CITATION: *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399
COURT FILE NO.: CV-08-362807-00 CP
DATE: 20120118

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL CANNON Plaintiff	*Samuel S. Marr, Margaret Waddell and Susan Brown*, for the Plaintiff
- and -	
FUNDS FOR CANADA FOUNDATION, MATT GLEESON and SARAH STANBRIDGE as trustees for the DONATIONS CANADA FINANCIAL TRUST, PARKLANE FINANCIAL GROUP LIMITED, TRAFALGAR ASSOCIATES LIMITED, TRAFALGAR TRADING LIMITED, APPLEBY SERVICES BERMUDA LTD. as trustee for the BERMUDA LONGTAIL TRUST, EDWIN C. HARRIS Q.C., PATTERSON PALMER also known as PATTERSON PALMER LAW, PATTERSON KITZ (Halifax), PATTERSON KITZ (Truro), McINNES COOPER, SAM ALBANESE, KEN FORD, RIYAD MOHAMMED, DAVID RABY, GREG WADE, GLEESON MANAGEMENT ASSOCIATES INC., MARY-LOU GLEESON, MATT GLEESON and MARTIN P. GLEESON	*John F. Rook, Q.C., Eric R. Hoaken and Mark W. Smyth* for the defendants Patterson Palmer (aka Patterson Palmer Law), Patterson Kitz (Halifax), Patterson Kitz (Truro), McInnes Cooper, Edwin C. Harris, Q.C. *John P. Brown and Meighan Leon*, for the defendants ParkLane Financial Group, Trafalgar Associates Limited and Trafalgar Trading Limited *Deborah Berlach and Emma Holland*, for the defendants Funds for Canada Foundation, Sam Albanese, Ken Ford, David Raby, Greg Wade, Riyad Mohammed and Mary-Lou Gleeson *Gary H. Luftspring and Andrea Sanche*, for the defendants Matt Gleeson and Gleeson Management Associates Inc. *Bradley E. Berg and Charles Dobson*, for the defendant Appleby Services (Bermuda) Ltd. as trustee of The Bermuda Longtail Trust
Defendants	

HEARD: August 22-25, 2011

CONTENTS

G.R. STRATHY J.

I. INTRODUCTION

[1] When Michael Cannon heard about the Donations for Canada Gift Program – an opportunity to obtain a $10,000 charitable tax credit in return for a $2,500 donation – he thought it was "too good to be true".

[2] It was.

[3] A few years later, his tax returns were reassessed by Canada Revenue Agency ("C.R.A.") and he had to repay his deductions, with interest. The only thing he received for his "donation" was a tax bill.

[4] In the eyes of C.R.A., the Donations for Canada Gift Program (the "Gift Program") was nothing more than a scheme, in which the funds of "donors" like Cannon flowed through a giant circle and into the pockets of the promoters. In return for participating in the Gift Program, the charities got 1% of the total money donated and the promoters' promise of a 20-year income stream from an investment that the promoters would make, using a fraction of the Gift Program donations.

[5] C.R.A. said that donors like Cannon lacked "donative intent" – there was no element of impoverishment in the so-called charitable donation, because the donor expected to be enriched by receiving a tax credit well in excess of his or her donation. The "donation" could not be characterized as a gift. Therefore, there was no allowable tax deduction and the full amount deducted had to be repaid – with interest.

[6] Cannon brings a motion for certification of this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*") and seeks to represent a class composed of almost 10,000 Canadian taxpayers who contributed to the Gift Program.

[7] Motions for summary judgment are brought by two groups of defendants, ParkLane Financial Group Limited ("ParkLane") and Edwin C. Harris Q.C. ("Harris") and law firms with which Harris has been associated.

[8] For the reasons that follow, I certify this action as a class proceeding, on the terms set out below, and I dismiss the motions for summary judgment.

II. THE FACTS

1. Cannon and the Proposed Class

[9] Cannon is an Ontario resident who participated in the Gift Program by contributing $10,600 in 2005 and $12,500 in 2006. In 2008 and 2009, his tax returns were reassessed by C.R.A. The charitable tax credits he had claimed for his donations to the Gift Program were disallowed. He has since paid the reassessed taxes and $6,703.76 in interest.

[10] Cannon had a 33 year career as a police officer, having risen to the rank of Staff Sergeant. He is a reasonably sophisticated investor, with some experience in tax planning strategies. He understands their risks and rewards. He participated in the Gift Program after receiving advice from his "professional counsel and tax advisor", in whom he placed trust and confidence.

[11] Cannon brings this action on his own behalf and on behalf of a national class of Canadian residents who participated in the Gift Program (the "Class"). The Class is described as follows:

> Any person who participated in the ParkLane Donations for Canada Charitable Gift Program while resident in Canada during the period between January 1, 2005 and December 31, 2009 [The "class period"], excluding Edward Furtak, Wayne Robertson, the Defendants, their subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, and any member of the families of the Individual Defendants, Wayne Robertson and Edward Furtak, and any entity in which any of the foregoing persons or entities has a legal or *de facto* controlling interest.

[12] Cannon asserts that he is representative of the Class and that his experience can be extrapolated to all members of the Class. The defendants dispute this.

[13] The Class consists of approximately 9,926 persons. There are Class members in every province and territory, except the Northwest Territories, with more than one-third located in Ontario. The out-of-pocket payments of Class members to the Gift Program total approximately $144 million.

2. The Gift Program

[14] In the following sections, I will describe the structure of the Gift Program, including the players involved and their functions. To put what follows in context, I will give a short and somewhat simplistic overview.

[15] The Gift Program was the brainchild of Edward Furtak ("Furtak"), a developer of software and a sometime promoter of tax avoidance schemes, who is the President and CEO of the Trafalgar Group of Companies. Furtak had developed a computer program called the Trafalgar Global Index Futures Program (the "Software Program" or "Global Index Futures Program"), which purportedly had a methodology for making money from the trading of S & P futures contracts by predicting short-term movements in the financial markets. Furtak established a trust in Bermuda, called the "Bermuda Longtail Trust" (the "Bermuda Trust"), for the benefit of himself and his family and he granted the Bermuda Trust the right to license the Software Program to third parties. The Software Program was in turn licensed by the Bermuda Trust to a Bermuda company owned by Furtak called Trafalgar Trading Limited ("TTL").

[16] Most of the cash donated to charities by participants in the Gift Program found its way into the pockets of Furtak's companies and the Bermuda Trust. The donations made by participants were super-sized by the very temporary injection of funds from the Bermuda Trust, which flowed briefly into the charities. Most of these funds were immediately returned to the Bermuda Trust, by way of the licensing agreement between the charities and TTL for the use of the Software Program. The super-sizing made the taxpayer's donation appear to be much larger than it was in fact, thus justifying the enhanced charitable tax credit each taxpayer was to receive.

[17] To make the Gift Program work, it was necessary to have six ingredients.

[18] First, there had to be taxpayers, like Cannon, who were willing to buy into the concept that they could maximize their tax deductions not just by giving money to charity, but by getting a receipt for more than they had actually given – that is, by making a profit from their charitable donations. There were almost 10,000 Canadians who were convinced to do this. They came from all walks of life, teachers, lawyers, nurses, administrators, presidents and police officers. Some donated in multiple years. The minimum donation was $10,000, but one enthusiastic donor made total donations of $4,000,000. Over 1,700 Donors donated between $50,000.00 and $100,000.00 each, and over 700 Donors donated over $100,000.00 each.

[19] Second, there had to be legitimate charities or Registered Canadian Amateur Athletic Associations that were in need of cash and were prepared to give back 99% of the money donated to them to Furtak's companies in return for the promise of a future income stream from the use of the Software Program.

[20] Third, there had to be an infrastructure of companies, trusts and agreements that would process the flow of funds. This infrastructure was designed by behind-the-scenes lawyers and

accountants and populated by companies that were led by ParkLane and largely controlled by Furtak.

[21] Fourth, there had to be a legal opinion, attesting to the fact that the Gift Program could likely sustain a challenge by C.R.A. Otherwise, no sensible donor would contribute to the program. Harris provided this opinion.

[22] Fifth, there had to be a sales force to market the Gift Program to potential donors. This was done by a network of fundraisers, also called distributors (the "Distributors"), who were enlisted by ParkLane.

[23] Sixth, there had to be cash, to inflate the donors' contributions, in order to convince C.R.A. that real money was being donated to the charities in return for the charitable receipts they were giving to the donors. This money was provided by Furtak through the Bermuda Trust.

[24] As described in the marketing materials prepared by ParkLane, the Gift Program worked in the following way. I will take the case of a typical $10,000 total donation. There were seven steps, which are identified in the diagram set out below.

[25] The first step was that a donor would write a $2,500 cheque or make a pledge to a "participating charity" – that is, a charity that had enrolled in the program and had entered into an agreement to use most of the funds donated to it to acquire a right to use the Software Program. Funds for Canada Foundation ("FFC Foundation"), was established in the second year of the Gift Program as an umbrella organization to receive donations and to disburse them to other qualified charities.

[26] In the second step, which occurred simultaneously with the first, the donor applied to become a beneficiary of the Donations Canada Financial Trust (the "Donations Canada Trust"), a private charitable trust created by Furtak. The donor executed an escrow agreement appointing ParkLane to hold the trust units and to donate them to the designated charity on the donor's behalf.

[27] On receipt of the donor's application, the third step occurred. The Donations Canada Trust made an "investment" in a sub-trust and was issued two units in the sub-trust.

[28] The fourth step occurred when ParkLane, as escrow agent on behalf of the donor, was issued two sub-trust units by the Donations Canada Trust. The donor was issued a confirmation of issuance of the "discretionary" interest in two sub-trust units, having an ostensible value of $7,500, in return for his or her cheque or pledge.

