothing is said about the relevance of the reason why the value of the donated textiles at the time of the donation exceeded their cost to the taxpayer. The taxpayer was simply considered to have made a charitable donation in an amount equal to the average appraised value of the donated textiles (approximately $229,000), even though the taxpayer had acquired them about a year earlier for a significantly lower price of only $12,000. There was no suggestion in the case that the fair market value of the textiles had increased over this short period, so as to account for the large difference between the $12,000 acquisition cost and the appraised amounts.

In the result, the court in Friedberg concluded that the donor's realization of a tax advantage because of the donation does not "normally" result in the donation not being a gift, even where the fair market value of the donated property exceeds the cost thereof to the donor. The case itself does not expand on what circumstances might fall outside of "normally". In other words, there was nothing in the Friedberg decision itself to suggest to Cassels that the donations under the Timeshare Program upon which it was opining would fall outside of "normally". Two later decisions of the courts, being Paradis and Duguay (discussed below), supported the Friedberg decision and provided further clarification on the role that a tax advantage plays in the analysis of whether there is a valid gift.

Gaetan Paradis v the Queen[7] involved the acquisition and donation to a charity of certain artwork by the taxpayer, where the fair market value of the donated property at the time of the donation was much greater than the taxpayer's cost. As a result, the taxpayer made a profitable gift in the sense described above in Friedberg. Paragraphs 39 and 40 and footnote 6 of Paradis discuss the relevance of these tax advantages in determining whether there is a gift. In short, the decision in Paradis states that the tax advantage (i) should not be considered in determining whether the taxpayer was impoverished (impoverishment would support the characterization of the transaction as a gift); and (ii) should not normally be considered to be a benefit in determining whether any consideration flows to the donor:

> 39 Take the case of the gift of the Messier-Leduc painting. Dr. Paradis became the owner of this painting by purchasing it from Galerie des Maîtres Anciens. Under the gift agreement, Dr. Paradis disposed of the painting without receiving any consideration from Musée de Joliette, which as a consequence was enriched by the acquisition of a new painting and Dr. Paradis was impoverished by an amount equal to the value of that painting. I do not believe that the receipt for

---

[7] [1997] 2 CTC 2557 (TCC). See Heakes Report, page 13.

tax purposes can be looked upon as consideration for the painting. The receipt is merely a document establishing that a gift was received by Musée de Joliette. True, that document is necessary in order to claim the value of the gift for the purposes of the deduction for gifts. However, the extent to which Dr. Paradis is entitled to that benefit does not depend on the Musée de Joliette. That is determined by the Act. **In my view, this tax advantage should not be considered in determining whether Dr. Paradis was impoverished.**

40 If such advantage were to be taken into account, a number of gifts might not qualify for the purposes of computing the deduction for gifts. I do not believe such an approach to be consistent with the spirit of the Act. This moreover is the point of view adopted by the Federal Court of Appeal in *Friedberg v. R.*, ((1991), 92 D.T.C. 6031 (Fed. C.A.))(December 5, 1991), A-65-89. [6] Linden J.A. wrote as follows at page 6032:

> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (see Heald, J. in *The Queen v. Zandstra* [74 DTC 6416] [1974] 2 F.C. 254 , at p. 261). **The tax advantage which is received from gifts is not normally considered a "benefit" within this definition,** for to do so would render the charitable donations deductions unavailable to many donors.

(FN) 6. However, Hugessen J.A. adopted a similar approach, though in a completely different context, in *Loewen v. Minister of National Revenue* (1994), 94 D.T.C. 6265 (Fed. C.A.) . He held that, in order to determine whether a debenture constituted capital property or an inventory asset, the actual cost of that property had to be considered, not the deemed cost for tax purposes. **In *Dutil v. R.* (1991), 95 D.T.C. 281 (T.C.C.) , Court file no. 91-42(IT), my colleague Judge Dussault considered whether there was a gift where the taxpayer's "sole" motivation was clearly to enrich himself, not impoverish himself. As counsel for the Minister admitted in her written submission, this was *obiter*. Furthermore, I consider the question to have been settled by the Federal Court of Appeal decision in *Friedberg* which was rendered after *Dutil*.**

(Bold emphasis added by Heakes.)

The decision in Queen v Duguay[8] goes further than the decision in Paradis. In Duguay, the taxpayers purchased and then donated certain artwork and jewellery. The purchase price was approximately 25% of the appraised value. The trial judge referred to the finding in Friedberg that a tax advantage is not normally considered to be a benefit and went on to state that in his opinion it does not matter if the taxpayer's principle motive was to obtain the tax advantage:

---

[8] [2002] 1 CTC 8 (FCA); affirming [1999] 3 CTC 2432 (TCC). The trial decision was rendered before the date of the First Cassels Opinion. The Federal Court of Appeal decision was rendered on November 3, 2000. See also the additional cases referred to in footnote 9.

164. … As this Court noted in *Paradis c. R.*, *supra*, three essential conditions must be met for a gift to exist: intent to give, delivery of the property and acceptance by the donor.

165 With regard to the first condition, I am in complete agreement with the view expressed by Judge Archambault in *Paradis* that this question must be decided strictly in the context of the legal relationship established between each of the appellants and the organizations that were to receive the gifts in question. In the case at bar, the evidence is clear that neither of the appellants received any consideration whatsoever from the organizations to which the property was given. **In my opinion, it does not matter that the principal motivation for each of the appellants was to obtain a tax advantage.** This approach has been confirmed, at least to some extent, by the Federal Court of Appeal's decision in *Friedberg v. R.* (1991), 92 D.T.C. 6031 (Fed. C.A.) . The following passage from page 6032 of that judgment is particularly interesting:

> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (see Heald, J. in *The Queen v. Zandstra* [74 DTC 6416] [1974] 2 F.C. 254 , at p. 261.) The tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors.

A receipt obtained from the recipient organization cannot be viewed as consideration even though the taxpayer must file the receipt to be entitled to the deduction for gifts. In the circumstances, the receipt simply attests a physical fact, namely that the designated property has been received by the organization in question. It is therefore my view that the appellants had the necessary intent to give the works of art and jewelry to the organizations in question….\ (Bold emphasis added by Heakes.)

On appeal, the Federal Court of Appeal confirmed the trial judge's reasoning and findings as follows:

> 8 The Tax Court of Canada judge applied to the transactions in question the rules in the *Civil Code of Lower Canada* which at the time governed the making of gifts, and in particular arts. 755 and 776. **He concluded that the conditions necessary for a gift to exist, namely the intention to give, delivery of the property and acceptance by the donee, had been met.** Applying *The Queen v. Friedberg*, 92 D.T.C. 6031 , a judgment of this Court, he found that **even though the respondents' primary motivation in the case at bar was to obtain a tax benefit, that did not nullify the donors' intent to give.** He was also of the opinion that obtaining a receipt from the recipient organization could not be regarded as consideration that eliminated the gratuitous and liberal nature of the transaction." (b\Bold emphasis added by Heakes.)
>
> .....
>
> 10 In my opinion, the judge correctly directed himself on the legal principles applicable in the case at bar. Similarly, I was not persuaded that he erred in applying these principles to the facts before him. Consequently, I would dismiss the appeal with costs.

Given both the facts in the Friedberg case and the above quotations from Paradis and Duguay, in my opinion, it was reasonable for Cassels to conclude in the Cassels Opinions that the Friedberg reasoning applies to situations where the donor may have an expectation of a profitable gift from the outset.

Similar views have also been expressed in the Report of Brian Nichols dated October 27, 2020 (the "**Nichols Report**"), filed on behalf of the third parties Gardiner Roberts LLP and the Estate of Ronald Farano.[9]

In my opinion, the Friedberg, Paradis and Duguay decisions collectively represent the state of the relevant jurisprudence relating to charitable gifts, as at the time the Cassels Opinions were delivered. These decisions support the conclusions reached by Cassels in the Cassels Opinions.

(ii) Cases relied upon by Mr. Krishna in the 2021 Krishna Report

Mr. Krishna appears to rely on three other cases (Beblow, Dutil and Abouantoun) in support of his opinion that the tax advantage from the donation of the Timeshare Weeks should have been taken into account, in determining (i) whether the impoverishment test was met; and (ii) whether there was a material benefit, or the expectation of a material benefit, to the Donors. In my view, these cases are less relevant and do not support Mr. Krishna's opinion on the relevance of such tax advantage. In short,

- Beblow was a family law case that involved such different facts that it would have been of little or no assistance to Cassels in determining whether there was a gift in the situation considered by them;

---

[9] See particularly paragraphs 19 to 29. In paragraphs 28 and 29 of this report, Mr. Nichols refers to a number of additional cases decided prior to the time of the Cassels Opinions. In short, these cases also collectively support the view that as at the time of the Cassels Opinions, a profitable donation may be considered to be a gift, even in situations where the taxpayer's primary motivation was to obtain a tax benefit. Three of these decisions are Federal Court of Appeal decisions issued on November 3, 2000, in which the earlier trial judgment was confirmed in each case. The cases are Langlois v R, 2000 CarswellNat 2415 (FC) affirming [1999] CTC 2589 (FCTD); Coté v R; [2001] 4 CTC 54 (FCA); affirming [1999] 3 CTC 2373 (TCC); and Duguay v R (cited in footnote 8).

- Dutil involved a "completely unrealistic and improbable valuation" in a very different fact situation from the situation considered by the Cassels Opinions and in any event was regarded by other courts as being inconsistent with and displaced by the higher court decision in Friedberg; and
- Abouantoun was a case of fraud or near fraud and again involved a very different situation.

Each of these cases is discussed in more detail below.

Beblow

Peter v Beblow[10] was a family law decision of the Supreme Court of Canada. The case involved a claim for unjust enrichment made against an estate by the deceased's long time common law wife and homemaker. The common law wife had over the years contributed valuable services in the home in which she had lived with the deceased. One of the arguments put forward on behalf of the estate was that the services were in the nature of a gift. An excerpt from the decision is contained in the 2021 Krishna Report; however, a fuller excerpt from the case provides some additional context for this case:

> This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner. As Dickson C.J., speaking for the Court put it in *Sorochan v. Sorochan, supra,* at p. 46, the common law wife "was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land". So there is no general duty presumed by the law on a common law spouse to perform work and services for her partner.
>
> Nor, in the case at bar was there any obligation arising from the circumstances of the parties. The trial judge held that the appellant "was under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the Respondent." This puts an end to the argument that the services in question were performed pursuant to obligation. It also puts an end to the argument that the appellant's services to her partner were a "gift" from her to him. **The central element of a gift at law -- intentional giving to another without expectation of remuneration -- is simply not present.**[11] [Bold emphasis added by Heakes.]

---

[10] [1993] 1 SCR 980.

[11] Supra, at pp. 981-982

Beblow is not a tax case and involved facts that are far removed from those considered in the Cassels Opinions. In particular, the case does not involve any tax advantages, and therefore quite understandably there is no discussion by the court of whether the existence of tax advantages is relevant to the determination of whether there is a gift. The rationale of this decision should be limited to the facts of the case. The case is therefore of little or no assistance in clarifying how to determine whether there has been a gift in the very different situation considered in the Cassels Opinions.

The impoverishment test had been referred to by other decisions prior to the time of the Cassels Opinions, but this test does not come from the Supreme Court of Canada in Beblow.[12] In fact, contrary what is stated in paragraphs 59 and 68 of the 2021 Krishna Report, the Beblow decision does not state that "The donor must, in effect, impoverish himself". Indeed, the word "impoverish" does not even appear in the Beblow decision.

Dutil

The Tax Court of Canada decision in the Dutil[13] case was issued on July 25, 1991, several months before the Federal Court of Appeal decision in Friedberg was released. Mr. Krishna relies on this case to support his argument that a valid gift did not occur because the Donors' intention was to enrich themselves.

As pointed out in the Heakes Report, the facts in Dutil involved a "completely unrealistic and improbable valuation"[14]. In contrast, the Cassels Opinions were rendered on the explicit assumption that the tax receipts for the donation of the Timeshare Weeks would be issued in amounts based on the fair market value of the donated Timeshare Weeks (less the value of the limited recourse charges) as determined by two independent valuations.[15] The situation in Dutil therefore was not analogous to the situation considered by Cassels.

---

[12] For example, it is referred to paragraph 39 of the Paradis decision, as described above.

[13] Dutil v R, 95 DTC 281 (TCC).

[14] See Heakes Report, page 13.

[15] See, for example, the First Cassels Opinion, at page 4. The Cassels Opinions also made it clear that the CRA had challenged gifts-in-kind donations on the basis of inadequate valuations, that the valuation of the Timeshare Weeks would be an important factor in determining whether the donations would be accepted by the CRA, and that even though the valuations were provided by accredited and experienced valuators, courts were not obligated to accept them. See for example pp 10-11 of the First Cassels Opinion.

Even more importantly, various cases decided after Dutil, and before the time that the Cassels Opinions were issued, had stated that the Federal Court of Appeal decision in Friedberg took precedence over the earlier lower court decision in Dutil. Indeed, the Paradis decision notes that the relevant statements in Dutil were obiter, and the Duguay decision specifically stated that there could be an intent to give even where the taxpayer's principle motivation was to obtain a tax advantage.[16] Accordingly, the Dutil case was neither relevant nor persuasive at the time that the Cassels Opinions were issued.

Abouantoun

The Abouantoun[17] case is discussed in the Heakes Report. As stated in the Heakes Report, the facts in Abouantoun were very far removed from the situation addressed in the Cassels Opinions. In Abouantoun, the taxpayer had claimed a charitable donation receipt for an aggregate amount that she claimed had been donated by her to the Order of St. Dominique over time in various cash donations. The Minister denied the charitable donation and in addition assessed penalties for gross negligence. The trial judge rejected the taxpayer's evidence.[18] The judge instead found that the taxpayer had participated in a scheme adopted by the Order to purchase false tax receipts in amounts that were vastly in excess of the amounts actually donated. The court found that there was no intention of the taxpayer to impoverish herself or give and therefore there was no gift. The judge in Abouantoun was also the judge in Paradis. He discusses at some length why he distinguished Abouantoun from both Paradis and Duguay. In brief, the critical difference was that the judge believed that the receipts in Abouantoun were deliberately issued as false receipts for "mock donations", and therefore the undue benefit from these false receipts should be taken into account in determining whether there was a valid gift. His reasoning is set out in paragraph 28 of the trial decision in Abouantoun as follows:

> 28 However, the situation appears to be quite different in the case at bar. It is not a matter of a donation in kind where there could be a divergence of opinion regarding its

---

[16] See Paradis and Duguay, discussed above, including footnote 6 of the Paradis decision, quoted on page 6 above.