[29] The fifth step was the donation of the sub-trust units by the donor to the charity. The charity was then sitting with $2,500 in cash and a piece of paper representing the two sub-trust units donated by the donor, with an ostensible value of $7,500.

[30] Under the terms of its agreement with the Gift Program, the charity was required to "redeem" the sub-trust units. To provide the funds to make the redemption, the Bermuda Trust primed the pump by indirectly acquiring the sub-trust units, through Donations Canada Trust, for $7,500. That was the sixth step. The charity was now sitting with a total of $10,000 in cash.

[31] At this point, the seventh step occurred: in return for his or her total donations, the donor would receive two charitable donation receipts, a cash receipt for $2,500 and a donation-in-kind receipt for $7,500, the stated value of the sub-trust units. At this stage, the donor's involvement ended and he or she would submit the charitable receipts along with his or her tax return.

[32] In point of fact, as I will describe below, the $10,000 did not remain with the charity for more than a *scintilla juris* – a "spark of right". At the "closing" of the donor's contribution, which was invariably done at the same time as a number of other transactions, most of the funds flowed in and out of the charity's bank account in rapid succession.

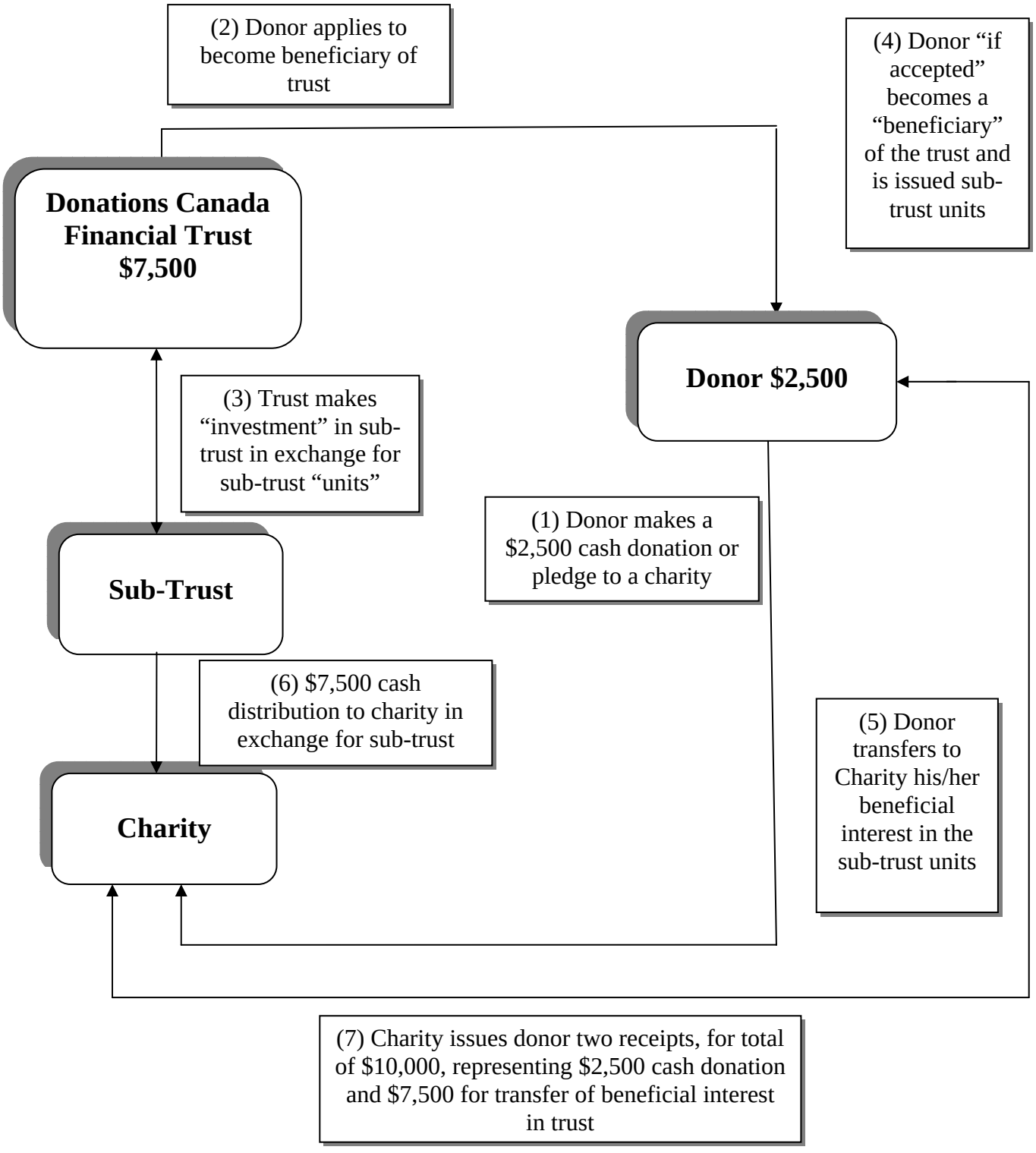
[33] The following chart describes the "front half" of the Gift Program, as it was depicted in ParkLane's marketing materials. The chart is taken from those materials, with some minor modifications.

[THE BALANCE OF THIS PAGE IS INTENTIONALLY BLANK]

DONATIONS CANADA

Example of $10,000 Donation

(Based on, but not identical to, diagram in ParkLane brochure)



[34] I will now describe the "back half" of the Gift Program – that is, what happened to the money after it was donated to the charity. This part of the Gift Program was not described in the marketing materials; however, ParkLane and some of the Distributors have adduced evidence that the Distributors were informed about various aspects of the back half, including the involvement of the Bermuda Trust, the software licensing agreement between the Bermuda Trust and TTL, and the royalty agreement the charity was required to enter into with TTL. A chart illustrating the "back half" of the Gift Program is contained at the end of this description.

[35] In order to participate in the Gift Program, a charity was required to enter into a royalty agreement with TTL. In consideration for this agreement, the charity paid TTL 99% of the total donations it received. The charity was entitled to keep 1% of each donation (i.e., $100 for each $10,000 donation) for its own operating expenses. In cases where FFC Foundation received donations, it kept 25% of the 1% and paid the balance to either the charity to which the funds were directed or to one of its own approved charities.

[36] As I mentioned earlier, Furtak's Software Program was licensed to TTL by the Bermuda Trust. The funds paid by the charity to TTL were to be invested by TTL on behalf of the charity, using the Software Program. TTL established a leveraged cash and margin trading facility on behalf of the charity, using the charity's cash, ostensibly leveraged up to the amount paid by the charity for the royalty agreement. The charity was to receive a speculative and unguaranteed future income stream from the Software Program, based on 60% of the monthly profits generated by its investment, for a period of twenty years. TTL was to receive 20% of the monthly profits and the remaining 20% was to be re-invested in the trading facility. The charity was never to receive a return of its principal.

[37] After it had received the licensing fee from the charity, i.e., the payment of 99% of the donations the charity had received, TTL:

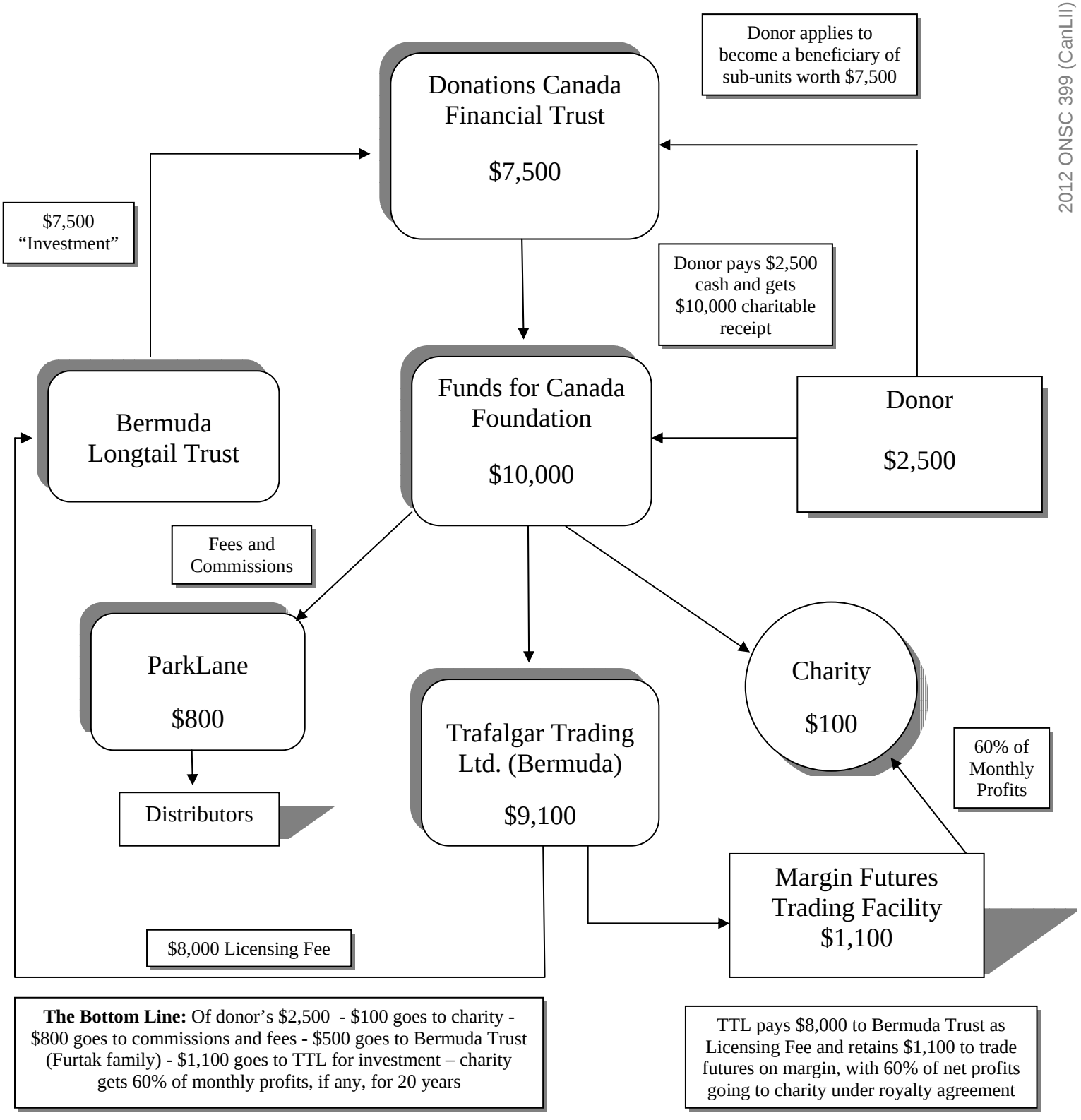
(a) paid $600 or $800 (the amount varied in different program years) to ParkLane to cover ParkLane's profit and the Distributors' commissions of about 18-20% of the donor's cash contribution;