[17] Abouantoun v R, 2002 DTC 3811 (TCC).

[18] One of the reasons given is that the amount of the alleged donations was "substantial compared to the income earned by each appellant" and was not credible given their circumstances as newly arrived immigrants. In addition, the evidence showed that the "Order had organized a scheme consisting in issuing false receipts; the receipts therefore have little or no probative value".

> value. In the case at bar, there is instead a mock donation. It is claimed that cash was donated whereas it was really the price paid to purchase a false receipt in respect of the donation whereby an undue tax benefit could be obtained. The undue benefit could offer a return of more than 200% on the purchase price of the false receipt. This, moreover, was implicitly acknowledged by one of the witnesses who participated in the scheme, when he frankly admitted that he had not been concerned at all with the use made of the money remitted to the Order. All that mattered to him was the tax benefit he sought.

In my opinion, it is clear that the judge in Abouantoun was influenced by the fact that the case involved mock donations amounting to fraud or near fraud, and that he took the tax benefit into consideration because it flowed from a "false receipt". As discussed above in the context of Dutil, the situation considered by Cassels was different in that the receipts issued for the donation of the Timeshare Weeks were supported by two independent valuations and therefore were not false receipts.

As at the time of the Cassels Opinions, although the courts had not applied the Abouantoun approach to situations other than those involving fraud or near fraud, some court decisions decided after the time of the Cassels Opinions have expanded the Abouantoun approach to take the tax advantage into account in situations that are very different from the situation in Abouantoun in that they do not necessarily involve fraud or near fraud. In my view, Mr. Krishna is seeking to do exactly the same thing. In so doing, Mr. Krishna is using hindsight to evaluate the Cassels Opinions, by seeking to apply a legal principle that had not been adopted by the courts at the time of the Cassels Opinions.[19]

A further observation is in order regarding the timing of the Abouantoun decision. This decision was issued on February 9, 2001 and therefore was not available when the First Cassels Opinion was issued on October 6, 2000.

In the result, in my opinion, the Beblow, Dutil and Abouantoun decisions involved situations that were not analogous to the situation considered by Cassels. My opinion remains that the

---

[19] See the reference to the Mariano and Cassan decisions on page 12 of the Heakes Report, as well as the discussion under heading F.2 on pp 14-15 of the Nichols Report, in which Mr. Nichols expresses the view (at paragraph 35) that until the McPherson decision was released in December, 2006, the Canadian tax courts accepted that there could be a profitable gift in accordance with the Friedberg concept.

Cassels Opinions were reasonable, given the state of the law at the time, as reflected in the applicable decisions in Friedberg, Paradis and Duguay.

(iii) Further comments on the use of the word "normally" in the Friedberg decision

Mr. Krishna is critical of the fact that the Cassels Opinions did not refer to fact that the Friedberg decision used qualifier "normally". In particular, he argues that the wording "not normally considered a benefit" in Friedberg must be read in the context of the facts in that case and limited accordingly, such that it did not apply in the situation considered by Cassels.[20]

In support of this argument, Mr. Krishna refers to the Dutil case (discussed above). As noted above, in my opinion, the Dutil case was not persuasive or applicable to the situation considered by Cassels.

In my opinion, as at the date that the Cassels Opinions were rendered, the only situations that the courts had identified as being outside of the scope of "normally" for this purpose involved fraud or near fraud, and this was not the case in the situation being considered by Cassels.

In addition, as discussed at pages 15 and 16 of the Heakes Report, the Cassels Opinions contained a number of other qualifications and indications of risk. Accordingly, given

(i) the other qualifications in the Cassels Opinions; and
(ii) the fact that there was no reason based on the then existing case law to indicate that the circumstances being considered might be outside of the scope of "normally",

in my opinion, it was not necessary for the Cassels Opinions to specifically discuss the "normally" qualifier in their discussion of the Friedberg decision in order for Cassels to meet the requisite standard of care.

(iv) Significance of order and effect of transactions undertaken by the Donors

As explained in the Cassels Opinions, the order of the transactions participated in by a Donor was as follows:

- The Donor applied to and became a beneficiary of the Trust;

---

[20] See paragraph 64 of the 2021 Krishna Report.

- The Trust in its discretion made a distribution of Timeshare Weeks to the Donor (subject to limited recourse security on the Timeshare Weeks);
- The Donor would decide in his or her discretion whether to make a donation of Timeshare Weeks along with cash to the RCAAA Donees or to retain the Timeshare Weeks.

The Cassels Opinions expressly assume that the distributions by the Trust would be "made with no conditions, or any obligation on the part of the Class A Beneficiary to make a subsequent donation to any RCAAA, and there is no arrangement that a donation will be made of Timeshare Weeks pursuant to the expression of willingness to support Canadian amateur athletics". In addition the Cassels Opinions state, "We understand that there is no obligation of any nature on any of the Class A Beneficiaries to donate any Timeshare Weeks at any time, and that there is no understanding that a donation will be made of Timeshare Weeks pursuant to the expression of willingness to support amateur athletics."[21]

As explained in the Cassels Opinions and the Heakes Report, it was Cassels' analysis that the lack of any conditions, understanding or arrangement was sufficient to delink the distribution from the later donation of the Timeshare Weeks by the Donors. (In other words, in their view, the donation of the Timeshare Weeks was not preordained from the outset.[22]) Therefore, in considering for example whether there was impoverishment, Cassels looked at the situation immediately before the donation was made by a Donor. Viewed from that perspective, it follows that:

- there was impoverishment because the Donor divested both the cash and the Timeshare Weeks; and
- the donations of the Timeshare Weeks were not even profitable gifts in the sense discussed above.

---

[21] See e.g. paragraph 1(I) of the First Cassels Opinion, and the further discussion on page 7 thereof.

[22] At paragraphs 91, 92 and 112, Mr. Krishna takes the view that all of the transactions that occurred under the Timeshare Program (including presumably the donation of the Timeshare Weeks) were preordained and the associated tax consequences should be determined accordingly. I do not understand how he draws this conclusion, given the case law that was available at the time the Cassels Opinions were issued, the assumptions in the Cassels Opinions and the fact that a number of Timeshare Weeks were in fact retained by the Class A Beneficiaries rather than being donated to the RCAAA Donees. See the further discussion in footnote 31.

Mr. Saltman explains this concept in the course of his examination for discovery (Q1832):

> Q. Would you agree that there was a financial benefit to the donor by receiving the timeshare unit effectively for nothing?
>
> A. Again, let me go back to the separateness, because it is critical to understanding. When the Trust…trustee makes a distribution of the timeshare[d] unit to the individual, his wealth increases. He hasn't paid for it admittedly, but his wealth increases. Then he has a decision to make. As I said, 12 or so kept the timeshare units. So their wealth was increased and it was maintained. And what they wanted to do with it afterwards, keep it, sell it, whatever.
>
> If a donor, on the other hand, wanted to make a gift, then there would be a reduction in that person's wealth. That person would be impoverished by the transfer of that asset, the timeshare unit, to the RCAA. And that fits within the framework of that is a true gift. It is very important to keep the two separate. [Underlining added by Heakes.]

In effect, Mr. Saltman is saying that the impoverishment test should be applied at the time of the donation. A similar point is made in the second "bullet" on page 4 of the First Cassels Opinion as follows:

> "If a Class A Beneficiary donates a Timeshare Week he or she is parting with the property received from the Trust and retains no material benefit, nor does he or she receive any material benefit in return for making the donation, except for the tax credit."

Mr. Krishna's conclusions appear to ignore the order and effect of the relevant transactions and to apply the impoverishment test before the Timeshare Week is acquired by the Donor. In addition, he takes the position that the tax advantage of the donation should be taken into account in determining whether there is impoverishment, contrary to Paradis and Duguay.[23]

With respect to Mr. Krishna, in my opinion, based on the then existing case law, Cassels' analysis was reasonable and met the requisite standard of care, given that (i) the distribution of

---

[23] As discussed above.

the Timeshare Weeks to the beneficiaries was made without conditions and was separate from the decision of the Class A Beneficiaries as to whether to make a donation of the Timeshare Weeks to the RCAAA Donees; and (ii) the available case law at the time, such as Paradis and Duguay, had held that the tax advantage should not be taken into account in applying the impoverishment test (leaving aside cases of fraud or near fraud). [24]

(b) Reasonable expectation

At paragraph 74, Mr. Krishna expresses the view that "even in the absence of a contractual obligation, or guarantee, a reasonable expectation of a material advantage or economic benefit in exchange for a donation is sufficient to taint it as a gift".

This principle is discussed by Cassels on pages 6 and 7 of the First Cassels Opinion, both in connection with the distribution by the Trust to the Donors and in relation to the tax credit that the Donors expected to receive. Cassels refers to the Woolner case (one of the cases relied upon by Mr. Krishna as discussed below) and refers to four "significant differences" for distinguishing the situation in Woolner from the situation considered by Cassels. At page 7 of the First Cassels Opinion, Cassels refers to Friedberg to support their view that the potential tax advantage to the Donors was not a benefit for this purpose. As discussed above, in my opinion, the available case law at the time that the Cassels Opinions were issued supported this view. The reasonable expectation of such a tax advantage therefore did not affect the validity of such donations as gifts.

Cases relied on by Mr. Krishna

In paragraphs 70 through 75, Mr. Krishna relies on the Woolner[25], Hudson Bay[26] and McBurney[27] cases to support his conclusions. In my opinion, these cases establish the basic principle that a gift may be negated by the receipt or expectation of receipt of a material benefit by the donor, but otherwise are not applicable to the situation considered by Cassels in the Cassels Opinions. The common factor in each of these three cases is that the person to

---

[24] In Paradis, the trial judge expressly stated at paragraph 39 that "In my view, this tax advantage should not be considered in determining whether [the taxpayer] was impoverished."

[25] Woolner v R, 99 DTC 5722; affirming 2000 DTC 1956 (TCC).

[26] Hudson Bay Mining & Smelting Co. v R, [1989] 2 CTC 309 (FCA); affirming [1986] 1 CTC 484 (FCTD).

[27] McBurney v R, [1985] 2 CTC 214 (FCA); allowing the Crown's appeal from [1984] CTC 466 (FCTD).

whom the alleged gift was made was expected by the donor to provide some sort of material advantage to the donor.

- In Woolner, the taxpayers made donations to the Mennonite Church which operated a school attended by their children "with the anticipation that their children would be provided with a bursary"[28].

- In Hudson Bay, the taxpayer made a $2.850 million payment (that it claimed to be a gift) to Manitoba Hydro concurrently with acquiring certain electrical transmission facilities from Manitoba Hydro. The payment in question was found to be tied to the acquisition of the electrical facilities by the taxpayer, and therefore was not a gift.

- In McBurney, the alleged gift was made to a registered charity that operated a school attended by the taxpayer's children, and the benefit was the securing of the desired education for his children. There was a moral but not a legal obligation to make payments to help the school. As stated by Stone JA at paragraph 14 of his decision:

> 14... The payments were made in pursuance of that duty and according **to a clear understanding** with the charities that while his children were attending these schools he would contribute within his means toward the cost of operating them. I cannot accept the argument that because the respondent may have been under no legal obligation to contribute, the payments are to be regarded as "gifts". **The securing of the kind of education he desired for his children and the making of the payments went hand-in-hand**. Both grew out of the same sense of personal obligation on the part of the respondent as a Christian parent to ensure for his children a Christian education and, in return, to pay money to the operating organizations according to their expectations and his means....[Bold emphasis added by Heakes.]

None of these three cases suggests that a tax advantage might also be considered to be a benefit for this purpose. In paragraph 101 to 103 of the 2021 Krishna Report, Mr. Krishna seeks to do just that. To the contrary, the existing case law at the time of the Cassels Opinions did not consider such a tax advantage to be a benefit for this purpose (leaving aside situations involving fraud or near fraud, such as "false receipts") and had expressly found that a donation can qualify as a gift even where the principal motive for the donation is to obtain the tax advantage. Accordingly, based on such case law, neither the expectation that the Timeshare Weeks would be donated, nor the expectation that a tax advantage would flow from the donations of the Timeshare Weeks, affected the validity of such donations as gifts.

---

[28] See paragraph 11 of the FCA decision.

Internal Cassels discussions and memos

In paragraphs 76 through 85 of the 2021 Krishna Report, Mr. Krishna refers to various extracts from the examination for discovery of Mr. Saltman as well as some internal comments made by Mr. Saltman's then partner James Parks. The comments from Mr. Parks were made in July, 2000 several months before the first Cassels Opinion was delivered. In my opinion, the comments illustrate that Cassels was aware of the potential risks and, as indicated by Mr. Saltman on discovery, the program was modified and the documents were drafted to address the risks identified by Cassels in the course of their analysis.[29] As can be seen in the first bullet point on page 4 of the First Cassels Opinion, one of the differences between the situation considered by Cassels and the situation in the Woolner case (discussed above) was that the Class A Beneficiaries were not subject to any "subtle pressures" to donate the Timeshare Weeks. The structure of the Timeshare Program was developed over the course of several months. During this period, a decision was made that the Beneficiaries should not be required to make a pledge in respect of the donation of Timeshare Weeks in advance of their becoming beneficiaries of the Trust and the structure was modified so that it did not include a pledge.

In paragraph 86, Mr. Krishna states that "Taking out the pledge does not actually address the problem." With respect, in my view the decision to not include a requirement for a pledge substantially reduced the risk that the donation of the Timeshare Weeks might be found not to be a valid gift under the case law in existence at the time of the Cassels Opinions. In my opinion, the internal correspondence and the evidence provided by Saltman on discovery demonstrate a high level of diligence on the part of Cassels in evaluating and addressing the tax risks.

(c) Claims in 2021 Krishna Report that there should have been more extensive disclosure

(i) Risk that certain parties may not have been dealing at arm's length with each other

In paragraphs 105 through 114 of the 2021 Krishna Report, Mr. Krishna argues that there was a substantial risk that the parties were not dealing at arm's length with each other. Although the

---

[29] See e.g. Q. 1850 in the examination for discovery of Saltman, which is quoted in paragraph 85 of the 2021 Krishna Report.

significance of such a finding is not fully discussed by Mr. Krishna, it seems that his main concerns are that, in his view:

A. this increased the risk that the valuation of the Timeshare Weeks would be challenged by the CRA; and
B. the transactions in the Timeshare Program were interconnected and preordained.