(b) paid approximately $8,000 to the Bermuda Trust as a "software licensing fee" for the use of the Software Program - the effect of this was that the advance of $7,500 was immediately repaid to Furtak and his family, through the Bermuda Trust, with an overnight profit of $500. This profit was ostensibly for giving TTL the privilege of using the Software Program on behalf of the charity;

(c) retained approximately $1,100 in its own account to trade futures on margin, notionally leveraged up to as much as $9,100, using the Software Program, for the benefit of the charity to whom the donor made his or her contribution.

[38] The following schematic describes the "back half" of the Gift Program.

The "Back Half" of the Gift Program



[39] There are, unfortunately, some messy questions that remain. It is not necessary for me to answer these questions, for the purpose of either the certification motion or the summary judgment motion. I will mention them only because I have concluded that a trial is required in order to answer them and the numerous other questions that must be answered in order to determine the liability of the defendants.

[40] First, there is no conclusive evidence that the sub-trust units donated by the donor had any significant intrinsic value and certainly no evidence that they had the value of $7,500 that was assigned to them. Second, there is no evidence that the right to the future income stream represented by the royalty agreement was commensurate with the consideration paid by the charity. Third, while there is some evidence that a few charities have obtained some returns for their "investments", the evidence does not show whether the "software licensing fee" paid by the charity to TTL represented the fair market value of the future investment stream. This is particularly troubling considering that the charity did not retain its capital. There is evidence that the returns generated by TTL for the charities have been meager.

[41] Some of the people and entities that populated this structure have already been introduced. I will describe them in more detail.

3. The Defendants

(a) Edward Furtak

[42] Furtak was the puppet master of this complex machinery. He was the President and CEO of the Trafalgar Group of Companies, which included ParkLane, TTL and Trafalgar Associates Limited ("TAL") (together, the "ParkLane Defendants"). He was also the settlor of the Bermuda Trust.

[43] Furtak was originally a defendant in this action, but the plaintiff has settled with him in exchange for information and some degree of cooperation.

[44] The evidence is open to the conclusion that the primary purpose of the Gift Program was to benefit Furtak and his family, through both:

- Furtak's control of the Bermuda Trust, of which the defendant Appleby Services Bermuda Ltd. ("Appleby") is ostensibly the trustee, but which appears to have been manipulated by Furtak and his colleagues to serve the ends of the Gift Program; and

- the ParkLane Defendants, which were the public face of the Gift Program and which facilitated the flow of funds.

(b) ParkLane

[45] ParkLane is an Ontario corporation incorporated by Furtak for the purposes of promoting leveraged charitable donation programs, including the Gift Program, to Canadian taxpayers**.** Between 2003 and 2006, ParkLane had promoted a tax shelter called the "Donation Program in Support of Canadian Amateur Athletics". Beginning in 2005, and continuing until 2009, under the direction of Furtak, ParkLane created, promoted and operated the Gift Program and sold it to the Class through its network of Distributors, which I will describe below.

(c) TAL and TTL

[46] TAL is an Ontario corporation, also incorporated by Furtak. It worked in conjunction with ParkLane to create, promote and operate the Gift Program.

[47] TTL is a Bermudan corporation established by Furtak. It participated in the creation and operation of the Gift Program and played a key role in the transfer of funds to the various participants in the program. Its role will be described in more detail below.

[48] The plaintiff alleges that the ParkLane Defendants are closely affiliated. They share common offices, computer systems, employees, officers, directors, shareholders, legal and beneficial owners, and professional advisors.

(d) Donations Canada Trust

[49] The Donations Canada Trust was a private charitable trust, created and settled by Furtak to facilitate the operation of the Gift Program. The plaintiff asserts that the purpose of the Donations Canada Trust was to be the false front of the Gift Program. It posed as a "charitable Canadian trust" and the ostensible source of the "matching" payments in the Gift Program. The plaintiff argues that, in reality, it was a shell through which funds flowed from the Bermuda Trust.

(e) Funds for Canada Foundation

[50] FFC Foundation was a registered charity, created in 2005 as a vehicle for disbursing donations to qualified charities. It facilitated the operation of the Gift Program in two ways. In the "front half" of the Gift Program, it received donations directly from donors and issued tax receipts to them. In the "back half" of the Gift Program, it served as a link between the participating charity and TTL. It gave the participating charity 75% of 1% of the initial donation, entered into a royalty agreement with TTL for the investment of a portion of the funds donated by the donor, received royalty payments from TTL, and distributed a portion of those royalties to the participating charity, less its own administration fee.

[51] FFC Foundation was established by the defendant Matt Gleeson, also known as Martin P. Gleeson ("Gleeson"), who provided consulting services to charities through his company, Gleeson Management Associates Inc. ("GMA"). Donations were received by FFC Foundation under the Gift Program from 2006 to July 2009, when its status as a registered charity was revoked by C.R.A. During that period, FFC Foundation disbursed funds it received to the participating charities, as required by the Gift Program.

[52] FFC Foundation informed participating charities that it had entered into the royalty agreement with TTL, which provided for a stream of royalty payments based on the profits from the licensing of the Software Program.

[53] There is evidence that the total returns through the Gift Program to the charities have been in the range of $6 million since 2006. Considering that the aggregate donations by Canadian taxpayers to the Gift Program were in excess of $140 million, this rate of return is less than 1% per annum on the contributors' donations and is an infinitesimal return on the total supersized donation that taxpayers were allegedly making to support the inflated charitable donation receipts that they received. In assessing these returns, it must be kept in mind that the charities have no right to receive the principal at the expiry of the 20 year royalty agreements with TTL.

(f) *Directors of FFC Foundation*

[54] The defendants Sam Albanese, David Raby, Ken Ford, Riyad Mohammed and Greg Wade were the directors of FFC Foundation during the Class period (the "FFC Directors").

(g) *The Gleesons*

[55] Gleeson was the founding director of FFC Foundation and the original trustee of the Donations Canada Trust. He held the position of trustee of the Donations Canada Trust until 2006, when he was replaced by Sarah Stanbridge. Through GMA, he also acted as "Director of Development" for FFC Foundation. In that capacity, he recruited charities to participate in the Gift Program through the FFC Foundation and was actively involved in the operations of FFC Foundation.

[56] Gleeson's wife, Mary-Lou Gleeson ("Ms. Gleeson") was and continues to be the Executive Director of FFC Foundation. Ms. Gleeson is also a shareholder of GMA and ran that company with her husband.

[57] GMA provides fundraising consulting services to charities and foundations. In 2005, GMA introduced a number of its pre-existing charity clients to the Gift Program. Six of these charities became beneficiaries of FFC Foundation through which they received charitable donations raised by the Gift Program.

[58] Gleeson is sued both in his personal capacity and, together with Sarah Stanbridge, in his capacity as trustee of the Donations Canada Trust. The action has been dismissed against Stanbridge as a result of a settlement.

[59] I will refer to Gleeson, Ms. Gleeson and GMA as the "Gleesons".

(h) *The Lawyers*

[60] Harris is a senior tax lawyer. In each of 2005, 2006 and 2007, Harris issued an opinion letter to ParkLane concerning the Gift Program (each of which will be referred to as the "Opinion Letter").

[61] The 2005 Opinion Letter was based on a statement of facts prepared by ParkLane's in-house lawyer. Although the 2005 Opinion Letter did not expressly say so, the clear implication was that a donor to the Gift Program would be entitled to receive tax credits both for his or her cash donation and for the donation in kind of sub-trust units. This implication was made express in the 2006 and 2007 Opinion Letters, although it was expressed to be "[S]ubject to the remaining uncertainties regarding the application of the GAAR [General Anti-Avoidance Rule] …"

[62] Harris's evidence is that he issued the Opinion Letter on the understanding that it was not to be shown to donors but could be used by their professional advisors for the purpose of advising their clients and that all donors would be required to sign documents acknowledging that they had received independent advice and were prepared to assume the risk of reassessment.

[63] In addition to providing an Opinion Letter, Harris provided what I will describe as a "Comfort Letter" in each of 2005, 2006 and 2007. The Comfort Letter, which I will refer to in more detail below, was included in the Gift Program materials given to potential donors and confirmed that Harris had provided ParkLane with an opinion concerning the Gift Program. Harris understood that the Comfort Letter would be used by ParkLane to inform prospective donors that he had issued the Opinion Letter for the benefit of ParkLane.

[64] Harris's name, photograph and biography were included in the Gift Program materials, along with the Comfort Letter. The fact that he had given ParkLane a tax opinion was highlighted several times in the Gift Program materials, along with an invitation to donors to have their professional advisors review his opinion.