A. Risk of valuation being challenged

The Cassels Opinions disclose on page 10 that the CRA had recently challenged the valuation of certain gifts-in-kind. Accordingly, the Cassels Opinions adverted to the risk of a CRA challenge to the valuations. However, in my opinion, the determination of the fair market value of the Timeshare Weeks did not depend on whether the various parties to the transaction dealt with each other at arm's length. The independent valuations themselves are based on the characteristics of the Timeshare Weeks and do not depend on any of the transactions that occurred following the donation of the Timeshare Weeks. Indeed, the independent valuations determine the value the Timeshare Weeks based on the marketplace and the intrinsic characteristics of the Timeshare Weeks. As such, these valuations do not rely on any arrangements that may have been made by some or any of the parties for the remarketing of the Timeshare Weeks following the donation to the RCAAA Donees. Therefore, I do not agree with Mr. Krishna that a finding of non-arm's length dealings between the parties should have any bearing on the valuation of the Timeshare Weeks or on the risk that such valuation would be challenged by the CRA.

In addition, at paragraph 111 of the 2021 Krishna Report, Mr. Krishna states that "Non-arm's length valuations require particular care, as they are vulnerable to distortion." It is not clear to me what Mr. Krishna means by "non-arm's length valuations"; however, I am aware of no evidence that the valuators themselves were not dealing at arm's length with the various parties who participated in the Timeshare Program.

B. Were the transactions interconnected and preordained?

In paragraph 112 of the 2021 Krishna Report, Mr. Krishna alleges that the transactions in the Timeshare Program were preordained, without providing any detailed support for his conclusion. The issue arose a number of times in the course of the examination for discovery of Mr. Saltman. Mr. Saltman points out that various decisions and exercises of discretion were involved in the course of the transactions:

- the Trustee exercised discretion in determining whether to distribute Timeshare Weeks to the Class A Beneficiaries;
- the Class A Beneficiaries had to decide whether to retain their Timeshare Weeks or become Donors;
- the RCAAA Donees had to determine how to market the Timeshare Weeks that were donated to them.

Mr. Saltman discusses this at Q 1224 of his Examination for Discovery as follows:

> 1224. Q. On that scenario it's quite circular; the developer sells at a higher price gets the units back in its hands at a much reduced price?
>
> A. You're describing it as though it's a single composite transaction, but there are elements of discretion all the way through the piece that break that sequence. So, for example, the trustee has to exercise discretion and make a distribution to a particular person as a donor who's expressed support for amateur athletics. And then that person who gets the time-share has to exercise discretion and make a donation. And I've already indicated to you that a number of people did not do that, so the developer wouldn't get anything from the person who's keeping the time-share unit.
>
> Then, once it comes into the hands of the RCAAA, they can decide if they want to wait, hold onto the time-share unit, or exercise their contractual rights and get cash more quickly in accordance with industry practices. So yes, the developer is earning a profit on the front-end on one transaction and on the back-end on the second transaction, but all of that is in accordance with industry practice and it's not preordained. There are elements, as I've just gone through, of discretion each way along the piece, including the fact that a number of the donors kept their time-share units and they donate them. And so, the developer didn't benefit from that.

Based on the above and on the description of the relevant transactions in the Cassels Opinions[30], in my opinion, it was reasonable for Cassels to analyze the transactions based on the existence of a separation between the distribution of the Timeshare Weeks and the donation thereof to the RCAAA Donees. [31]

---

[30] In particular, see paragraph 1(i) and the later discussion on page 7 of the Cassels Opinions.

[31] In addition, at paragraph 91 of the 2021 Krishna Report, Mr. Krishna claims that a gift that is part of a series of transactions is determined in the context of the entire series of predetermined arrangements ("**step transaction doctrine**"). With respect, the application of the step transaction doctrine in Canadian tax law is more nuanced than is implied by this statement. Mr. Krishna refers to two UK House of Lords cases and a 2001 Federal Court of Appeal decision. None of these cases involves gifts. The UK cases are generally regarded as supporting a business purpose test and possibly a step transaction test in the UK tax law, at least in certain circumstances. In Stubart Investments (decided before the GAAR became applicable), the Supreme Court of Canada referred to these UK cases, and discussed both the step transaction doctrine and the business purpose test. The Supreme Court expressly rejected the application of a general business purpose test in Canadian income tax law, but did not expressly accept or reject the step transaction doctrine. Instead, the Supreme Court set out a general principle of statutory interpretation and various interpretive guidelines. None of these guidelines expressly refers to the step transaction doctrine (although one of the guidelines states that the formal validity of a transaction may be ignored where the object and spirit" of the allowance or benefit provision is defeated by the procedures blatantly adopted by the taxpayer to synthesize a loss, delay or other tax saving device.) As later stated by the Federal Court of Appeal in Central Supply, another case involving transactions undertaken before the GARR became effective, 'Since Stubart, the business purpose test, as a general principle of interpretation, has not been utilized in Canada. Further, without the assistance of the business purpose test, the potential for the "step transaction" analysis, which has evolved in the United Kingdom recently, is greatly circumscribed.' The impact of GAAR on the step transaction doctrine, and the continued application of the step transaction doctrine as part of the GAAR, are discussed in the Federal Court of Appeal decision in OSFC. (This case involved the application of the GAAR to deny the deduction of certain non-capital losses by the taxpayer.) The GAAR is discussed separately at some length in the Cassels Opinions, but it was not invoked by the CRA in challenging the tax advantages claimed under the Timeshare Program. Therefore it was not addressed in the Heakes Report.

With respect, as at the time that the Cassels Opinions were delivered, the case law dealing expressly with gifts was much more germane than any of these decisions, which factually involved situations very far afield from the situation considered in the Cassels Opinions. See Furniss v Dawson, [1984] 1 ALL ER 530 (HL); Ramsay v IRC, [1982] AC 300; Stubart Investments v R, [1984] 1 SCR 536. at paras. 55 and 65; OSFC Holdings v R, 2001 FCA 260; and Central Supply v R, [1997] 3 FC 674 (FCA) at para.8.

(ii) More extensive disclosure of tax risks

Overall disclosure of risk

In paragraphs 157 to 163, the 2021 Krishna Report refers to various internal communications between Messrs. Saltman and Parks that took place over an extended period during which the transactions were established and finalized and the Cassels Opinions were delivered. The 2021 Krishna Report itself notes that the Cassels Opinions "show that they were aware of the risk of a CRA challenge" and that, "If all or substantially all of the Donors decided to gift their Timeshare Weeks to the RCAAA Donee, the CRA may be more inclined to challenge the arrangement" .[32] I would agree with Mr. Krishna that the Cassels Opinions do show an awareness of the risk of challenge by the CRA. Indeed, as discussed on pages 15 and 16 of the Heakes Report, the Cassels Opinions contained a number of qualifying statements and indications that participation in the Timeshare Program would involve risk for the Donors, such that a prudent person investing in the Timeshare Program should understand that such an investment would involve risk and that he or she should consider obtaining his or her own tax advice. Accordingly, in my opinion, the overall level of risk disclosure by Cassels met the requisite standard of care.

Concurrent donation of cash

In paragraph 152, the 2021 Krishna Report alleges that the requirement for a concurrent gift of cash combined with the exercise of the put option substantially elevated the risk of a CRA attack. First, as discussed above given that the Donors were not required to make any donation at all, they were not subject to a requirement to make a concurrent donation of cash. The Donors could choose to retain the Timeshare Weeks or to make a concurrent donation of Timeshare Weeks and cash. I do not agree with Mr. Krishna that the fact that Timeshare Weeks would only be accepted by the RCAAAs as a donation if the Donors made a concurrent cash donation was relevant to the issue of whether the donations constituted gifts. Therefore, I

---

[32] Krishna Report, paragraph 29.

disagree with the statement that the requirement for a concurrent donation of cash elevated the risk of a CRA attack as at the time that the Cassels Opinions were delivered.

Additional risks

The 2021 Krishna Report suggests that the Cassels Opinions should have expressly disclosed the risk of a CRA assessment and the costs of disputing same. In my opinion, both of these are self-evident potential consequences of a challenge by the CRA, the risk of which was adequately disclosed in the Cassels Opinions.

(iii) Impact of put and call options on valuation of Timeshare Weeks

In paragraphs 134 through 147, the 2021 Krishna Report discusses the possible relevance of the put options and the call options to the valuation of the Timeshare Weeks. The 2021 Krishna Report concludes that they were a relevant factor and that the put option should therefore have been disclosed in the Cassels Opinions. I disagree with Mr. Krishna, and wish to make some observations in this regard:

- Cassels did not express an opinion on the fair market value of the Timeshare Weeks. Therefore, it was not incumbent on them to set out in their opinion all relevant factors that might be relevant to a valuation.

- Both the put options and the call options were separate property from the Timeshare Weeks. The subsequent sale of the Timeshare Weeks by the RCAAA Donees was a separate transaction from the donation of these properties to the RCAAA Donees by the Donors.

- The Donors were not party to the put or the call options. These options were between CAA (on behalf of the RCAAA Donees and a third party.) This is entirely different from the situations in the Leary and Marechaux cases relied on in paragraphs 135 to 137 of the 2021 Krishna Report. In both of these cases, the taxpayer/donor (not the donee) was found to have received a benefit that negated the making of a gift.[33]

---

[33] Leary involved a favourable loan arrangement being received by the taxpayer/donor and that was found to have been "fed" to the taxpayer/donor by the donee. "It is not inapt to say that the Order of St. John, which was the recipient of the $10,000, fed the source of the material advantage which came

- Because the put options were separate property, the discussion of how to value put options in paragraphs 133 to 136 is not germane to the valuation of the Timeshare Weeks.

- Finally, as noted earlier in this Reply, in referring to the Kossow and Marechaux cases in paragraphs 138 to 142, Mr. Krishna is relying on jurisprudence decided after the Cassels Opinions were issued to support his view of the applicable law at the time that the Cassels Opinions were issued.

In any event, the valuation of the Timeshare Weeks was not the responsibility of Cassels and therefore does not affect the question of whether Cassels met the requisite standard in issuing the Cassels Opinions.

(d) Independence of the Cassels Opinions

In paragraph 170, Mr. Krishna indicates that he does not understand how the Heakes Report concluded that the Cassels Opinions were appropriately independent. The Cassels Opinions were delivered by Cassels to their client CAA. It is clear that Cassels and CAA were in a solicitor-client relationship. As explained in the Heakes Report, it is in my experience quite common for counsel to one party in a transaction to express an opinion on tax considerations where it is contemplated that the opinion may be relied on by a party who is not his or her client. As stated by Estey, in doing so, the lawyer must "assume an independent posture ... and make an independent, good faith determination as to what the ultimate decision of a court would probably be..."[34] It was in this sense that I expressed the opinion in the Heakes Report that the Cassels Opinions were "appropriately independent". The opinion was based on my review of the materials provided to me, particularly the transcript of the examination for discovery of Mr. Saltman.

---

to Mr. Leary as a result of his gift." See Leary v Commissioner, (1980) 32 ALR 221, 228. Marechaux involved an interest free loan and a favourable put option being received by the taxpayer/donor and which, in the circumstances, were found to linked to the donation and negate the making of a gift. See Marechaux v R, 2010 DTC 5174 (FCA).

[34] See Heakes Report page 19 and footnote 32 thereto.

The subject of the independence of the Cassels Opinions arose a number of times during the examination of Mr. Saltman. In brief, Mr. Saltman freely admitted to having received input from Stephen Elliott and Harley Mintz, but his answers in the examination for discovery consistently reflected the fact that Mr. Saltman made the final decision as to content and wording of the Cassels Opinions. This is succinctly summarized in the following exchange between Ms. Dutt[35] and Mr. Saltman during the examination for discovery of Mr. Saltman:

> Q [Ms. Dutt]. ... And I just want to short circuit it. Anything that was included in the opinion in its final form was included because you wanted it to be included in the opinion, and your word was the final word in regards to the opinion.
>
> A [Saltman]. Yes.[36]

The examination for discovery of Mr. Saltman shows various examples of requests for changes from Mr. Elliott, some being rejected by Mr. Saltman because he did not agree with them; others being accepted because he did agree with them.

For example,

- Mr. Elliott requested that Mr. Saltman issue two versions of the original Cassels Opinion. Mr. Elliott requested that one version, which would be provided to CAA, would contain both the conclusions reached by Cassels and their reasoning. He requested that a second, shorter version be issued for review by prospective Donors or their advisors. The shorter version would contain the conclusions reached by Cassels, but would not explain their reasoning. Mr. Saltman did not accept this request, as he felt that "I had to render the best opinion I could, complete opinion, and I expected people to read it. I didn't want to give a lite and heavy version."[37]

---

[35] Counsel for the Third Party Mintz & Partners.

[36] See Q. 3176 of the examination for discovery of Saltman on Nov. 5, 2015. Similarly, the response to Q. 1072 on October 27, 2015, Mr. Saltman indicated that the [content of the opinion] "is my decision ultimately", notwithstanding the receipt of comments and changes from various members of the working group.

[37] See discovery of Saltman on October 29, 2015, QQ. 2451 to 2453.

- Mr. Saltman accepted a suggestion from Mr. Elliott that the sentence "The Trustee, however, expects that most, if not all, of the Class A Beneficiaries will donate their Timeshare Weeks" by deleting the words "if not all". Mr. Saltman indicated in the examination for discovery that he agreed, after discussion with the working group, that it would be factually inaccurate to retain these words.[38]

- Mr. Saltman did not accept a suggestion from Mr. Elliott that Mr. Saltman delete the sentence from the Cassels Opinion that reads, in part, "If all or substantially all of the Class A Beneficiaries who receive Timeshare Weeks donate them the CCRA [now the CRA] may be more inclined to challenge the arrangement ....". Mr. Saltman indicated in his examination for discovery that he thought it was important to retain this sentence in the opinion as he thought it was an important disclosure.[39]

- Mr. Saltman accepted a suggestion from Mr. Elliott to delete the following sentence from the draft Cassels Opinion. "In any event, if such donation of property were denied, the donation of the $4,000 cash would still qualify for the tax credit." Saltman indicated that he agreed to delete this sentence because he concluded that it had already been adequately dealt with in the draft Cassels Opinion.[40]

---

[38] See discovery of Saltman on October 28, 2015, Q. 2208.
[39] See discovery of Saltman on October 29, 2015, QQ. 2473-2477 and 2480.
[40] See discovery of Saltman On October, 2015, QQ. 2489-2497.