[65] Patterson Kitz (Halifax), Patterson Kitz (Truro), Patterson Palmer, also known as Patterson Palmer Law, and McInnes Cooper (together, the "Law Firms" and, together with Harris, the "Lawyers") are partnerships carrying on the practice of law in Eastern Canada. Patterson Kitz (Truro) and Patterson Kitz (Halifax) carried on business in partnership under the name Patterson Palmer Law until December 2005. Harris was counsel at Patterson Palmer in 2005. Since January 1, 2006, he has been counsel at McInnes Cooper.

[66] I will describe in more detail below the involvement of Harris in the Gift Program.

(i) *Appleby and the Bermuda Trust*

[67] Appleby is an independent corporate trustee, based in Bermuda. Furtak created the Bermuda Trust in 1998, naming a predecessor of Appleby as trustee. The trustee was given wide-ranging powers to manage the assets of the trust, but was not required to interfere in the management or conduct of any company owned by the trust. Included in the trust assets managed by Appleby were two computer software programs developed by Furtak, the most recent being the Software Program. In its capacity as trustee, Appleby licensed the use of the Software Program to third parties

[68] Appleby granted TTL a limited, non-exclusive licence to use the Software Program, in return for license fees that were to be paid to the Bermuda Trust. The "software licensing fee" of about $8,000, paid by TTL to Appleby out of the funds remitted from each $10,000 "donation", was ostensibly for the privilege of using the Software Program to trade on behalf of the charity.

[69] Appleby professes to have little knowledge of the Gift Program. It does acknowledge, however, that from time to time it was requested, by or on behalf of Furtak, to transfer sums of money from the Bermuda Trust to the Donations Canada Trust. Appleby claims that it has no knowledge of the reasons for those transfers. It also acknowledges that TTL paid licence fees to Appleby, to the account of the Bermuda Trust, during the life of the Gift Program.

[70] I will now describe some of the other participants in the Gift Program, namely the Distributors, the Donors and the Charities.

4. The Distributors

[71] As noted earlier, ParkLane did not market the Gift Program directly to the public. Instead, it relied on a network of 455 Distributors, who were financial planners and the like, who marketed the Gift Program to their clients. The defendants attach considerable importance to the Distributors, whom they call "Independent Financial Advisors", as sources of independent advice to the donors regarding the Gift Program and its associated risks.

[72] ParkLane recruited the Distributors. It conducted training sessions for the Distributors and provided them with written materials, explaining the structure of the Gift Program. ParkLane told the Distributors how the Gift Program worked and that $7,500 of the total donation was provided by the Bermuda Trust. It showed the Distributors copies of Harris's Opinion Letter.

[73] All Distributors were required to enter into a "Charity Fundraising Agreement" with ParkLane. The recital to this agreement referred to the desire of ParkLane to engage the Distributor to raise donations for and to refer clients to the Gift Program. The agreement provided, in part, that the Distributor was strictly limited to supplying donors with written materials about the Gift Program that had been approved in advance by ParkLane:

> 4.4 The Distributor shall not, without the consent of ParkLane, make any representations, tax or otherwise, in the course of marketing the Donation Program and he or it will not distribute any written material with respect to the marketing of the Donation Program which representations and material have not been provided or approved in advance by ParkLane.
>
> 4.5 Neither the Distributor or any other person is authorized to give any information or to make any representations, tax or otherwise, in connection with the Donation Program other than as contained in the Donation Program Materials, as approved by ParkLane, or in any amendments or supplements thereto, or in any other marketing materials provided by ParkLane … to the Distributor.
>
> 4.6 The Distributor shall, in furtherance of his or its obligations hereunder, and at his or its own cost and expense:
>
> (a) take all diligent and reasonable steps to ensure that every potential or actual donor is fully informed as to the structure and mechanics of, and any and all amounts and fees payable or to be contributed pursuant to, the Donation Program and has been advised by a professional advisor of the nature of any and all potential tax and business/commercial risks associated with entering into the Donation Program and to take reasonable efforts to ensure that each such participant is a suitable candidate for the Donation Program and that funds contributed to the Donation Program by each such participant is from a legitimate source …

[74] ParkLane has filed affidavit evidence from three Distributors, Ted Gacich (“Gacich”), William MacKay (“MacKay”) and Lorne Allen (“Allen”). As well as advising their clients to participate in the Gift Program, each of these three Distributors participated for several years as a donor.

[75] Gacich was Cannon’s financial advisor. He holds designations as a Financial Planner, Chartered Life Underwriter and Chartered Financial Consultant and has been in the financial services business for 19 years, specializing in tax planning. He marketed the Gift Program in 2005, 2006 and 2007 to approximately 80 clients and participated himself as a donor in two of those years. In 2005, he was a sub-distributor of another Distributor, Life Planning Insurance Agency Limited (“LPL”). Thereafter, he was a Distributor in his own right, through his company.

[76] The Fundraising Agreement between ParkLane and Gacich for 2006 begins with the following recital:

> WHEREAS ParkLane and LPL wish to engage the Distributor to raise donations to and to refer clients to the ParkLane Donations for Canada Program …
>
> AND WHEREAS the Distributor wishes to refer clients to the Donation Program for the fundraising fees enumerated herein …

[77] The Agreement goes on to provide that:

- ParkLane and LPL grant Gacich, the Distributor, a non-exclusive right to raise donations for and to refer clients to the Gift Program;
- Gacich accepts the appointment and undertakes to use best efforts to raise donations and refer clients;
- the Distributor is entitled to remuneration for raising donations and securing and closing transactions;
- the information that the Distributor was entitled to provide to his or her clients concerning the Gift Program was strictly controlled, as set out in clauses 4.4, 4.5 and 4.6 above;
- there is also an acknowledgment that the Distributor has no authority to act on behalf of ParkLane in connection with the Gift Program and a statement that there is no partnership, agency or employment relationship between them.

[78] Gacich deposed that prior to recommending the Gift Program to his clients, he did due diligence to satisfy himself that it was a valid and viable program. He deposed that he always carefully reviewed the Donor Declaration and the Tax Risk Disclosure Statements (described below) with his clients to ensure that they understood the obligations and risks involved in participating in the Gift Program. He said that he reviewed the Donor Declaration with Mr. Cannon in 2005 and 2006 and he reviewed the new Tax Risk Disclosure Statement with him in 2006.

[79] Gacich stated:

> I recall reviewing each of the matters addressed in the Donor Declaration with Cannon in 2005 and 2006 before he decided to participate in the Gift Program in each of those years. Based on my discussions with him and the questions he asked of me on the various different occasions that I met with him I was of the view at the time, and I continue to be of the view that he is a reasonably knowledgeable investor who understood the nature of the Gift Program and how it worked and the risks involved in the Program,

> including the risk that he might be re-assessed and be required to pay penalties and interest as a result.

[80] Gacich stated that the Tax Risk Disclosure Statement, which Cannon signed in 2006, reflects an acknowledgement of the risks that Gacich had discussed with Cannon. He denied that he "promised" Cannon that he would receive a tax credit and says that, on the contrary, he fully reviewed the risks with Cannon. Gacich swore that Cannon was also aware that by signing the Donor Declaration, he was unconditionally releasing ParkLane.

[81] Gacich swore that he discussed these matters with all his clients and that, in some cases, clients decided not to participate because they were risk adverse. His clients' donations varied: one was $1 million in total and others ranged as high as $100,000 to $280,000.

[82] Gacich swore that he received a commission of 18-20% of each client's cash donation. He had 80 clients who participated in the Gift Program. He likely made tens of thousands, if not hundreds of thousands of dollars in commissions through the sale of the Gift Program to his clients.

[83] Gacich testified that he was aware of the "back half" of the Gift Program – that is, the part that was not described in the glossy marketing brochures that were given to donors. He knew that:

- the charities did not retain more than $100 of the total donation;
- the charities paid the balance in exchange for an unguaranteed and unsecured future income stream from the use of the Software Program;
- the Bermuda Trust financed the sub-trust units by paying $7,500 to Donations Canada Trust, which was immediately returned to the Bermuda Trust with an additional $500, ostensibly for the charity's use of its Software Program; and
- most of the donations circulated back to the promoters.

[84] Gacich was not aware, at the time at least, that the Bermuda Trust was established by Furtak for the benefit of himself and his family. Nor did he tell his clients – unless they asked – where the money was coming from to finance the acquisition of the sub-trust units.

[85] Gacich did not recall having told Cannon that the money he was putting into the Gift Program would be used by the charity to purchase the royalty agreement. He acknowledged that, under the terms of the distributorship agreement, this was not information he would likely have provided to Cannon. He also acknowledged that he did not inform Cannon of the role played by TTL and the Bermuda Trust in the structure of the Gift Program.

[86] Allen was the President of LPL, the company that originally engaged Gacich as a sub-distributor. Allen recruited approximately 100 sub-distributors and entered into agreements with them to market the Gift Program. Most of these people were professional financial, tax or legal

advisors, including accountants, life insurance agents, licensed financial planners and occasionally lawyers or mortgage brokers. He also did some individual marketing to his own clients. Like Gacich, Allen says that he was careful to review the Donor Declaration, the Tax Risk Disclosure Statement and the release of ParkLane with his clients.

[87] MacKay is a financial planner and provided financial services and tax planning advice to his clients. He marketed and promoted the Gift Program; approximately 200 of his clients participated in the Gift Program. He personally participated in the Gift Program from 2005 to 2008. His evidence concerning his dealings with his clients is substantially the same as the evidence of Gacich and Allen.

[88] ParkLane, TAL and TTL have issued a third party claim against all the Distributors. They say that if Cannon's action is certified, they will proceed with their claims against the Distributors for any donors who do not opt out of the action, in order to ensure that all liability issues are determined in the same proceeding.