- I did not find any example mentioned in the examination for discovery of Mr. Saltman of a change being made to the draft Cassels Opinions that Mr. Saltman did not agree with.

The foregoing supports my conclusion that the Cassels Opinions were appropriately independent.

Yours truly,

Edward A. Heakes

EAH

This is Exhibit "P9" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

Phone: 416-847-7300 | Fax: 1-866-285-6527 | Email: info@taxchambers.ca
155 University Avenue, Suite 300, Toronto, ON M5H 3B7
taxchambers.ca | Toll Free: 1-855-847-7300

February 16, 2022

Reply To: Vern Krishna, CM, QC
E-mail: vern.krishna@taxchambers.ca
Telephone: (416) 847-7300

By Email

Roy O'Connor LLP
1920 Yonge Street
Suite 300
Toronto, Ontario
M4S 3E6

Attn: David F. O'Connor & J. Adam Dewar

Re: Lipson v. Cassels Brock and Blackwell LLP
Court File No: CV-09-376511

A. PURPOSE & SCOPE OF OPINION

1. You have asked me to provide a Rejoinder Opinion on Brian Nichols' Report of October 27, 2020 ("**BN**") with respect to the third-party claim brought by Cassels Brock & Blackwell LLP ("**CB**") against Gardiner Roberts LLP ("**GR**"), the Estate of Ronald J. Farano, deceased ("**Farano**"), the Reply of Edward A. Heakes ("**Heakes Reply**") of December 15, 2021, and some comments in the Expert Report of Peter Jewett dated November 19, 2020 **("Jewett")**.

2. This Rejoinder Opinion addresses issues raised in the above reports.

3. The relevant period of the BN Report on the Farano Commentary is as of December 22, 2000. The "**Relevant Period**" of the CB Reports is 2000 to 2003 (inclusive).

4. My Rejoinder is supplemental to my previous Opinions.

B. ISSUES ADDRESSED

5. I address the following issues:

   a) Meaning of "gift" under the common law and in context of tax legislation.

   b) Risk Analysis.

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

c) Series of transactions, non-arm's length transactions, valuation risks, and exclusion of valuation reports from litigation.

d) State of knowledge within the tax bar of risks and assessing policies of Canada Revenue Agency ("**CRA**") in respect of charitable donations.

e) Whether CB and Ronald J. Farano met the standard of care of prudent tax specialists when they rendered their Opinions.

C. SUMMARY OF MY OPINIONS

6. **In my Opinion, BN and Heakes do not fully address the context and legislative framework of the FCA's decision in *Friedberg* and Justice Linden's caution that *not every gift will be found to benefit from the provisions*.**

7. **In my Opinion, it would be inappropriate to ignore Justice Linden's caution and extend the reasoning of *Friedberg* to all charitable donations. The caselaw does not support enrichment from donations in all circumstances beyond normal benefits under the ITA.**

8. **In my Opinion, the suggestion that *Friedberg, Duguay,* and *Paradis* overruled the general common law requirement of impoverishment as a requirement of a gift is not supported by the cases.**

9. **In my Opinion, the reasonable expectation of Donors of an immediate profit and benefits from the interdependence of the series of transactions in the Timeshare Program substantially increased the risk of a CRA assessment.**

10. **In my Opinion, there was a substantial risk that the parties in the Timeshare Program were not factually at arm's length with each other as they were not independent and were intimately involved with each other in various steps of the overall structure of the promotion.**

11. **In my Opinion, the non-arm's length structure of the Program and the series of transactions in the Timeshare Program increased the risk to the Donors that the CRA would closely scrutinize and challenge the valuation of the Timeshare Weeks.**

12. **In my Opinion, the Donors would be at a considerable disadvantage in tax litigation with the CRA if they could not adduce evidence of the professional valuations through the contractual exclusion of the expert appraisal testimony.**

13. **In my Opinion, the tax bar was aware of CRA assessments and heightened audit and litigation risks for potential donors of charitable gifts during the Relevant Period.**

14. **In my Opinion, the CB Opinions during the Relevant Periods should have provided greater disclosure of the risks inherent in the Timeshare Program for retail investors, who were specifically targeted in their opinions.**

15. **In my Opinion, a prudent and competent tax specialist would have disclosed the risks associated with the Timeshare Program to potential investors in plain language highlighting the risks of CRA audit and assessment resulting from the non-arm's length structure of the Program, valuation issues involved with the option contracts, the contractual exclusion of the valuation reports from tax litigation, the onus of proof in tax litigation, and the costs and time associated with tax litigation**.

16. **Cassels Brock and Ronald J. Farano did not meet the standard of care of prudent income tax solicitors or specialists in issuing their Legal Opinions in respect of the Timeshare Programs.**

D. FACTS RELIED UPON BY FARANO

17. BNs' Report outlines the facts that Farano relied upon.

E. "GIFTS" IN CONTEXT OF LEGISLATIVE FRAMEWORK

18. As previously discussed, Canadian courts generally define a "gift" as "a voluntary transfer of property from one person to another gratuitously and not as the result of a contractual obligation without anticipation or expectation of material benefit." For cases in the Relevant Period, see, generally:

> *Woolner* v. *A.G. of Canada et al*., 99 DTC 5722; [2000] 1 CTC 35, at para 7 (FCA); *The Queen* v. *Zandstra*, 74 DTC 6416, at 6419; [1974] CTC 503, at 508 (FCTD); *The Queen* v. *McBurney*, 85 DTC 5433, at 5435; [1985] 2 CTC 214, at 218-19 (FCA); *The Queen* v. *Burns*, 88 DTC 6101, at 6103; [1988] 1 CTC 201, at 205 (FCTD); aff 'd. 90 DTC 6335; [1990] 1 CTC 350 (FCA); *The Queen* v. *Friedberg*, 92 DTC 6031, at 6032; [1992] 1 CTC 1, at 2 (FCA); *Pustina et al*. v. *The Queen (sub nom. Whent v. The Queen)*, 96 DTC 1594, at 1602; [1996] 3 CTC 2542, at 2558 (TCC); aff 'd. 2000 DTC 6001; [2000] 1 CTC 329 (FCA); and *The Queen* v. *Littler*, 78 DTC 6179 (FCA), in which the court states that the word "gift" in a taxing statute must be taken as referring to what is known to the law as a gift.

19. In *Peter v. Beblow*, [1993] 1 S.C.R. 980, the Supreme Court of Canada defined "gift". McLachlin J. (as she then was) speaking for La Forest, Sopinka, and Iacobucci JJ. said: "the central element of a gift [is the] intentional giving to another without expectation of remuneration" [at p. 991-92].

20. Heakes states at page 8 of his Reply that *Peter v. Beblow* was a family law case that involved different facts, and that it would have been of little or no assistance to Cassels in determining whether there was a gift in the situation considered by them.

21. There is no suggestion in the decision that the Supreme Court was articulating a different concept of "gift" for purposes of family law.

22. The requirement that the giving be “without expectation of remuneration" means that the donor must impoverish himself or herself through the act of giving.

23. For example, where an individual transfers property with a FMV of $10,000 without remuneration, she is impoverished to the extent of the value of the property transferred. If, in return, the individual receives a tax credit of 50% under the *ITA*, her impoverishment is reduced by $5,000. Nevertheless, she is impoverished by $5,000. This is the “normal” expected consequence of all charitable donations under section 118.1 of the *ITA*.

24. See also *Hodges v. Deputy Commissioner of Taxation*[1] (previous Opinion), which states:

> Thus, the concept involves a net increase in the worth of the donee, corresponding with a net decrease in the worth of the donor, but without any detriment arising to the donee from the transfer of property.

25. The *net decrease in the worth of the donor* implies that the donor must impoverish himself or herself by the value of the transferred property.

26. Both BN[2] and Heakes[3] rely upon Justice Linden’s comment in *Friedberg* as authority that there could be a profitable gift from charitable donations:

> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (see Heald J. in *The Queen v. Zandstra*). The tax advantage which is received from gifts is not normally considered a 'benefit' within this definition for to do so would render the charitable donations deductions unavailable to many donors.

27. Heakes states at page 3 of his Reply that the *Friedberg* case did not elaborate on possible exceptions to the general principle that a tax advantage does not "normally" constitute a benefit for the purposes of determining whether there has been a gift.

---

[1] *Hodges v. Deputy Commissioner of Taxation*, No. NT 96/405, AAT No. 12314 (1997) at para. 18, citing *Leary v. Federal Commissioner of Taxation* (1980), 80 A.T.C. 4438.

[2] BN states at para. 19 of his Report: "However, there was authority from the Federal Court of Appeal indicating that there could be a profitable gift".

[3] When the Cassels Opinions were delivered, the Federal Court of Appeal decision in *Friedberg* was a leading decision on the validity of gifts for income tax purposes.

28. BN's Report relies upon *Friedberg*[4] as authority that there could be a profitable gift from a charitable donation at para. 19: "however, there was authority from the Federal Court of Appeal indicating that there could be a profitable gift".

29. Similarly, Heakes states in his Responding Report that in his opinion, the *Friedberg*, *Paradis* and *Duguay* decisions collectively represent the state of the relevant jurisprudence relating to charitable gifts, as at the time the Cassels Opinions were delivered.

30. Heakes further states at page 5:

> In the *Friedberg* decision, nothing is said about the relevance of the reason why the value of the donated textiles at the time of the donation exceeded their cost to the taxpayer. The taxpayer was simply considered to have made a charitable donation in an amount equal to the average appraised value of the donated textiles (approximately $229,000), even though the taxpayer had acquired them about a year earlier for a significantly lower price of only $12,000.

31. However, as explained below, in interpreting "normally", *Friedberg* should be read in the context of its particular facts and the legislative framework applicable to cultural properties within which the FCA based its decision.

Legislative Framework

32. The *ITA* has special rules for tax credits in respect of gifts that qualify as *cultural gifts*.

33. To qualify as a "cultural gift", *The Canadian Cultural Property Export Review Board* must determine that the object is of outstanding significance by reason of its close association with Canadian history, its aesthetic qualities, or its value in the study of the arts or sciences [paragraph 118.1(1)(a) of the *ITA*].

34. There are two aspects of the legislative framework of the *Cultural Property Export and Import Act* **(***CPEIA*) and the *ITA* that allow a donor to derive tax benefits from his donation of cultural gifts.

35. First, a special rule in the *ITA* exempts capital gains from dispositions of certified cultural property from tax [subparagraph 39(1)(a)(i.1)].

36. Hence, Mr. Friedberg's gain of $217,000 from his donation of "cultural property" was a profitable gift that was exempt from tax.

37. Justice Linden was addressing profitable gifts specifically in the case of cultural property.

> It is clear that it is possible to make a 'profitable' gift in the case of *certain cultural property*. Where the actual cost of acquiring the gift is low, and the fair market

[4] 92 DTC 6031 (FCA); aff'd on other grounds [1993] 4 SCR 285,

> value is high, it is possible that the tax benefits of the gift will be greater than the cost of acquisition. A substantial incentive for giving property of cultural and national importance is thus created through these benefits. But not every gift will be found to benefit from these provisions.

38. The FCA's reasons are specific to donations of "*certain cultural property"*. And, as Justice Linden stated: "*not every gift will be found to benefit from these provisions*".

39. In respect of the second tax advantage (tax credit) the FCA said:

> The tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors.

40. Justice Linden's comment on "not normally" should be read in context. As Lord Halsbury said in *Quinn v. Leathem*:[5]

> Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are qualified by the particular facts of the case in which such expressions are to be found.

Justice Linden's "not normally" comment suggests that there may be circumstances where a tax credit greater than the amount donated would be considered a benefit. As *Bassila* and *Merhi* (discussed below) show, tax courts frown upon enrichment from donations.

41. *Friedberg* is limited by its facts and is not a "trump card" for all types of donations.

42. BN states in paragraph 51 of his Report "*Friedberg* overruled *Burns* and *Dutil*, which had held that a donor must be impoverished in order for there to be a gift".

43. In *Burns* [90 DTC 6335], the trial judge found that the contributions by Dr. Burns to the Canadian Ski Association through one of its divisions in Southern Ontario were for the purpose of securing a material advantage for his daughter and were benefits. The FCA dismissed the taxpayer's appeal. The taxpayer's contributions were not payments made without consideration or without material benefit. *The court found that the contributions were not true "gifts".*

44. In *Dutil*, 95 DTC 281 (Court File No. 91-42(IT)), the taxpayer made a payment of $1,100 to a museum in Quebec and was provided with a receipt along with a certificate of valuation for $5,500.

45. The Tax Court stated:

[5] [1901] AC 495 at 506.

> Our tax system provides for the deduction of a charitable gift within the limits determined by the Act, when such a gift is made to a recognized body. It may thus be regarded as a normal consequence intended by the legislature in order to encourage such gifts. However, it may be seriously doubted whether such a gift even exists in the true sense when the taxpayer's sole motivation is clearly to enrich himself, not impoverish himself. *If Friedberg (supra) is used as authority for the argument that this may nevertheless be the result of a gift, it is still true that it is the exception and not the rule* [emphasis added].

46. See also *Woolner v. The Queen,* 99 DTC 5722 (FCA), *The Queen v. McBurney,* 85 DTC 5433 (FCA), *Burns v. MNR,* 88 DTC 6101 (FCTD), and *The Queen v. Zandstra,* 74 DTC 6416 (FCTD)).

47. *Friedberg* does not mention overruling any other prior cases. The FCA approves *Zandstra*, [1974] 2 FC 254, 74 DTC 6416 at page 6032:

> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (see Heald, J. in *The Queen* v. *Zandstra* [74 DTC 6416] [1974] 2 F.C. 254, at p. 261.)

48. In his Responding Report at page 8, Heakes states that "the *Friedberg*, *Paradis* and *Duguay* decisions collectively represent the state of the relevant jurisprudence relating to charitable gifts, as at the time the Cassels Opinions were delivered". However, as noted below, *Paradis* and *Duguay* involved different facts and different legal systems leading to different conclusions.

49. *Paradis* and *Duguay* involved the role of taxpayer motivation in making charitable donations for tax purposes. Both cases were decided under the requirements of "gifts" and procedural requirements under the Quebec *Civil Code*.

50. In *Paradis*, the Court relied on article 755 of the *Civil Code of Lower Canada* (*C.C.L.C.*) [paras. 35-37]:

> Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favour of the donee, whose acceptance is requisite and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolutive condition.
>
> Where there is no gift by notarial deed, the second paragraph of article 776 of the *C.C.L.C.* acknowledges gifts of moveable property as valid where they are accompanied by delivery. This paragraph reads as follows:

> Gifts of moveable property, accompanied by delivery, may however be made and accepted by private writings, or verbal agreements.

51. The three essential conditions under the Quebec *Civil Code* for the existence of a gift by hand: intent to give, physical delivery and acceptance by the donor [para. 37].

52. Archambault T.C.J held that motivation was not relevant in determining the validity of gifts under Quebec law at paragraph 38:

> The Minister claims that Dr. Paradis's principal motivation in acquiring the paintings and transferring them to the donees was strictly to obtain a tax benefit, not to divest himself of them in their favour. I do not deny that this motivation played an important role in Dr. Paradis's actions during the relevant years. However, I do not believe it is pertinent to consider the tax advantage in order to determine the validity of a gift in Quebec law.

53. The court also confirmed the Minister's gross negligence penalties for inflated donation claims (at para. 73):

> [The taxpayer] was not only negligent in claiming a deduction for gifts of $36,500 in respect of the Messier-Leduc painting, but he also knowingly, or at least under circumstances amounting to gross negligence, made a false statement. I believe [the taxpayer] took part in a scheme to enable him to claim unwarranted tax deductions in respect of the donation of the … painting, the value of which indicated on the receipt from the Musée de Joliette considerably exceeded the fair market value of that painting. One would have had to have been credulous and naive to have believed that the appraisal prepared … could be a reasonable determination of that painting's fair market value.

54. The court also questioned the independence of the valuation opinions (para. 76):

> As … the seller of the Messier-Leduc painting… had an economic interest in completing the sale, it is conceivable that he was not sufficiently independent to provide a proper appraisal. Even if there had been no obligation on [the taxpayer's] part to obtain an independent appraisal, the fact that [the seller] claimed the Messier-Leduc painting was worth four times the price [the taxpayer] had paid for it should have raised a doubt in his mind as to the validity of such an appraisal. *There are no "magic or miraculous" tax shelters in our tax system* [emphasis added].

55. *Duguay*[6] involved multiple appeals and some 200 people in a so-called "scheme"[7]. The Federal Court of Appeal affirmed the Tax Court's decision that the transactions in question were to be determined under rules in the *Civil Code of Lower Canada*, and in particular, arts. 755 and 776 and that motivation was not relevant for tax purposes.

56. Both *Paradis* and *Duguay* illustrate how aggressive the CRA can be in the case of inflated donation claims. The courts reduced the value of the donations and did not let the taxpayers make profitable gifts.

57. I also note two other cases in the Tax Court that addressed taxpayer enrichment through donations.

58. *Bassila* v. *The Queen*, 2001 CanLII 20 (TCC), rejected the taxpayer's claim for charitable donations because he enriched himself beyond "normal" tax benefits under the *ITA* (para. 5):

> [T]he appellant not only recovered his outlay but also derived a benefit therefrom through the tax credit. Thus, not only did he not diminish his substance, but he also derived a benefit beyond the tax benefit normally provided for by the *Act*.
>
> One must therefore speak not of impoverishment but of enrichment in these circumstances. I share therespondent's view that there were in this case no gifts within the meaning of section 118.1 of the *Act*.

59. Similarly, *Merhi v. The Queen*, 2001 CanLII 691 (TCC), rejected the taxpayer's claims for donations beyond the normal benefits provided by the *ITA* (paras. 64 and 65):

> In view of my conclusion, I also find that none of the three appellants Roger and Elie Merhi and Reine Helou made gifts within the meaning given that term by the courts. Indeed, Ms. Langelier demonstrated that, in acting as they did, the taxpayers not only recovered their outlay, but also derived a benefit through the tax credit. They clearly derived a benefit beyond the tax benefit normally provided for by the *Act*.
>
> One must therefore speak not of impoverishment but of enrichment in the circumstances. I share the respondent's view that no gifts were made in any of these three cases.

[6] 2000 CarswellNat 2413, 2000 CarswellNat 3240, [2000] A.C.F. No. 1802, [2002] 1 C.T.C. 8, 103 A.C.W.S. (3d) 1247, 2000 D.T.C. 6620 (Fr.), 268 N.R. 313; 1998 CarswellNat 2373, 1998 CarswellNat 2887, [1999] 3 C.T.C. 2432, 99 D.T.C. 100 (Fr.).

[7] To use the language of the Tax Court in *Paradis* at para. 69.

60. **In my Opinion, BN and Heakes do not fully address the context and legislative framework of the FCA's decision in *Friedberg* and Justice Linden's caution that *not every gift will be found to benefit from the provisions*.**

61. **In my Opinion, it would be inappropriate to ignore Justice Linden's caution and extend the reasoning of *Friedberg* to all charitable donations. The caselaw does not support enrichment from donations in all circumstances beyond normal benefits under the ITA.**

62. **In my Opinion, the suggestion that *Friedberg, Duguay,* and *Paradis* overruled the general common law requirement of impoverishment as a requirement of a gift is not supported by the cases.**

Risk Analysis

63. CB specifically targeted its Legal Opinions to potential individual donors who would acquire and hold the Timeshare Weeks as capital property.

64. There were several areas that suggested heightened CRA audit and assessment risk: (1) Expectation of Immediate Profit and Benefits; (2) Series of Transactions and Non-arm's Length Relationships; (3) Exclusion of the Valuation Report from Litigation and put options.

Expectation of Immediate Profit and Benefits

65. The Timeshare Program was structured so that individuals could, through a series of steps, derive tax credits greater than the cost of their donations, thereby ensuring an immediate cash profit.

66. The contract provided that it was the "expectation of the Athletic Trust that the Canadian Beneficiaries will gift their Timeshare Interests as charitable donations" to Registered Canadian Amateur Athletic Associations (RCAAAs).

67. Canadian courts have considered the “expectation of benefits” in several tax cases and held that the expectation was sufficient to invalidate the purported gift.

68. See, for example, *Woolner* v. *A.G. of Canada*[8] where taxpayers were not under any contractual obligation to contribute to the Church for their child to receive a bursary but were "highly expected" to contribute. The FCA held that, even absent contractual commitments, the expectation that the taxpayer would receive a material advantage from her donation was sufficient to contaminate her "gift".

[8] 99 DTC 5722; [2000] 1 CTC 35 (FCA).

69. See *Zandstra*[9]:

> This Court has held that a gift, within the meaning of the common law, is a voluntary transfer of property from one person to another gratuitously and not as the result of a contractual obligation without anticipation or expectation of material benefit….

70. See *McBurney,* [1985] 2 C.T.C. 214, 85 D.T.C. 5433 (FCA):

> I cannot accept the argument that because the respondent may have been under no legal obligation to contribute, the payments are to be regarded as "gifts".

71. The common theme of these appellate decisions is that, even absent contractual commitments, a material advantage or economic benefit disqualifies the property from being a gift under the common law.

72. The Timeshare Program allowed Donors to receive property *without cost* but with a liability attached in the form of a Lien on the property.

73. The Lien was payable on demand and carried interest at a market rate payable in arrears.

74. Donors could pay off the Lien and extinguish their liability for US$3,200 by donating their units.

75. Donors would obtain a tax credit based on a US$10,000 donation (or Canadian dollar equivalents).

76. Hence, at a tax credit rate of 50%, Donors would obtain an immediate profit more than their cash outlay.

77. James Parks addressed this aspect of the structure of the Timeshare Program in his Memo of July 13, 2000, at paragraph 3:

> …while you can say that there is no material advantage obtained because the "donor" retains no property, the fact is that the donor does receive a clear tax benefit. Notwithstanding *Friedberg*, which held only that the tax advantage received from the tax credit does not disqualify the "gift", there clearly is a monetary advantage in paying $4,000 and receiving credit for having made a $10,000 donation.

78. Parks states: "I doubt very much that we can state positively in the opinion that there is no clear understanding that a Class A beneficiary will be expected, although not legally required, to make a donation of the Timeshare Weeks that are received from the trust".

[9] *The Queen* v. *Zandstra* 74 DTC 6416; [1974] 2 F.C. 254 at p. 261.

79. Parks was also concerned about the risks of litigation. At Q. 1849 of Mr. Saltman's discoveries:

> ... I am not convinced the smell test would be met if the matter were litigated. As we have also discussed, it is a simple matter for Revenue Canada to challenge the arrangement and force the donors to support their position. If they do not have the stomach for a fight, they clearly should not be undertaking this type of planning. The letter should address this, even if it detracts from the marketing aspect ...

Series of Transactions and Non-arm's Length Relationships

80. "Series of transactions" refers to the integration of individual and separate steps into a composite transaction. The doctrine is important in tax planning arrangements to determine whether a court will look at a sequence of events in isolated steps or as a composite.

81. The linkage of separate steps into a "series" depends upon their interdependence and the way the transactions are structured. Thus, we must determine: when is a sequence of events (e.g., A to B, then B to C) considered a single composite transaction, such as A to C?[10] This is a factual determination.

82. Relying on Saltman's Discoveries, Heakes states in his Responding Report that the series of steps in the Timeshare Program were not preordained but involved discrete decisions, each involving discretion. For example, Heakes identifies the following steps (pages 19-20):

- the Trustee exercised discretion in determining whether to distribute Timeshare Weeks to the Class A Beneficiaries;
- the Class A Beneficiaries had to decide whether to retain their Timeshare Weeks or become Donors;
- the RCAAA Donees had to determine how to market the Timeshare Weeks that were donated to them.

83. The House of Lords addressed the issue of preordained steps to produce a given result in several cases involving tax planning. See, for example, *Furniss v. Dawson*, [1984] A.C. 474 (U.K. H.L.) and *Craven v. White* (1988), [1989] A.C. 398 (U.K. H.L.), which the Federal Court of Canada cited with approval in *OSFC Holdings Ltd*., 2001 FCA 260.

---

[10] *OSFC Holdings Ltd*. v. *R*., 2001 FCA 260, [2001] 4 C.T.C. 82, 2001 D.T.C. 5471, 17 B.L.R. (3d) 212, 275 N.R. 238, 29 C.B.R. (4th) 105, [2001] F.C.J. No. 1381, [2002] 2 F.C. 288, 2001 CAF 260, Justice Rothstein quoting Krishna, Vern, *The Fundamentals of Canadian Income Tax*, 6th ed. (Scarborough: Carswell, 2000), at page 888 at para. 18.

84. Lord Oliver explained the approach to preordained steps in tax planning in *Craven v. White*, at page 514:

> As the law currently stands, the essentials emerging from *Furniss v. Dawson*, [1984] A.C. 474, appear to me to be four in number: (1) that the series of transactions was, at the time when the intermediate transaction was entered into, pre-ordained in order to produce a given result; (2) that that transaction had no other purpose than tax mitigation; (3) that there was at that time no practical likelihood that the preplanned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life, and (4) that the pre-ordained events did in fact take place.

85. Heakes comments on the risk of a CRA challenge of the arrangement in his Opinion (at pages 9 and 10):

> The Cassels Opinions point out that the Trustee "expects" that most of the Donors would donate the Timeshare Weeks received by them and states that if all or substantially all of the Donors decided to gift the Timeshare Weeks to the RCAAA…, the CRA "may be more inclined to challenge the arrangement", although the Cassels Opinions later refer to the "unlikely" success of such a challenge. However, the Cassels Opinions also note that there was neither an obligation on the part of the Donors to make such a donation nor an understanding that a donation would in fact be made. The Cassels Opinions implicitly conclude that, had they existed, these would have been more relevant than the existence of an expectation by the Trustee.

86. Heakes states that " it was reasonable for Cassels to analyze the transactions based on the existence of a separation between the distribution of the Timeshare Weeks and the donation thereof to the RCAAA Donees". However, Saltman's response to Q. 1224 of his Discoveries shows the link between the various transactions:

> So yes, the developer is earning a profit on the front-end on one transaction and on the back-end on the second transaction, but all of that is in accordance with industry practice and it's not preordained

87. The linkage between the front end and the back end speaks to their interdependence. Without the two linked ends, the Timeshare Program would not have produced the desired profits.

88. Heakes addresses the step transactions doctrine in footnote 31 of his Responding Report. He suggests that the two UK House of Lords cases (*Furniss v. Dawson*, and *Craven v. White*), which the Federal Court of Canada cited with approval in *OSFC Holdings Ltd*. did not involve gifts and that the UK cases "are generally regarded as supporting a business purpose test and possibly a step transaction test in the UK tax law, at least in certain circumstances".

89. Heakes states correctly that the Supreme Court expressly rejected the application of a general business purpose test in Canadian income tax law [*Stubart Investments,* [1984] 1 SCR 536] but did not expressly accept or reject the step transaction doctrine. He states that "instead, the Supreme Court set out a general principle of statutory interpretation and various interpretive guidelines".

90. Justice Estey explained the guidelines as follows:

> Moreover, the formal validity of the transaction may also be insufficient where:
>
> - the setting in the Act of the allowance, deduction or benefit sought to be gained clearly indicates a legislative intent to restrict such benefits to rights accrued prior to the establishment of the arrangement adopted by a taxpayer purely for tax purposes;…
>
> - 'the object and spirit' of the allowance or benefit provision is defeated by the procedures blatantly adopted by the taxpayer to synthesize a loss, delay or other tax-saving device, although these actions may not attain the heights of 'artificiality' in s. 137. This may be illustrated where the taxpayer, in order to qualify for an 'allowance' or a 'benefit', takes steps which the terms of the allowance provisions of the Act may, when taken in isolation and read narrowly, be stretched to support. *However, when the allowance provision is read in the context of the whole statute, and with the 'object and spirit' and purpose of the allowance provision in mind, the accounting result produced by the taxpayer's actions would not, by itself, avail him of the benefit of the allowance"* [emphasis added].

91. With respect, Heakes' comment in footnote 31 ignores the jurisprudence on the interdependence of composite transactions during the Relevant Period, which the FCA quoted with approval in *OSFC Holdings Ltd*.

92. The series of steps in the Timeshare Program would also consider the non-arm's length relationships of the promoters and parties in the Program.

93. As discussed in my earlier Opinion (October 1, 2021), the concept of arm's length describes the relationship between parties who act in their own self-interest and without undue control or influence of one of the parties of a transaction over the other.[11]

94. There are two concepts of arm's length: legal and factual.[12]

[11] See, for example, S1-F5-C1 "Related Persons and Dealing at Arm's Length" (June 9, 2015).
[12] *Income Tax Act*, para. 251(1)(b).