[89] As I mentioned earlier, the defendants make much of the role of the Distributors, whom they call the "Independent Financial Advisors", an expression that appears to be an artful creation of counsel, rather than a term that was actually used by the promoters of the Gift Program. This label glosses over the fact that the Distributors were retained and paid by ParkLane under a "Fundraising Agreement" and that their role was to "raise funds" for the Gift Program. The Distributors were limited in the information concerning the Gift Program that they were permitted to provide to donors. They made substantial commissions if their clients donated to the Gift Program. There are certainly arguments to be made that the Distributors were a cog in the machinery of the Gift Program and that they were recruited because they had a stable of well-heeled clients who would be interested in contributing to the Gift Program as a way of reducing their taxes. It could open to a trial judge to find that, in spite of the language in the "Fundraising Agreement", the Distributors were agents of ParkLane for the purpose of raising funds.

5. The Donors

[90] ParkLane has adduced evidence from six Donors who participated in the Gift Program between 2005 and 2008. These include: Mr. Russ Mergelas, Mr. Ralph Narum, Mr. Robert MacKay, Mr. Lorne Allen, Mr. William MacKay and Mr. Gacich.

[91] Each of these could be described as a reasonably knowledgeable investor, who participated in the Gift Program after being advised by his personal financial advisor and who understood how the program worked and the risks involved, including the risks of a re-assessment by C.R.A., penalties and interest. Each reviewed the Donor Declaration and Tax Risk Disclosure Statement with his advisor before participating in the program and understood the nature and scope of the release that he signed in favour of ParkLane. Like Cannon, these donors have had their tax returns reassessed by C.R.A. but, unlike him, they have not accepted C.R.A.'s position and they are appealing the re-assessment.

6. The Charities

[92] In 2005, there were six participating charities that received funds through the Gift Program. These were all Registered Canadian Amateur Athletic Associations: Biathlon Canada, Canadian Amateur Football Association, Canadian Amateur Wrestling Association, Canadian 5 Pin Bowlers Association, Canadian Lacrosse Association, and Little League Baseball Canada. Donors could designate one of these charities as the recipient of their donations. It is fair to note that these organizations were not well-recognized in the Canadian not-for-profit landscape and the idea of a sustained flow of income, even with modest returns, was probably enticing to them.

[93] From 2006 onward, FFC Foundation was prominently identified in the promotional materials of the Gift Program as a registered Canadian charity that supported a group of participating Canadian charities. It received donations through the Gift Program and disbursed them to the participating Canadian charities, including at least some of the charities that had participated in 2005. Charities that participated in the Gift Program through FFC Foundation included Canadian Community Living Foundation, Scarboro Foreign Missions and the New Brunswick Foundation for the Arts. Other charities continued to participate directly in the Gift Program rather than though the FFC Foundation.

[94] Certain qualifying charities could receive "directed donations" through the FFC Foundation, that is, donations specifically earmarked by donors to the charities. To qualify for a directed donation, the charity or Distributors would have to assemble $1.5 million in aggregate donations, i.e. $375,000 in contributions from donors. All charities participating through FFC Foundation entered into letters of understanding, committing to their participation in the Gift Program.

[95] If FFC Foundation was the charity designated by a participant, then it decided which qualifying charity would be the recipient of Gift Program funds, unless donations were earmarked for a particular charity through a directed donation.

7. Marketing Materials

[96] ParkLane prepared a promotional brochure that, with some variations, was in substantially the same form from year to year. The cover for the brochure in 2005 was entitled "Donations Canada" and showed pictures of athletes, presumably representing the beneficiaries of the 1% of the charitable donations actually retained by the charities, though this fact was not mentioned in the brochure.

[97] Inside the brochure, there was a description of how the Gift Program worked. The brochure for 2005 described the Gift Program as a "unique charitable donation program" that would enable donors to "enhance their personal cash contributions to a variety of supported Canadian charities through a gift of [sic] beneficial interest in a Canadian resident trust." The brochure said that the Gift Program was designed to "assist charities in raising much needed funding." It described Donations Canada Trust as having been established "with a funding

commitment of $200,000,000 in cash to promote charitable giving in Canada". I note parenthetically that if this "funding commitment" was made by the Bermuda Trust to the Donations Canada Trust, there is no evidence at all that the Bermuda Trust had resources of this magnitude.

[98] The brochure went on to explain that donors who donated cash to a charity would be able to apply to become a beneficiary of Donations Canada Trust and that upon this happening, the donor would assign his or her beneficial interest in the trust to the charity "which will result in an additional cash contribution to the charity". The clear implication of all this was that the donor's cash would be matched with an appropriate portion of the $200 million "funding commitment" provided by the Donations Canada Trust and given to the charity.

[99] The brochure contained a diagram, showing how the entire donation of $10,000, the $2,500 cash donation from the donor and the $7,500 "investment" from the Donations Canada Trust to the sub-trust, were distributed to the charity. That diagram was in substantially the same form as the first of the two diagrams earlier in these reasons.

[100] Nowhere in the brochure was there any explanation of the role of the Bermuda Trust or of the fact that the funds "donated" to the charity were not actually retained by the charity and that 99% of the funds flowed back to the promoters. The niceties of these issues were, apparently, left to the Distributors, who were limited in what they could tell their clients, as set out above. It is apparent, at least from the evidence of Gacich, that he only told his clients about the "back half" of the Gift Program, when they asked.

[101] The 2005 brochure contained a letter dated June 15, 2005, on Patterson Palmer letterhead, signed by Harris, which stated as follows:

> You requested our opinion concerning the consequences under the Canadian Income Tax Act and Regulations of participation in the Program by an individual who donates cash and a beneficial interest in a trust to a charitable organization, a charitable foundation, or a registered Canadian amateur athletic association.
>
> We reviewed the Program and its compliance with the Income Tax Act and Regulations and with the proposed amendments thereto, and we issued our opinion to you dated May 18, 2005.
>
> That opinion may be viewed by the professional adviser of any potential donor by contacting your office, providing that the adviser agrees that the opinion is the property of ParkLane Financial Group and is provided to the adviser without responsibility on our part, or the part of ParkLane Financial Group, for his or her sole use in assessing the Program and in determining its suitability to a donor's specific circumstances.

[102] This letter and similar letters written by Mr. Harris and included in the marketing materials in 2006 and 2007 are what I have referred to above as the "Comfort Letter", because they were intended to give a prospective donor comfort that the Gift Program had been vetted by a respected Canadian tax lawyer who was satisfied that it complied with the *Income Tax Act* and regulations.

[103] Also included in the brochure was a page addressed "To Donors", with this statement:

> ParkLane Financial Group Ltd. has received a tax opinion from Mr. Edwin C. Harris, Q.C. of Patterson Palmer, Halifax, with respect of [sic] the Donations Canada Program.
>
> Mr. Harris' opinion is available for review by your professional advisor. For more information, please have your accountant or lawyer contact our Burlington, Ontario office at [phone number].

[104] Underneath these statements was a picture of Mr. Harris and a brief summary of his impressive credentials:

> B.Com. (Dalhousie) 1954; LL.B (Dalhousie) 1958; LL.M. (Harvard) 1959; C.M.A. (1956); C.A. (1957); Admitted to Nova Scotia Bar (1959); Q.C. (1975); F.C.M.A. (1984); F.C.A. (1984).

[105] Beneath this was the following statement:

> Mr. Harris is counsel with the law firm of Patterson Palmer, Halifax. The author of many articles on taxation and estate planning, and texts on Canadian income taxation, he is an adjunct professor at Dalhousie Law School, Halifax and the Former Chair of the Canadian Tax Foundation.

[106] The marketing materials for the Gift Program in 2006 and 2007 were substantially similar to the 2005 materials, except that they now contained a description of FFC Foundation, which had come into existence in 2005. There was also a description of some of the participating charities. The materials in each year up until and including 2007 contained a Comfort Letter from Harris and a note addressed from ParkLane "To Donors", indicating that it had received a "tax opinion" from Harris with respect to the Gift Program. Additionally, one of the benefits of the Program listed in the brochure was a:

> Tax Opinion by top Canadian legal professionals

[107] Inside the cover of the 2007 brochure, there was a letter from Mr. Olsthoorn, the President of ParkLane. In the letter, Mr. Olsthoorn described the Gift Program as an "innovative product design [which] provides a unique opportunity for Canadian donors to make significant cash contributions to registered Canadian Charities and Foundations."

[108] Mr. Oolsthoorn went on to say in his letter that:

> ParkLane has consulted with top Canadian tax and legal professionals in the design of this program. In addition, the Program has been reviewed by hundreds of tax and legal advisors of participating donors.

[109] As we now know, the ParkLane brochure told only half the story about the Gift Program. In particular, it did not describe what happened to the donor's money after it reached the hands of the charity. It did not show that 99% of the $10,000 aggregate donation immediately left the charity, which was left with $100 and a promise of a future income stream.