95. The Timeshare Program involved a series of interconnected and preordained sequence of events and transactions. Mr. Saltman refers to the factual connections between the parties in his Discoveries:

> Q. 1498: Was CAA intended to be independent from the Trust?
>
> A. CAA was a separate entity from the Trust, but they were administering the whole program for the Trust, for the trustee, for the donors and so on. So, they were intimately involved.
>
> Q. 1506: CAA's only interest, as I understand it, was in getting donations to the RCAAAs.
>
> A. No. *That is the front end. They were also involved in the back end*. They represented the RCAAAs with the developer to try to realize proceeds, as well. They were involved in the whole program, therefore.

96. The Timeshare Program provided that:

- The Trustee had the sole legal title to all of the property comprising the Trust Fund and also had exclusive management and control of all Trust property (Article 2.3 of the Athletic Trust of Canada Trust Deed).
- The Beneficiaries did not have any right or power to alienate or otherwise encumber the Timeshare Interests.
- The Trustee had the absolute power, notwithstanding any rule of law to the contrary, to purchase Trust assets at fair market value on such terms, conditions and price as the Trustee in its absolute and uncontrolled discretion considered advisable. The Trustee's decision in this regard was final, absolute and binding without any other approval whatsoever (Article 2.4, Schedule 3, Athletic Trust of Canada).

97. **In my Opinion, the reasonable expectation of Donors of an immediate profit and benefits from the interdependence of the series of transactions in the Timeshare Program substantially increased the risk of a CRA assessment.**

98. **In my Opinion, there was a substantial risk that the parties in the Timeshare Program were not factually at arm's length with each other as they were not independent and were intimately involved with each other in various steps of the overall structure of the promotion.**

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

Exclusion of The Valuation Report from Litigation and Put Options

99. The value of the donations was central to the tax credits that the Donors could claim.

100. Through a marketing arrangement with a company called Canadian Athletic Advisors Ltd. (CAA), the developers could acquire (call options), and were required to acquire (put options), the Timeshare Weeks for a price that was either 60 percent *below* the appraised fair market value of the Weeks, or (if more than 100 units purchased) between $1,000 to $1,100 US per week.

101. Thus, the developers could purchase (or be required to purchase) the properties at a price substantially below their appraised fair market value, which ranged between $13,275 and $28,600.

102. Heakes states in his Responding Report (page 23): "Both the put options and the call options were separate property from the Timeshare Weeks. The subsequent sale of the Timeshare Weeks by the RCAAA Donees was a separate transaction from the donation of these properties to the RCAAA Donees by theDonors.

103. The put options would be directly relevant to the determination of the FMV of the Timeshares.

104. The option contracts would likely attract the attention of the CRA's audit.

105. In the circumstances of the overall and integrated financial arrangements, there was a substantial risk that the CRA would closely scrutinize the Timeshare Program in an audit and would focus on the options contracts and their impact on valuations.

106. The Valuation Report contained an unusual clause that explicitly exonerated Michael Cane Consultants from giving testimony or attending in any court by reason of the appraisal.

107. In tax litigation, the Minister's Assumptions of Fact are deemed to be correct *unless* the taxpayer can establish otherwise [ss. 152(8)].

108. Hence, the taxpayer has the initial burden of dislodging the Minister's assumptions of fact. In *Hickman Motors Ltd v R,* [1998] 1 C.T.C. 213 (SCC), the Supreme Court stated (para 92):

> The Minister, in making assessments, proceeds on assumptions and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment.

109. The exclusion of the testimony of Michael Cane Consultants in any litigation *in any court* concerning the valuation resulting from the appraisal exposed the Donors to considerable litigation risk if the CRA based its assessment upon the valuation of the Timeshare Weeks.

110. **In my Opinion, the non-arm's length structure of the Program and the series of transactions in the Timeshare Program increased the risk to the Donors that the CRA would closely scrutinize and challenge the valuation of the Timeshare Weeks.**

111. **In my Opinion, the Donors would be at a considerable disadvantage in tax litigation with the CRA if they could not adduce evidence of the professional valuations through the contractual exclusion of the expert appraisal testimony. That fact, the onus generally and the relevance of the put option should have disclosed to the Donors.**

CRA Policies for Charitable Donations

112. The CRA has published its interpretation of "gifts" in various sources and adopted the common law definitions. The CRA has stated that the transaction must not result directly or *indirectly in a right, privilege, material benefit or advantage to the donor* or to a person designated by the donor and must be made without conditions attached. See, for example, (30 August 1994 External T.I. 9334415 - CHARITABLE DONATIONS) at para. 4(a):

> It is the Department's position that a 'gift' for the purposes of section 118.1 of the Act must be regarded as such at common law. In this regard, it is our view that such a gift is a voluntary transfer of real or personal property from a donor, who must freely dispose of his or her property to a donee, who receives the property given. The transaction must not result directly or *indirectly in a right, privilege, material benefit or advantage to the donor* or to a person designated by the donor. To qualify, the donation must be in the form of an outright gift. Any legal obligation (i.e., a direction with respect to the use of the funds) imposed on the donee would cause the transfer to lose its status as a gift. Further, in order for an expenditure to be considered a gift it must be made without conditions, from a detached and disinterested generosity, and out of affection, respect, or charity like impulses, and not from the constraining forces of any moral or legal duty. The donee must have an unfettered right to use a donation as it wishes.

113. See also Interpretation Bulletin IT-110R3 (June 20, 1997) "Gifts and Official Donation Receipts," as follows:

> A gift . . . is a voluntary transfer of property without valuable consideration. Generally, a gift is made if all three of the conditions listed below are satisfied:
>
> (a) some property—usually cash—is transferred by a donor to a registered charity;
>
> (b) the transfer is voluntary; and

(c) the transfer is made without *expectation of return*. No benefit of any kind may be provided to the donor or to anyone designated by the donor, except where the benefit is of nominal value (emphasis added).

State of Knowledge of Tax Bar of Risks

114. During the Relevant Period, the CRA was actively involved in auditing charitable donation arrangements in the 1990s. There was considerable litigation covering a broad spectrum of issues in the arrangements.

115. Some cases dealt with "buy low, donate high" schemes, based on valuations of donations. See, for example:

> *Dutil* v. *The Queen*, 95 DTC 281 (TCC) [Donation of watercolours. The Tax Court said: "There was even some doubt that the taxpayer had made a true 'gift' within the meaning of the law of Quebec, since his sole motivation was to enrich himself not to impoverish himself "].

116. Some cases involved the donor's expectation of material benefits in return for his/her donation, which would negate the "gift".

117. See for example:

- *The Queen* v. *Dr. F. Bruce Burns*, 88 DTC 6101 (FCTD): per Pinard, J. "I would like to emphasize that one essential element of a gift is an intentional element that the Roman law identified as *animus donandi* or liberal intent (see Mazeaud, Leçon de Droit Civil, tome 4ième, 2ième volume, 4ième edition, No. 1325, page 554). The donor must be aware that he will not receive any compensation other than pure moral benefit; he must be willing to grow poorer for the benefit of the donee without receiving any such compensation. In my view, the defendant believed he was paying for his daughter's ski training, and he considered that to be the benefit. Consequently, the defendant did not have the *animus donandi* or liberal intent required to allow the payments he made to the C.S.A. to be considered 'gifts' under subparagraph 110(1)(a)(ii) of the Act".

- *Tite* v. *MNR*, [1986] 2 C.T.C. 2343, 86 D.T.C. 1788 (TCC): There was no "gift" made in the proper sense, such that it arose because of "detached and disinterested generosity". Under the provisions of paragraph 110(1)(a) of the *Income Tax Act* it is not possible to make a "gift" if some valuable consideration such as goods or services is received in return).

118. Some were valuation disputes between the donors and the CRA.

119. See, for example:

- *Ken A. Whent v. The Queen,* (TCC) [1996] 3 C.T.C. 2542: "…I have arrived at three adjusted appraisals of $660,000, $650,000, and $680,000. The highest ($680,000) is only 4.4 per cent higher than the lowest ($650,000) … I find that the fair market value of the Morrisseau Art during the years 1984, 1985 and 1986 was $660,000 or very close to that amount. For convenience when issuing the required reassessments, the fair market value may be regarded as two-thirds of the PADAC appraised value and, I assume, two-thirds of the amounts of the charitable receipts issued by the respective public galleries".

- *Aikman et al. v. The Queen*, 2000 DTC 1874, [2000] 2 CTC 2211 (TCC): the appellants donated a Cyclo-Crane to the Canadian Museum of Flight and Transportation. For tax credit purposes, the donors, estimated the cost of recreating the original prototype, ascertained the craft's fair market value (FMV) to be US$3,075,000. The Canadian Cultural Property Export Review Board (CCPERB) disagreed and assessed the vehicle's FMV at US$200,000. The court concluded that the evidence did not support an FMV above US$200,000, emphasizing that the onus is on the appellants to show that the CCPERB's FMV evaluation was incorrect. In the absence of a market price or place for the object being donated, the taxpayer runs the risk that the CCPERB or the court will take the price at which the artifact was purchased as the best evidence of its FMV.

120. Some cases concerned gross negligence penalties for inappropriate valuations.

121. See, for example:

- *Coté et al. v. The Queen*, 99 DTC 72, [1999] 3 CTC 2373 (TCC): the appellants purchased art and jewelry from a dealer on the advice of a colleague for the purpose of donating them to charity and deducting the appraised value of the donations from their income. Upon assessment, the Minister disallowed the claimed credits. The Tax Court of Canada found that the Minister should have allowed for credits based on the market value of the gifts, but that it was correct to assess penalties for the difference between that amount and the inflated amount the appellants claimed.

- *Gagnon v. The Queen*, [1991] T.C.J. No. 655 (TCC): "…the appellant was told of what he referred to as a "tax shelter" that would enable him to obtain a tax deduction,… Although the appellant said he checked with some colleagues to see if such a practice was common and legal, his statement and his evidence clearly show that he accepted the proposal with the assurance that the receipt he would be given for tax purposes would be much greater than the amount spent. I do not believe that a reasonable and even slightly well-informed person could accept such a proposal concocted by third parties, suggesting at the outset that the value and the amount of the receipt will be obviously falsified. I do not think a reasonably

intelligent and prudent person could seriously claim to have made an honest gain through a charitable donation in such circumstances".

- *Duguay et al. v. The Queen*, 99 DTC 100, [1999] 3 CTC 2432 (TCC): the Minister disallowed all the charitable gift tax credits the appellants had claimed with respect to artwork they had purchased and donated to registered charitable organizations. The donors were found grossly negligent in procuring charitable receipts that they knew, or ought to have known, exaggerated the fair market value of the works by a factor of 4. The Tax Court was also correct in affirming the penalties on the taxpayers for misrepresenting the items' FMV.

- *Langlois v. The Queen*, 99 DTC 124, [1999] 3 CTC 2589 (TCC): the Minister disallowed all tax credits claimed by the taxpayer, who had purchased and donated works of art to registered charitable organizations. The receipts filed by the donor did not reflect the FMV of the works. In fact, their value was substantially exaggerated. However, because the donor had done some research and had taken certain precautions prior to donating the artwork, he was not grossly negligent in respect of filing the said receipts.

122. The tax bar was aware of, and concerned with, increasing CRA audit scrutiny at the time of donation arrangements, and the role of charities in their structure, particularly in the context of retail investor and tax shelter arrangements.

123. For example, in a public presentation entitled *Fundamental New Developments in the Law of Charities in Canada,* a conference sponsored by the Continuing Legal Education Committee of the Canadian Bar Association of Ontario in Toronto on Friday, October 27, 2000 (published January 1, 2001), James M. Parks of Cassels Brock & Blackwell, Barristers and Solicitors, Toronto addressed some of the concerns:

> Recent amendments to the Act, following changes introduced in the February 1999 Budget, could lead to serious consequences for charities and donors, as well as advisors. When the proposals were introduced, the Minister of Finance referred specifically to instances involving so-called "art flips", in which fairly elaborate arrangements had been developed to permit works of art, with a value of no more than $1,000 (thus eligible to be treated as "personal-use property") to be acquired by potential "donors" at a "discount" to their assumed "real" fair market value. Typically, a "donor" would acquire such a property for say, $400, and then immediately donate it to a receptive charitable recipient which would be prepared to issue an official receipt for a value of $1,000. The charity would in many cases sell the property back to the proprietor at a discount….
>
> The Federal Court of Appeal has held that the amount paid by a donor does not necessarily establish its "value" when the property is given to a charity, although it is a factor to be taken into account.

> For this reason and as a matter of tax policy for a variety of other reasons undoubtedly associated to a large extent with CCRA's wish to codify these rules, the Department of Finance announced in February 1999 that there would be serious consequences for charities that issued receipts for values that could not be justified. These rules were recently enacted and are now law. There are also penalties for advisors to charities, in addition to the penalties that had always been available to CCRA to attempt to regulate the donors themselves.
>
> *The objective is to try to "chill" this type of tax planning, by exposing not only the donor but persons advising donors and presumably those alleged to be promoting" these types of arrangements, as well as the charities themselves.*
>
> Despite substantial lobbying efforts by a number of organizations, the rules have now been enacted, and they are very broadly worded (emphasis added).

124. BN states in paragraph 19 of his Report, that "On December 22, 2000, tax specialist lawyers were of the view that the FCA authority (that there can be a profitable gift) trumped the lower court authority that a gift must require impoverishment of the debtor." In my opinion, as stated above, that is an over extension of the caselaw.

125. The Heakes Report (page 15) states that the Cassels Opinions contained several qualifying statements and indications that participation in the Timeshare Program would involve risk for the Donors, such that a prudent person investing in the Timeshare Program should understand that such an investment would involve risk and that he or she should consider obtaining his or her own tax advice.

126. Heakes states in his Responding Report (page 23) that the risks of CRA assessment and the costs of disputing same were "self-evident potential consequences of a challenge by the CRA, the risk of which was adequately disclosed in the Cassels Opinions".

127. With respect to Heakes, retail investors would be unlikely to sufficiently comprehend the complex statutory tax provisions, common law jurisprudence, valuation issues of call and put options, and anti-avoidance rules pertaining to charitable donations to understand the risk of CRA audits, the substantial probability of adverse assessments, and the evidentiary implications of excluding the valuation reports from litigation.

128. It would be unlikely that the Donors would appreciate the risk, length, onus, and costs of tax litigation resulting from any CRA assessments.

129. Jewett states that it was industry practice and not unusual for Donors to seek a second tax opinion (at page 8):

> It was also clear that any Donor, and/or the Donor's professional advisors, were perfectly free to seek their own second tax opinion from completely

> independent counsel should they wish. In my experience, seeking a second tax opinion in tax related transactions was not, and is not, unusual. It is a frequent part of professional advisors' own due diligence before suggesting or recommending such a transaction to their clients.

130. Jewett states that Donors could obtain their own second opinions from completely independent counsel.

131. However, it would be unlikely in the circumstances for individual Donors to seek an independent second tax opinion where the CB Opinions were from a prestigious law firm and were specifically targeted to them. [13]

132. A prudent tax specialist would have outlined the risks associated with the Timeshare Program in plain language for the benefit of retail investors.

133. The Opinions to the retail investors should have highlighted the risks of CRA audit and assessment resulting from the non-arm's length structure of the Program, valuation issues involved with the donations and option contracts, the contractual exclusion of the valuation reports in the event of tax litigation, and the onus, costs, and time associated with tax litigation.

134. **In my Opinion,**

135. **The tax bar was aware of CRA assessments and heightened audit and litigation risks for potential donors of charitable gifts during the Relevant Period.**

136. **The CB Opinions during the Relevant Periods should have provided greater disclosure of the risks inherent in the Timeshare Program for retail investors, who were specifically targeted in their opinions.**

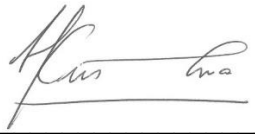
137. **A prudent and competent tax specialist would have disclosed the risks associated with the Timeshare Program to potential investors in plain language highlighting the risks of CRA audit and assessment resulting from the non-arm's length structure of the Program, valuation issues involved with the option contracts, the contractual exclusion of the valuation reports from tax litigation, and the onus, costs, and time associated with tax litigation**.

[13] The Legal Opinion of October 6, 2000, stated: "This opinion is specifically directed to potential donors who are individuals and who acquire and hold the Timeshare Weeks as capital property". The opinions of May 18, 2001, September 7, 2001, May 13, 2002, November 11, 2002, and April 8, 2003, stated: "This opinion may be relied upon only by CAA and potential donors, their agents and professional advisors, for the purpose of the transactions contemplated by this opinion."

TAXCHAMBERS LLP
TAX LAWYERS & ADVISORS

138. **Cassels Brock and Ronald J. Farano did not meet the standard of care of prudent income tax solicitors or specialists in issuing their Legal Opinions in respect of the Timeshare Programs.**

Tax Chambers LLP



Vern Krishna, CM, QC, FRSC, FCPA
Of Counsel

This is Exhibit "Q" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

CITATION: Lipson v. Cassels Brock & Blackwell LLP
COURT FILE NO.: CV-09-376511CP
DATE: October 20, 2022

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JEFFERY LIPSON Plaintiff	*Adam Dewar* for the Plaintiff
- and -	
CASSELS BROCK & BLACKWELL LLP Defendant	*Peter Griffin* the Defendant
	Sean Dewart and Adrienne Lei for the third-parties Gardner Roberts LLP and The Estate of Ronald J. Farano, Deceased
	Ethan Shiff for the Third Party Prenick Langer LLP
	Deepshikha Dutt and *Frank Bowman* for the Third Party Mintz & Partners LLP
Proceeding under the *Class Proceedings Act, 1992*	

PERELL, J.

FILE DIRECTION

[1] This is a certified class action with a trial scheduled for January 23, 2023. I have been advised that the main action has been settled subject to formalizing the agreement and court approval. Some of the third party proceedings have also conditionally settled.

[2] In these circumstances, I set November 14, 2022 for a motion in writing for approval of the notice plan and ancillary relief.

[3] I set January 20, 2023 for a settlement approval hearing (virtual hearing) and for any motions to implement the settlement of the third party proceedings.

[4] The parties shall file their materials in accordance with the *Rules of Civil Procedure* and on Ontariocourts.caselines.com.

Perell, J.

This is Exhibit "R" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Exhibit R – List of Cases Approving Contingency Fee of 30% or More

1. In *Green v. CIBC*, 2022 ONSC 373 (CanLII) at paragraph 97, Justice Myers approved a 30% fee on a $125 million "mega settlement" against a Canadian Bank.

2. In *Suzic v. VIB Event Staffing et al*., 2022 ONSC 3837at paragraph 64, Justice Akbarali approved a 33% fee in a small employment class action.

3. In *Davidson v. Solomon (Estate)*, 2020 ONSC 2898 (CanLII) at paragraph 73, Justice Mew awarded a 33% fee in a comparatively small settlement ($430,000) against the estate a dentist accused of surreptitiously videotaping his patients. In that case, class counsel's docketed time exceeded their percentage-based contingency fee;

4. In *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090 (CanLII) at paragraph 32, Justice Perell approved a 33.3% fee of $7,033,225.40 on a $21,120,797 settlement in a wrongful solitary confinement class action;

5. In *Brazeau v. Attorney General (Canada), 2019 ONSC 4721 (CanLII)* at paragraph 29 Justice Perell awarded Class counsel a 33.3% contingency fee in a wrongful solitary confinement class action;

6. In *Park v. Nongshim Co., Ltd*., 2019 ONSC 1997 (CanLII) at paragraph 81, Justice Glustein adopted the "presumptive approval" of the retainer agreement as set out in *Cannon* and approved a 1/3rd (33.3%) contingency fee in a price fixing class action;

7. In *Ronald J. Valliere v. Concordia International Corp.* 2018 ONSC 5881, Justice Morawetz approved a 33.3% contingency fee as set out in the retainer agreement as applied to the portion of a $18 million securities settlement relating to non-Quebec residents (the fees for the Quebec residents would be sought separately by Quebec class action counsel);

8. In *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537 (CanLII), at paragraphs 19 and 20 Justice Belobaba approved the 33% contingency fee (plus disbursements and taxes) as specified in the retainer agreement on a $26.5 million securities class action;

9. In *Silver v. Imax Corp*., 2016 ONSC 403 (CanLII), Justice Baltman approved a 33% contingency fee (plus disbursements and taxes) in a securities case (there were two co-counsel firms – the retainer with one was set at 33% and the second was set at a range of 25-33% with the second firm requesting the fee be set at 33%);

10. In *Rezmuves v. Hohots,* 2020 ONSC 5595 (CanLII) at paragraphs 10 and 43 where Justice Perell approved a 30% contingency fee in a very small ($500,000) solicitors negligence class action settlement;

11. In *Vester v. Boston Scientific Ltd*., 2020 ONSC 3564 (CanLII) at paragraphs 44 and 56 where Justice Perell approved a 30% contingency in a $21.5 million medical device class action;

12. In *Harper v. American Medical Systems Canada Inc*., 2019 ONSC 5723 at paragraphs 14 and 54 Justice Perell approved a 30% contingency in a $20 million medical device class action;

13. In *Condon v. Canada,* 2018 FC 522 (CanLII) at paragraph 111 Justice Gagné of the Federal Court approved a 30% contingency fee as set out in the retainer agreement in a $17.5 million data breach settlement;

14. In *Cass v. WesternOne Inc.,* [2018] O.J. No. 4165, at paragraphs 125-128 Justice Glustein approved a 30% contingency fee (plus disbursements and taxes) on a $1 million securities settlement. In Cass, the Plaintiff was approved for Class Proceedings Fund funding and as such, the Fund's 10% levy was deducted from the settlement as well;

15. In *Ramdath v. George Brown College of Applied Arts and Technology*, [2016] O.J. No. 2803, at paragraphs 13 and 14, Justice Belobaba approved a 30% contingency fee (plus disbursements and taxes) as specified in the retainer agreement on a $2.725 million educational negligence settlement;

16. In *Frank v. Caldwell,* [2014] O.J. No. 1028, at paragraphs 30-32 and 38-39 Justice Perell approved a 30% contingency fee (plus disbursements and taxes) as specified in the retainer agreement on a USD$3.5 million securities settlement;

17. In *Sayers v. Shaw Cablesystems Ltd*., [2011] O.J. No. 637, at paragraphs 30 and 39 Justice Perell approved a 30% contingency fee (plus disbursements and taxes) as set out in the retainer agreement on a $337,800 employer negligence settlement;

18. In *Verna Doucette v. Eastern Regional Integrated Health Authority*, [2010] N.J. No. 46, at paragraphs 6 and 85 Justice Thompson from the Newfoundland and Labrador Supreme Court - Trial Division approved a 33.3% contingency fee (plus fees and disbursements) as set out it in the retainer agreement on a $17.5 million medical negligence settlement.

This is Exhibit "S" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

Firm	Photocopies	Long distance phone calls and conference calls	Postage	Fax	Process Server	Courier	Corporate Search Services	Experts	Travel	Court and administrative filing fees	Research services	Redi Web/Document Management	Court Reporters and related services	Transaction Levy	Document Production Fees	Mediator Fees	FIRM TOTALS	GST/HST on Disbursements	Total Disbursements & HST
Roy Elliott O'Connor LLP (2008 to June 30, 2010 - GST Applicable)	$2,555.60	$7.58	$0.57	$21.60	$30.00	$48.65	$0.00	$0.00	$0.00	$0.00	$255.11	$5,476.99	$0.00	$0.00	$0.00	$0.00	$8,396.10	$419.81	$8,815.91
Roy Elliott O'Connor LLP (July 1, 2010 to May 31, 2013)	$28,117.75	$17.56	$19.34	$295.45	$2,158.50	$1,393.06	$0.00	$59,299.69	$146.22	$529.00	$2,415.45	$21,000.00	$111.00	$50.00	$0.00	$0.00	$115,553.02	$14,986.95	$130,539.97
Roy O'Connor LLP (June 1, 2013 onwards)	$22,030.48	$48.20	$663.85	$85.90	$1,446.50	$2,752.18	$549.61	$282,461.40	$27.25	$1,257.00	$687.69	$21,400.00	$10,521.12	$0.00	$3,895.75	$9,705.90	$357,532.83	$46,347.31	$403,880.14
Grand Total	**$52,703.83**	**$73.34**	**$683.76**	**$402.95**	**$3,635.00**	**$4,193.89**	**$549.61**	**$341,761.09**	**$173.47**	**$1,786.00**	**$3,358.25**	**$47,876.99**	**$10,632.12**	**$50.00**	**$3,895.75**	**$9,705.90**	**$481,481.95**	**$61,754.06**	**$543,236.01**

This is Exhibit "T" referred to in
the affidavit of Peter L. Roy,
sworn before me, this 29th day of
November, 2022

A Commissioner for Taking Affidavits.

The Law Foundation of Ontario

The Fund's entitlement to a levy and how it is calculated

If a case is awarded funding, a levy in favour of the Class Proceedings Fund (the "Fund") is payable after the case is either settled or adjudicated in favour of the class.

Regulation 771/92 sets out the way in which the Fund's levy is calculated.

10.

(1) This section applies in a proceeding in respect of which a party receives financial support from the Class Proceedings Fund. O. Reg. 771/92, s. 10 (1).

(2) A levy is payable in favour of the Fund:

(a) when a monetary award is made in favour of one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act; or

(b) when the proceeding is settled and one or more persons in such a class is entitled to receive settlement funds. O. Reg. 771/92, s. 10 (2).

(3) The amount of the levy is the sum of,

(a) the amount of any financial support paid under section 59.3 of the Act, excluding any amount repaid by a plaintiff; and

(b) 10 per cent of the amount of the award or settlement funds, if any, to which one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act is entitled. O. Reg. 771/92, s. 10 (3).

In summary, the levy is composed of repayment of the disbursement funding provided by the Fund and 10 % of the "amount of the award or settlement funds, if any, to which one or more persons in a class" is entitled.

The courts have interpreted various aspects the formula for the 10% levy.

In *Martin v. Barrett*, [2008] O.J. No. 3813, the court concluded that the Fund's 10 per cent levy is calculated on the Net recovery, after the deduction of counsel fees and any other costs incurred to administer the settlement.

At paragraph 42, the Court stated:

> [42] ...The success of a class action can be measured by the amount distributable to, or applicable for the benefit of, the class. It is, in my opinion, both reasonable and logical for the quid pro quo to be received by the Foundation for its financial assistance in achieving such success to depend on the extent of the success, without regard to counsel fees or other expenditures made for the same purpose.

At paragraph 48, the Court further stated:

> [48] The levy payable to the Fund pursuant to the Regulation is to be calculated by applying 10 percent of the net amount of any monetary award or settlement amount remaining after the deduction therefrom of all sums which the court directs to be paid to those other than class members. These deductions may include, among other items, the full amount approved by the court as fee for class counsel, amounts expended or to be expended for notice, administration, distribution, or for any other expense that the Court approves as payable from a monetary award or settlement fund.

In *Houle v. St. Jude*, 2017 ONSC 5129, the Court followed this approach when calculating hypothetical scenarios as to how the Fund's levy compared to a third party funder's levy. See paragraphs 40 to 41.

In *Smith v Money Mart*, 2010 ONSC 1334 approved at 2011 ONCA 233, the Court approved a settlement that provided for the payment of the levy by the defendant Money Mart to the Fund directly, and pursuant to which the levy applied to the cash portion of the settlement as well as vouchers given to class members.

In *Jeffery Rudd v. London Life Insurance Co*, 2016 ONSC 5506, affirmed 2018 ONCA 716, the Court concluded that the levy was applicable to a Judgement whereby no monies were directly paid to the class members, but were rather paid into an account held by the Defendant for the benefit of class members. It also held that the levy was payable directly by the defendant to the Fund. See paragraphs 110 to 116 of the Superior Court decision and paragraphs 58 to 67 of the Court of Appeal decision.

Example:

Settlement Amount: $10,000,000

To calculate levy, deduct all of:

Counsel fees: $2,000,000
Funded disbursements returned to the fund: $200,000
Administration costs: $50,000

Total amount subject to the levy
$7,750,000

Levy = $7,750,000 X .10 = $775,000

For any questions about the calculation of the levy in particular cases, please contact Remissa Hirji.

Class Proceedings Fund webpages

Class Proceedings Fund

The Class Proceedings Fund provides financial support to approved class action plaintiffs for legal disbursements and indemnifies plaintiffs for costs that may be awarded against them in funded proceedings.

Read more

Application process

Details on the process and documents needed to apply to the Class Proceedings Fund.