8. Contractual Materials for the Gift Program

[110] Every donor participating in the Gift Program was required to sign certain standard form documents. These documents were amended from time to time during the Gift Program. In 2005, the standard documents included:

(a) a Pledge to a Charity directed to ParkLane as escrow agent;

(b) an Enduring Property Pledge to a Charity directed to ParkLane as escrow agent, directing that the "cash gift shall be retained by the Charity … for not less than 10 years from the date the gift was received by the Charity…";

(c) an Application to be Designated as a Beneficiary of the Donations Canada Trust, stating, among other things, "I am interested in supporting the work of the charity to which I have made a pledge of a cash gift (the "Charity") and would like to see it benefit from further gifts";

(d) a Donor Declaration in which the donor declared and agreed that:

  (i) they had read and fully understood all and any written materials and documents in the Gift Program Materials, including (after 2005) the Tax Risk Disclosure Statement, in respect of their participation in and donations to the Gift Program;

  (ii) except for what was contained in the materials provided by ParkLane, no other promise, representation or warranty had been made by ParkLane to them or was relied upon by them;

  (iii) they had received independent professional advice in respect of the Gift Program from their own personal advisor/lawyer/accountant;

  (iv) they fully understood the advice and information provided to them by their own personal advisor/lawyer/accountant in respect of all and any legal,

commercial/business and tax consequences related to their participation in the Gift Program, including the fact that up to 8% of their aggregate donation amounts would be used to pay charity fundraising fees;

(v) they accepted any and all tax risks whatsoever related to their participation in the Gift Program, including the risk that their charitable donations, or a portion of them, might be re-assessed and even denied; and

(vi) they unconditionally released ParkLane and its officers and employees from any and all claims or liabilities of any kind whatsoever that they then had, or in the future might have with respect to matters occurring on, prior to or after the date of the Donor Declaration, arising out of, based upon, resulting from or in connection with their participation in the Gift Program; and

(e) a Transfer of Units of Sub-trust to Charity, recognizing that all registered holders of the sub-trust units "have mutually agreed to donate our respective units to" a participating charity and designating ParkLane as escrow agent to hold and transfer the sub-trust units.

[111] In 2006, a Tax Risk Disclosure Statement was included in the documents to be signed by donors. It provided, among other things:

(a) The ParkLane Donations for Canada Program (the "Program") is being offered by ParkLane Financial Group Ltd. ("ParkLane") to assist registered Canadian amateur athletic associations, foundations, charities and other qualified donees under the *Income Tax Act* (Canada) (the "Act") ("Charity" or "Charities") in raising long-term and short-term charitable funding. The Program is principally designed to provide a donor resident in Canada ("Donor" or "Donors") with the means of effecting: (1) a cash donation to a Charity, entitling such Donor to a cash receipt; and (2) a distribution from a sub-trust ("Sub-Trust") of a Canadian-resident trust ("Master Trust") to a Charity, entitling the Donor to a donation-in-kind receipt.

(b) Tax Opinion & Advice

(c) Edwin C. Harris, Q.C., of McInnes Cooper, tax counsel to ParkLane, has, based on the interpretation of the Act and favourable case law, provided a legal opinion to ParkLane outlining the tax consequences and the intended results for a Donor making a donation under the Program. **ParkLane recommends and urges any prospective donor interested in participating in the Program to review the tax consequences of making a donation with his or her professional legal, accounting and tax advisor.**

(d) ParkLane has worked closely with leading Canadian accounting and tax law professionals in the structure, design and development of the Program. Should C.R.A. or RQ choose to challenge the tax structure of the Program, ParkLane believes that very strong arguments can be made in supports of its position. ParkLane has at its disposal a contingency fund of $500,000 set aside to support Donors in dealing with audits, reassessments or challenges made against the Program. This fund will remain in place until December 31, 2010 and will be used exclusively to provide assistance to Donors, which, in the past, has included assisting clients in responding to C.R.A. questionnaires drafting and filing of notices of objection, preparing appeals and funding tax litigation.

(e) While ParkLane intends to assist and support Donors in the event of such challenges and has committed the funds in this regards, **ParkLane cannot guarantee that each Donor will receive the income tax consequences contemplated under the Program and makes no representations in respect of a Donor's entitlement to claim the tax credits in respect of any donations made pursuant to the Program.** ParkLane cautions each Donor that he or she may not ultimately obtain the income tax results designed to be achieved under the Program and may, in fact, incur certain costs and interest payments associated with any reassessment by the C.R.A. or RQ. [emphasis in original]

9. The C.R.A. Re-Assessment

[112] Cannon was reassessed by C.R.A., which disallowed his deductions for his charitable gifts to the Gift Program in 2005 and 2006. On about May 7, 2008, he received a letter from C.R.A. indicating that of the $40,000 he had claimed, representing $10,000 in cash and $30,000 in kind, no amount was allowable as a charitable gift. A letter dated February 4, 2009 gave him the same bad news concerning his 2006 donation, $12,500 of which was in cash and $37,500 was in kind.

[113] The C.R.A. letters described the nature of the Gift Program and described the Bermuda Trust as the "Facilitator". They stated that in the first year of the agreement, the charities that participated in the Gift Program received payments from TTL equivalent to an annual return of 0.16% (zero point sixteen percent). C.R.A. was unable to confirm that the funds paid had actually been invested on behalf of the charities.

[114] The position taken by C.R.A. was that the donations made by Cannon were not a gift, because they were made in the expectation of a material advantage, namely, the expectation that he would receive the trust units at no costs to himself and that he would transfer those units to a charity and receive a second charitable donation receipt for three times the value of his cash payment. The 2008 letter continued:

> Furthermore, the charities were obliged as a condition of participation in the Program to transfer almost all of these funds to specific parties. Through a series of transactions and directions signed by all parties involved, these funds followed a circular flow and ended up back in the hands of the promoters. This series of transactions was preordained with the result that, for a cash payment, you would claim donation receipts four times greater than the cost of participating in this scheme. It is our opinion that you participated in this scheme with full knowledge of this material benefit. Accordingly, it is our opinion that the full amount of the funds transferred to the charities does not represent a gift.

[115] In the absence of a "donative intent", Cannon was not entitled to claim a charitable deduction.

[116] In 2008, C.R.A. audited FFC Foundation for the period December 2005 to December 2006. It concluded that the Foundation had not complied with the requirements of the *Income Tax Act* and revoked its charitable status in 2009. C.R.A. has also disallowed all charitable deductions made by Class members with respect to tax receipts issued under the Gift Program.

III. THE CERTIFICATION MOTION

1. Introduction

[117] The plaintiff submits that this is an ideal case for certification and that it is substantially the same as *Robinson v. Rochester Financial Limited et al.*, [2010] O.J. No. 187, 2010 ONSC 463 (S.C.J.), application for leave to Divisional Court denied, 2010 ONSC 1899 (Div. Ct.) ("*Banyan Tree*"), a decision of Justice Lax, certifying a class action relating to a charitable donation scheme called the "Banyan Tree Gift Program". The plaintiff says that he relies on well-established causes of action, that the Class is clearly identifiable and that the common factual and documentary underpinnings of the claim of every Class member give rise to common issues of fact and law. He says that he is an appropriate representative of the Class, that he has a suitable litigation plan and that certification is the preferable procedure for the resolution of claims of Class members and will accomplish the goals of the *C.P.A.*

[118] The defendants say that this case is distinguishable from *Banyan Tree*. While they make a number of objections, their fundamental complaint is that the claims of the Class members are not common, because they can only be resolved by analyzing individual circumstances. They say that liability cannot be determined on a class-wide basis and will require an examination of such matters as the investor's knowledge, sophistication, experience and risk tolerance and the information, written and oral, disclosed to each investor. The defendants say that for those reasons a class proceeding is not the preferable procedure for dealing with the claims of the Class.

2. *Banyan Tree*

[119] In *Banyan Tree*, the plaintiffs sought to certify a class action on behalf of taxpayers, who had contributed to the Banyan Tree gift program. They sued the promoters and a law firm as a result of C.R.A.'s disallowance of their tax deductions. Lax J. certified causes of action in negligence and breach of contract against the promoters and also certified the action against the law firm in negligence.

[120] The structure of the Banyan Tree gift program was quite different from the ParkLane Gift program, although as in this case, the participants were solicited by a network of "financial advisors" who promoted and sold the program. In *Banyan Tree*, however, the charitable donation of each taxpayer was pumped up through a loan from the promoters of 85% of the amount of the donation. The plaintiffs alleged that it was an express or implied term of their contracts with the promoters that they would receive a charitable tax receipt that would be recognized by C.R.A. and that they would not be at risk to repay the loans. They pleaded causes of action in contract and negligence.

[121] The promoters did not dispute that the statement of claim disclosed causes of action in breach of contract and negligence, and Lax J. agreed. There was substantial debate with respect to the commonality criterion for certification. The promoters argued that the action was essentially a point-of-sale misrepresentation case and that, even though a cause of action for misrepresentation was not being asserted, it would be necessary to present "evidence as to who said what to whom in respect of each and every transaction". Lax J. found that the standard form of brochure and program information, the standard contract language and the evidence of the plaintiffs and their witnesses provided a sufficient evidentiary basis to raise common issues "that the tax opinion was considered to be part of the gift program, that it was necessary to launch the program, and that participants entered into common contracts on express or implied terms that they would receive a charitable donation tax receipt recognized by CRA and a risk-free loan" (at para. 50).

[122] In *Banyan Tree*, the plaintiffs alleged that the law firm's opinions were prerequisites for the promotion and sale of the program and that the law firm intended that the participants would rely on its opinion in deciding whether or not to participate in the program. They pleaded that the law firm owed the participants a duty of care and that it was negligent in the preparation of the opinions. The lawyers argued that because the plaintiffs had never read their opinions, there could be no duty of care and they brought a motion to dismiss the claim on the basis of the plaintiffs' admission that they had not read the opinion letters.

[123] Justice Lax found a cause of action in negligence against the lawyers. She addressed the lawyers' argument as follows, at para. 21:

> FMC [the law firm] submits that a duty of care cannot be created based on the fact that an opinion was prepared, when its contents were never read or relied upon by anyone. They say that the

> allegations against FMC arise from the existence and the contents of the letters and that, in substance, the claim is made for negligent misrepresentation. I disagree. The claim is not pleaded on the basis that the plaintiffs read or relied upon the FMC letters, but on the basis that FMC issued the opinion letters with the expressed intention that they be relied upon by the gift program defendants and knowing that the gift program defendants would rely upon and publish the existence of the opinions in promoting the gift program.