Read more

The Fund's entitlement to a levy and how it is calculated

If a case is awarded funding, a levy in favour of the Class Proceedings Fund (the "Fund") is payable after the case is either settled or adjudicated in favour of the class. Regulation 771/92 sets out the way in which the Fund's levy is calculated.

Read more

Meeting dates

The Class Proceedings Committee's list of scheduled meeting dates. Application hearings are scheduled after a full application has been received.

Read more

Reports & resources

The Class Proceedings Fund reports financial information and activities annually within the Foundation's annual report. Find these reports, as well as other resources, here.

Read more

Committee

The Class Proceedings Committee is responsible for making decisions about whether applicants will receive support from the fund. Meet its members.

Read more

JEFFREY LIPSON	- and -	**CASSELS BROCK & BLACKWELL LLP et al.**	-and-	**MINTZ & PARTNERS LLP et al.**
Plaintiff		Defendant		Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

Affidavit of Peter L. Roy – Settlement & Fee Approval

ROY O'CONNOR LLP
Barristers
1920 Yonge Street
Suite 300
Toronto, Ontario
M4S 3E2

David F. O'Connor (LSO# 33411E)
J. Adam Dewar (LSO# 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204
Email: dfo@royoconnor.ca
Email: jad@royoconnor.ca

Lawyers for the Plaintiff

TAB 3

Court File No.: CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

JEFFREY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP

Defendant

- and -

MINTZ & PARTNERS, DELOITTE & TOUCHE LLP, GLENN F. PLOUGHMAN, SHELLEY SHIFMAN, PRENICK LANGER LLP, GARDINER ROBERTS LLP, THE ESTATE OF RONALD J. FARANO, DECEASED, JOHN DOE 1-100, JOHN DOE INC. 1-100, JOHN DOE PARTNERSHIP 1-100 and JOHN DOE LLP 1-100

Third Parties

Proceeding under the *Class Proceedings Act, 1992*

Affidavit of Jeffrey Lipson – Settlement & Fee Approval

I, **Jeffrey Lipson**, of the City of Toronto, in the Province of Ontario, hereby make oath and say:

1. I am the Representative Plaintiff in this action. I have direct knowledge of the matters to which I depose of in this affidavit. The defined terms in this affidavit have the same meaning in this affidavit as they do in the affidavit of Peter L. Roy J. sworn November 29, 2022 and the Settlement Agreement dated November 14, 2022.
2. I am submitting this affidavit to seek approval of the Settlement Agreement and Class Counsel's fees, disbursements and taxes.

Background & Participation in the Program

3. I was in the men's retail business from 1960 to 1982, when I went full time into the real estate investment business. In 2007, I retired.
4. In or around the fall of 2000, I learned of the Program. I understood the gist of the Program, but I did not understand the intricacies and complexities of how it worked. While I did not read the Cassels Brock Opinion about the Program, it was important to me however that there was a legal opinion, from a reputable law firm, to support the tax benefits offered by the Program.
5. I ultimately participated in the Program for each of the 2000 through 2003 tax years. I made significant investments in the Program and would ultimately acquire and donate 276 timeshare weeks and the corresponding required amount of cash to various RCAAAs between 2000 and 2003.
6. In the fall of 2004, I received a letter from CRA denying the full amount of the tax credits I had claimed in respect of the Program for the 2000 taxation year. I subsequently received additional correspondence from CRA denying my tax credits for the tax years 2001 through 2003.
7. In or around April 2004, I retained the law firm, Thorsteinssons LLP, to act on my behalf in all dealings with the CRA relating to my donations under the Program. It is my understanding that Thorsteinssons LLP acted for most of the Class Members in this regard.

8. The dispute with the CRA proceeded by way of test cases brought by two of the Program's participants. The test cases were resolved by way of the offer to settle from CRA discussed immediately below.
9. In early 2008, the CRA made an offer to settle, offering to accept each donor's tax credit for the amount of cash they donated to the RCAAAs, but not the value of the Timeshare weeks. On March 24, 2008, I accepted the CRA's offer to settle. That settlement was better than the possibility that a court could find that no tax credit was available at all. The effect of the settlement with CRA meant that the Class Members and myself would not earn a return on our participation in the Program and would get approximately a 50% tax credit (assuming the highest tax rate) of the cash we invested in the Program.
10. I was disappointed with the results of the Program. I and others subsequently contacted and retained the law firm, Davies, Ward, Phillips & Vineberg ("Davies") for advice. Davies eventually launched this Class Action. It is important to note that Davies would not act in this matter on a contingency basis and would only work on a fee for service basis. I attempted to personally fund this litigation with the assistance of several other disappointed Program participants but that effort proved to be costly and unsustainable. I subsequently made the decision to retain experienced class action counsel, who were prepared to act on a contingency basis, to take over as class counsel.
11. After a number of conversations with lawyers at what is now Roy O'Connor LLP (principally Peter Roy, David O'Connor and Adam Dewar), I decided to continue to act as Representative Plaintiff and to transfer carriage of this action to their firm. As discussed further below, I reviewed and signed a formal Retainer Agreement (a copy of which is

attached as Exhibit "G" to the affidavit of Peter Roy sworn November 29, 2022), in which I agreed to continue to act as the Representative Plaintiff on behalf of the Class Members. Without waiving any privilege, I can say that some of the terms of the Retainer were specifically requested by me (through Davies). I and Davies (on my behalf) spoke and corresponded with RO at length about the Retainer. I read and reviewed the Retainer carefully (with the assistance of Davies) before I signed it. I understand and agreed to the terms of the Retainer and specifically the 25% contingency fee payable to Roy O'Connor LLP ("RO") if the case was successfully resolved.

My Role as Representative Plaintiff

12. As the Representative Plaintiff, I was consulted by RO throughout this litigation. My contact was most often with Adam Dewar and David O'Connor but I also spoke with Peter Roy at various times.

13. Over the course of this action, I received numerous updates on the status of the action, considered RO's advice and provided input or instructions on every major decision as required. Without limiting the generality of the foregoing, I took the following steps to advance this action:

    a. retained and instructed RO to assume carriage of this class proceeding;

    b. instructed RO to seek financial support from the Class Proceedings Fund;

    c. provided information, input and instructions to RO;

    d. reviewed and assisted in the preparation of the amended statement of claim;

    e. provided affidavit evidence in support of the certification motion;

f. attended for a cross-examination in advance of certification;

g. provided documents for use in the discovery process;

h. attended for my examination of discovery and a follow-up examination for discovery;

i. consulted with RO on several occasions before and during the recent mediation process and, in particular, approved the settlement at $8.25 million; and,

j. reviewed and approved the settlement terms and structure as well as the Settlement Agreement in this case.

My Views of the Proposed Settlement

14. I have reviewed and considered the terms of the Settlement Agreement. I have also reviewed the affidavit of Mr. Roy regarding the Settlement.

15. I understand that the key features of the Settlement include the following:

    a. Cassels Brock has agreed to settle the class action for a total payment of $8.25 million;

    b. the $8.25 million payment will be the total compensation to the Class Members for all damages arising from their participation in the Program and will also be the source of payment of all fees, expenses, any fees (and disbursements and taxes) of Davies that are approved for reimbursement, the statutory levy for the Class Proceedings Fund and taxes;

    c. I understand that the Settlement will be paid out in two stages:

        i. The first stage payments will be based on the Class Members *pro rata* cash donations to the Program; and,

ii. If any funds remain after the first stage after one year, the remaining funds will be used to increase the payments for those Class Members that cashed their cheques in the first phase.

d. as I generally refer to above, legal fees and related disbursements (including taxes), the costs of administration and distribution of money to Class Members, and a 10% statutory levy for the Class Proceedings Fund will be deducted from the $8.25 million Settlement Fund;

e. payments will be calculated based on a review of the records already in the possession of the Parties and will be made, for the most part, automatically. While most Class Members will not have to make a claim or application to receive compensation, Class Members for whom the Parties have no information as to their contributions to the Program will be asked to confirm the value of their contributions and to provide relevant backup documentation;

f. Cassels Brock will receive a full release of all Released Claims, as defined in the Settlement Agreement;

g. any funds remaining after stages one and two above will be paid to a charity to be agreed upon by the Parties and approved by the Court.

16. In the circumstances, I believe that the Settlement is an excellent result and is a fair deal for my fellow Class Members. I have weighed the benefits that would be available to Class Members under the Settlement against the costs, risks and delay if we continued the case through a trial and the likely appeal process. The balance was overwhelmingly in favour of the Settlement. I have considered, among other things, that:

a. Class Members will receive a reimbursement for a portion of their Cash Donation (aside from the tax credit already available) and will not have to wait several years

for only the possibility of receiving what could be less compensation in the future; and,

b. Class Members have little, if anything, to do to receive their share of the Settlement. While RO and the Administrator will try and update or improve contact and donation information, compensation will be calculated by an independent administrator and be more or less automatically paid to the Class Members.

17. I agree with the opinion of RO that this Settlement is fair, reasonable and in the best interests of the class. I am proud of the results achieved in this Settlement. I am proud that I was able to assist and be part of this successful claim.

My Views on Class Counsel's Requested Fee

18. As set out above, I spoke to RO at length about my Retainer Agreement before I signed it. I carefully read and understood the terms my Retainer Agreement at the time I signed it. RO answered and responded satisfactorily to all of the questions and requests that I and Davies had about the Retainer Agreement and its terms. I agreed with the terms of the Retainer Agreement when I signed it as noted above, and I agree with the terms now.

19. I understand, and understood at the time of signing, that my Retainer Agreement with RO is a contingency fee agreement. I understood that to mean that the Class Members would not be required to pay any fees or disbursements to advance the litigation and that RO would only get paid from amounts that they were able to secure from a successful trial or settlement of the case. The burden of the fees and disbursements would be borne by RO. I understood that, if the case was successful, RO's fees would be 25% of money

recovered, plus, subject to court approval, any costs recovered as wells as disbursements and taxes I thought the arrangement was a fair one for both the Class and for RO.

20. I note that RO took on this large and complex case and pursued it for almost 12 years. Without the efforts and perseverance of RO, this case would not have been brought and certainly would not have been brought to this successful resolution. I have been impressed with the work of my lawyers and have thanked them for their efforts, time and success.

21. I believe that without a class proceeding, it would have been impossible for the Class Members to have access to justice against the Defendant. While many members of the Class are almost certainly of above average financial means, no individual Class Member was prepared to fund (or continue to fund in the case of Davies retainer) the necessary expenses to litigate this action against a well-funded defendant such as Cassels Brock. I understand that most individual claims were too small for any lawyer to take them individually on a contingency basis and pursue them to trial without the benefit of a class proceeding.

22. My own experience with trying to fund this litigation on a fee-for-service basis illustrates the difficulty with proceeding with litigation (including a class action) on a non-contingency basis. As set out in Mr. Roy's affidavit, while I initially retained Davies to prosecute this action on behalf of the Class on a fee-for-service basis, that arrangement, even with the assistance of several other Funding Class Members proved to be unsustainable.

23. I am advised by Mr. Roy and believe that Class Counsel accepted a lower percentage contingency fee (i.e. 25% rather than a higher percentage) than they could have sought because Davies had already done a considerable amount of work to investigative this mater and had drafted and issued the Statement of Claim. At the same time, I also note that RO has performed exponentially more work than what was performed by Davies.

24. As set out in Mr. Roy's affidavit and in my Retainer Agreement with RO, the other Funding Class Members and myself paid Davies approximately $320,000.00 for their fees, disbursements and taxes regarding this class action. As set out in my Retainer Agreement, I understand that RO will request that Davies Costs be reimbursed out of the Settlement Fund. In fact, I (through Davies) specifically requested that reimbursement so that those of us who funded the Davies retainer (i.e., those who started and pursued the Class Action) will not bear a disproportionate share of the legal costs of advancing this action.

25. By taking this matter on contingency and pursuing it as a class proceeding, I believe that RO's efforts have allowed the Class Members (including me) to receive compensation for a reasonably significant portion of our out-of-pocket portion of the cash donated to the Program and that the Class Members would almost certainly not have pursued such compensation without this class action.

26. I can also add that the issues in this case relate, obviously, to money that I invested or donated 20 or so years ago. When I accepted the offer by CRA (to receive the tax credit on my cash donations), I did not expect at that time that I would get further compensation or reimbursement for my cash donations. The compensation that I may receive under

this Settlement (if approved) is much appreciated and comforting. Having said that, I suspect that many (if not nearly all) Class Members have long forgotten about their investments in the Program and any payments that they receive under the Settlement (if approved) may be seen as a sort of unexpected bounty.

Honourarium

27. While I understand that Courts may, in some cases, award a representative plaintiff an honourarium to acknowledge their role and particular contributions as plaintiff, I have considered that fact but decided on my own, that I do not wish to seek an honorarium.

SWORN REMOTELY BEFORE ME)
by Jeffrey Lipson via videoconference)
in the City of Boca Raton,)
in the State of Florida, USA, of before me)
in the City of Toronto, in the Province of)
Ontario,)
this 29th day of November, 2022 in)
accordance with O.Reg. 431/20)
Administering Oath or Declaration)
Remotely.)
)
)

A Commissioner for Taking Affidavits, etc.

Jeffrey G. Lipson

JEFFREY LIPSON	- and -	**CASSELS BROCK & BLACKWELL LLP et al.**	-and-	**MINTZ & PARTNERS LLP et al.**
Plaintiff		Defendant		Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

Affidavit of Jeffrey Lipson – Settlement & Fee Approval

ROY O'CONNOR LLP
Barristers
1920 Yonge Street
Suite 300
Toronto, Ontario
M4S 3E2

David F. O'Connor (LSO# 33411E)
J. Adam Dewar (LSO# 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204
Email: dfo@royoconnor.ca
Email: jad@royoconnor.ca

Lawyers for the Plaintiff

JEFFREY LIPSON	- and -	**CASSELS BROCK & BLACKWELL LLP et al.**	-and-	**MINTZ & PARTNERS LLP et al.**
Plaintiff		Defendant		Third Parties

Court File No. CV-09-376511-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Toronto

MOTION RECORD (SETTLEMENT & FEE APPROVAL) VOLUME 2 OF 2

ROY O'CONNOR LLP
Barristers
1920 Yonge Street
Suite 300
Toronto, Ontario
M4S 3E2

David F. O'Connor (LSO# 33411E)
J. Adam Dewar (LSO# 46591J)

Tel: (416) 362-1989
Fax: (416) 362-6204
Email: dfo@royoconnor.ca
Email: jad@royoconnor.ca

Lawyers for the Plaintiff