[124] The law firm argued that the opinion letters disclaimed reliance on the letter by anyone other than the promoters and donors who were provided with copies of the letter, and that it was not reasonably foreseeable that persons who did not receive or read the letters would sustain damages as a result of the opinions in the letter. Lax J. concluded that the lawyers knew or ought to have known that the very existence of the opinion would be used to market the Gift Program and that potential donors would rely on the existence of the opinion in deciding whether to participate. She stated, at paras. 24 and 25:

> The allegation is not that FMC provided the letters intending that they be read and relied upon by the plaintiffs and proposed class members, although some may have done so, but rather that FMC provided the letters (1) with the intention that they be used by the gift program defendants in the manner the plaintiffs allege, namely to market the program as one in which proposed class members would receive a charitable tax receipt recognized by C.R.A.; and (2) with the intention and knowledge that the existence of a tax opinion would inform the decision of class members about whether or not to participate in the gift program. If these allegations are made out at trial, it is not plain and obvious that they could not support a duty to take care that the opinions expressed in the letters were accurate and reliable and that a failure to take such care or a failure to warn was the proximate cause of the losses the plaintiffs allege they suffered.
>
> To put this in a different way, the reliance the plaintiffs allege is not on the tax opinion *per se*, but on there being a tax opinion that FMC intended and knew would be used by the gift program defendants to support the legitimacy of the gift program for income tax purposes and would be relied upon by the class members in deciding whether or not to participate. I would therefore not give effect to FMC's argument that this is a negligent misrepresentation claim "dressed up" as a negligence claim. It is properly pleaded as a negligence claim and the essential elements of the cause of action - duty, foreseeability, proximity, breach, and damage - are present. The express qualifications on the opinion are not matters to be considered at the certification stage.

[125] Justice Lax went on to note at para. 26 that "there is precedent … for advancing a class action claim in negligence against a law firm even though generally, a lawyer owes a duty of care only to the lawyer's client: *Baypark Investments Inc. v. Royal Bank* (2002), 57 O.R. (3d) 528 at paras. 23 and 33 (Sup. Ct.), aff'd, [2002] O.J. No. 4377 (C.A.); *Elms v. Laurentian Bank of Canada*, 2004 BCSC 1013, 35 B.C.L.R. (4th) 373 (S.C.) at paras. 63-65, aff'd, 2006 BCCA 86."

[126] After reviewing previous decisions, such as *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 18 B.L.R. (3d) 240, [2001] O.J. No. 4622 (S.C.J.), *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 (Gen. Div.) and *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429, 90 B.C.L.R. (3d) 195, Lax J. found, at para. 30, that "there is clearly a developing line of authority in Ontario and elsewhere that have permitted claims of this kind to proceed". She concluded at para. 31:

> … it is certainly arguable that FMC ought reasonably to have foreseen that its tax opinion would be used to market the gift program and that the participants would be "disappointed" and suffer damages if FMC was negligent in giving that opinion. 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.

[127] Justice Lax found that the proposed class definition, "all individuals who participated in the Banyan Tree Gift Program for [the taxation years at issue]" was acceptable.

[128] Justice Lax also found that a class proceeding would be the preferable procedure for the resolution of the common issues and rejected the defendants' motion to stay the proceeding until the donors' appeals to the Tax Court had been determined. Finally, she found that the representative plaintiff was appropriate and had produced a satisfactory litigation plan.

[129] A motion for leave to appeal to the Divisional Court was dismissed by Dambrot J. He found that the appeal of the gift program defendants was highly fact-driven and did not meet the test for leave. Regarding the appeal by the lawyers, he found at paras. 23 to 25 that the absence of direct reliance on the advice of the law firm was not fatal to the claim in negligence:

> It is arguable that reliance by the plaintiffs on the existence of a positive opinion given by Fraser [the law firm] to the gift program defendants supports their claim against Fraser in negligence. In my view, the words of Sharpe J., as he then was, at paragraph 10 of his judgment in *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605(Gen. Div.), one of the many cases relied on by Lax J., are apposite:
>
> > The defendant also submits that there can be no cause of action for breach of duty, whether as a solicitor or as a fiduciary, absent a plea of reliance by the plaintiff on his

> advice. While the plaintiff does not allege direct reliance on the solicitor, it seems to me at least arguable that where a party invests money in an RRSP to be invested in mortgages, the reliance the party places on the trustee or other advisors to ensure that adequate steps are taken to protect his interests may be adequate to support a claim against the solicitor retained by the trustee or advisor, particularly where the solicitor is aware of the identity of the party and the nature of the party's interest: see *White v. Jones*, [1995] 1 All E.R. 691 (H.L.).
>
> Here, equally, the absence of direct reliance by the plaintiffs on the solicitor's advice may not be determinative. Even without direct reliance on the advice, it remains arguable that when the plaintiffs entered the scheme, they were relying on the legal advisors of the architects of the scheme to ensure that their pledges would qualify as valid charitable donations for tax purposes. If the legal advisors acted negligently in giving their advice to the gift plan defendants, the plaintiffs could have a claim in negligence against those legal advisors.
>
> While it may be, particularly taking into account the qualifications and reservations expressed in Fraser's opinion, that the claim against Fraser will ultimately fail, I cannot say that there is good reason to doubt the correctness of the orders in issue, namely, the order to certify as against Fraser, the order to decline to strike the pleadings against Fraser and the order refusing to strike the claim against Fraser.

[130] Accordingly, leave was not granted.

[131] Against this background, I turn now to the question of whether, and on what terms, this action should be certified as a class proceeding.

A. The Test for Certification

[132] Section 5(1) of the *C.P.A.* sets out the criteria for the certification of a class proceeding. The court shall certify the action as a class proceeding where the five-part test for certification is met:

> (a) the pleadings or the notice of application discloses a cause of action;

> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
>
> (c) the claims of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff who,
>
> (i) would fairly and adequately represent the interests of the class,
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[133] As Justice Lax observed in *Banyan Tree* at para. 14, these requirements are linked:

> "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 (A.G.)*, [2008] O.J. No. 3419, 169 A.C.W.S. (3d) 27 (Sup. Ct.) at para. 14.

[134] It has been observed on many occasions that the *C.P.A.* is remedial legislation and that it should be interpreted generously in order to give effect to its objectives: access to justice, behaviour modification and judicial economy: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 at 47 (Gen. Div.), aff'd (1995), 21 O.R. (3d) 453 (Div. Ct.).

[135] I turn to the five components of the s. 5(1) test.

1. Causes of Action

[136] Section 5(1)(a) of the *C.P.A.* requires that the pleadings disclose a cause of action. The test is the same as that applied in a motion to strike a pleading under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 on the ground that it discloses no reasonable cause of action: "assuming that the facts as stated in the Statement of Claim can be proved, is it 'plain and

obvious' that the plaintiff's Statement of Claim discloses no reasonable case of action?" - *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at para. 33.

[137] This test was summarized by Cameron J. in *Balanyk v. University of Toronto* (1999), 1 C.P.R. (4th) 300, [1999] O.J. No. 2162 at para. 25 (S.C.J.) as follows:

> The test to be applied is whether, assuming the facts pleaded are true, it is plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action. Only if the action is certain to fail because the pleading contains a radical defect should the relevant portions be struck out. If the pleading has some chance of success, it should remain. An arguable point of law or a novel cause of action should be left to the trial judge or a motion for judgment based on the point after exchange of pleadings. The motion for judgment may be under Rule 21.01(a) on the basis of some question of law or under Rule 20 where a factual context is required for its resolution: see *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959; *Prete v. Ontario* (1993), 16 O.R. (3d) 161 (C.A.); *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Abramovic v. Canadian Pacific Ltd.* (1991), 6 O.R. (3d) 1 (C.A.).

[138] The principles applicable to this aspect of the test are settled:

- no evidence is admissible for the purposes of determining the section 5(1)(a) criterion;
- all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
- the pleading will be struck only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
- matters of law that are not fully settled by the jurisprudence must be permitted to proceed; and,
- the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information.

See generally: *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.

[139] As is so often the case in class actions, the plaintiff asserts multiple causes of action against multiple defendants. The following chart describes the causes of action asserted against the various defendants:

	Cause of Action	**Party**
(a)	Negligence	All Defendants
(b)	Negligent Misrepresentation	The ParkLane Defendants The Gleesons Harris Patterson Palmer Law (for 2005 only) McInnes Cooper (for 2006 – 2009)
(c)	Fraud and Fraudulent Misrepresentation	The ParkLane Defendants Appleby Trustee Gleeson (which refers to Gleeson in his capacity as trustee for the Donations Canada Trust from 2005 to in or about April 2006) The Gleesons
(d)	Conspiracy	The ParkLane Defendants Appleby Trustee Gleeson (from 2005 to in or about April 2006) The Gleesons
(e)	Consumer Protection Legislation (rescission and damages)	The ParkLane Defendants FFC Foundation (from 2006 – 2009) and FFC Directors Trustee Gleeson The Gleesons
(f)	Breach of Contract	ParkLane Trustee Gleeson
(g)	Unjust Enrichment and	The ParkLane Defendants

	Constructive Trust	FFC Foundation and FFC Directors, Appleby Trustee Gleeson The Gleesons

[140] The claims against the FFC Directors begin from the time period of 2006 onwards. Although this chart indicates that the plaintiff claims against the FFC Directors for negligence, breach of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, and unjust enrichment, there is no pleaded claim against them for unjust enrichment.

(a) Negligence

[141] There are allegations of negligence against all defendants and separate allegations of negligence against the Lawyers and the FFC Directors. The allegations of negligence essentially boil down to this:

> (a) all the defendants, other than the FFC Directors, were negligent in the planning and creation of the Gift Program and in failing to ensure that C.R.A. would recognize the charitable donation receipts issued to Class members and the tax credits they claimed;
>
> (b) all the defendants, other than the FFC Directors, negligently misrepresented that the Gift Program would provide valid charitable donation receipts when they knew or ought to have known that this would not occur;
>
> (c) the Lawyers issued their Opinion Letters and Comfort Letters without due care and attention, with the intention that those letters would be relied upon by the Class, when they knew or ought to have known that the letters were inaccurate;
>
> (d) the FFC Directors owed a duty of care to the Class to ensure that the charity was properly operated and they failed to ensure that Class members' donations were being received by the charities as gifts so that the donations would qualify for charitable tax credits.

[142] In *Banyan Tree*, the "gift program defendants" did not dispute that there was a properly pleaded claim against them in negligence and a cause of action was certified in negligence.

[143] I will make some general observations about the negligence pleading before turning to the submissions of each group of defendants.

[144] The ParkLane Defendants, together with some of the other defendants, say that the claim in negligence is in substance a claim in negligent misrepresentation and is "subsumed" by that claim. They say that where the plaintiff's claim is that the defendant breached a duty to provide accurate information and not to make false or misleading statements, the cause of action is for negligent misrepresentation and the plaintiff cannot circumvent the requirement to plead reliance by pleading the case in negligence. The defendants rely, in particular, on *Deep v. M.D. Management*, [2007] O.J. No. 2392 at para. 28 (S.C.J,), aff'd 2008 ONCA 189 and *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113, 2010 ONSC 42.

[145] This is a major battle ground for the defendants, for understandable reasons. If the claim is for negligent misrepresentation alone, the defendants will argue that issues of individual reliance make the claim unsuitable for certification: see *McKenna v. Gammon Gold Inc. et al.*, 2010 ONSC 1591, [2010] O.J. No. 1057 at para. 135 (S.C.J.), varied, 2010 ONSC 1591, [2010] O.J. No. 1057 (Div. Ct.) and the authorities referred to there. If, on the other hand, the plaintiff has a cause of action in negligence, as was the case in *Banyan Tree*, the focus will be on the defendants' conduct, making the claim more amenable to certification. This is, no doubt, why the plaintiff's pleading describes the claim under the heading of "Negligence", although most of the allegations sound like negligent misrepresentation.

[146] I agree that a plaintiff cannot dress up a negligent misrepresentation claim in negligence clothes and then assert negligence as a separate cause of action. That is what happened in *Deep v. M.D. Management*. The plaintiff owned Nortel shares in his RRSP and claimed against Nortel when the value of the shares dropped dramatically. Justice Brown struck the claim for negligent misrepresentation, as the plaintiff had failed to plead that he had relied upon any representations made by Nortel. This left a claim for negligence, but Brown J. found that it was in substance a claim for misrepresentation. The alleged duty of care was to accurately represent Nortel's financial situation and the breach of this duty was by misrepresentation and failure to disclose. Justice Brown held, at para. 28:

> As I read Dr. Deep's negligence pleading, it acts simply as an additional pleading of the first element for the cause of action of negligent misrepresentation - the existence of a duty of care based on a special relationship. In my view opinion [sic] Dr. Deep has not pleaded a cause of action sounding in negligence that is separate from his cause of action for negligent misrepresentation. As a result, it suffers from the same defects as his pleading of negligent misrepresentation.

[147] It was clearly a case where the pleading of negligence was in substance a pleading of negligent misrepresentation.

[148] Similarly, in *Singer v. Schering-Plough Canada Inc.*, the plaintiff claimed that two sunscreen manufacturers had misrepresented the degree of protection their products provided against UVA rays. Causes of action were asserted for negligence and breach of the *Consumer*

Protection Act, 2002, among others. In an apparent effort to avoid the issue of reliance that would arise in a claim for negligent misrepresentation, the plaintiff asserted a cause of action in negligence.

[149] I found in that case that the pleading of negligence was essentially that the defendants owed a duty of care to provide consumers with accurate information on the labels of the products and not to make false or misleading claims in the labeling and advertising of their products. In substance, it was a claim for misrepresentation without a pleading of reliance and was therefore not properly pleaded. There was no allegation in that case that the product itself was defective.

[150] In *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.), van Rensburg J. made a similar observation at para. 88:

> The negligence pleading in this case is in substance a pleading of negligent misrepresentation without the ingredient of reliance. There is also no pleading that the alleged negligence caused damage to the plaintiffs and no separate claim for a remedy based on negligence. Accordingly, the claims sounding in negligence *simpliciter* ... will not be permitted to proceed and the claim shall be amended accordingly.

[151] On the other hand, there is no reason that a plaintiff cannot plead both negligence and negligent misrepresentation, arising out of the same factual circumstances, as long as the claims are, in fact, distinct. Thus, in *Dobbie v. Arctic Glacier Income Fund*, [2011] O.J. No. 932, 2011 ONSC 25, there were distinct pleadings of negligence on the one hand and of negligent misrepresentation on the other. It was pleaded not only that the defendants issued prospectuses that contained misrepresentations, but also that, had the defendants fulfilled their duties, the securities would either not have been issued or would have been offered at lower prices. In that case, Tausendfreund J. noted, at para. 59:

> A review of the pleadings in the case before me indicates that unlike *Deep* and *Imax*, the claims of negligence and negligent misrepresentation are pleaded quite differently and raise separate causes of action. The negligence *simpliciter* claim asserts that the securities issued pursuant to the prospectuses would not have been issued, or would have been issued at a substantially reduced offering price, but for the negligence of the defendants. The negligent misrepresentation pleading, on the other hand, points to a number of misrepresentations contained in various prospectuses and public disclosures.

[152] Similarly, in *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724, [2011] O.J. No. 5062 (S.C.J.), Perell J. certified a class action pleading both negligent misrepresentation and negligence. He stated, at para. 79:

> I agree with Justice Lax's analysis [in *Banyan Tree*]. The [*Banyan Tree*] 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.

[153] In the *Lipson* case before Justice Perell, the lawyers' letters were expressly stated to be prepared so that they might be relied upon by potential donors. In the case at bar, they were not. It is arguable, however, in this case, as it was in *Banyan Tree*, that it was reasonably foreseeable that the Opinion Letters and the Comfort Letters in this case would be used to market the Gift Program.

[154] It seems to me that, in the application of the s. 5(1)(a) test, the court should be careful not to strike a pleading on the ground that it has been "subsumed" by another pleading when the evidence at trial could well support separate causes of actions under both pleadings. Put another way, only when it is plain and obvious that a pleading has been dressed up to hide its real identity, should a court refuse to allow it to go forward.

[155] In this particular case, reading the pleading generously, there are allegations that the "product" – the Gift Program – was negligently designed and that it did not work. There are also allegations that the defendants negligently made misrepresentations that it would work. It is conceivable that one claim might succeed and the other might fail. Why should it not be left for the common issues judge to determine whether one or both claims have been made out, assuming that both claims are appropriate for certification? Similar observations were made by Wilson J. in *Hunt v. Carey*, above, in the context of conspiracy pleadings.

[156] I now turn to a consideration of the negligence pleading against each group of defendants.

(i) ParkLane, TTL, TAL

[157] The pleading against the ParkLane Defendants includes allegations that these defendants "negligently planned and created the Gift Program" and that they "failed to ensure that C.R.A. would in fact recognize the charitable donation receipts issued and tax credits claimed by the Class members".

[158] Reading the pleading generously and with due allowance for drafting deficiencies, including the lack of particulars, there is a pleading of negligence that is distinct from the pleading of negligent misrepresentation. It is possible to envisage circumstances in which the misrepresentation claim could fail, but the negligence claim could succeed. If, for example, the Gift Program could have been structured in such a way that the Class members at least obtained a valid receipt for their $2,500 cash donations, then the ParkLane Defendants could have a liability in negligence, whether or not they misrepresented the fact that donors would be able to "supersize" their donations. Alternatively, as in *Dobbie v. Arctic Glacier Income Fund*, the plaintiff could argue that the Gift Program would not have been offered at all had the ParkLane Defendants properly investigated the tax consequences.

[159] I am satisfied, therefore, that the plaintiff has properly pleaded a cause of action in negligence against the ParkLane Defendants.

(ii) FFC Foundation

[160] Reading the pleading generously, the plaintiff pleads that FFC Foundation was negligent in failing to ensure that C.R.A. would recognize its charitable donation receipts as valid. It is arguable and not therefore plainly and obviously wrong that a charity owes a duty of care to donors to ensure that it is operated in such a way as to give the donor a valid charitable receipt in return for a donation. I will therefore certify a cause of action in negligence against FFC Foundation.

(iii) FFC Directors

[161] The plaintiff asserts a claim in negligence against the FFC Directors, and Ms. Gleeson, the Executive Director of FFC Foundation. He also says that he is asserting a claim for negligent misrepresentation against Ms. Gleeson, but apparently not against the FFC Directors.

[162] The pleading against the FFC Directors is that they, among other things:

> - owed a duty to Class members to ensure that the FFC Foundation was operated in keeping with its objects and that their donations were in fact gifted to charities as set out in the promotional materials;
>
> - owed a duty to Class Members to supervise Ms. Gleeson to ensure that the charity was operated in keeping with its objects and their donations were in fact gifted to charity;
>
> - were negligent in the performance of their duties and obligations as directors of the FFC Foundation and, as a result, caused damages to the plaintiff and Class members;

- negligently breached their duties by permitting the FFC Foundation to be used as a vehicle whereby the other defendants (other than the Lawyers) perpetrated a fraud; and

- failed to identify the fact that the charitable donees did not have free use of the funds donated to them and were in fact required to pay the vast majority of the donations they received to the Bermuda Trust or to TTL.

[163] There are no pleadings that:

- the FFC Directors were parties to any breach of contract;

- that they negligently planned or created the Gift Program;

- that they were involved in any conspiracy, fraud, or misrepresentation; or

- that they were unjustly enriched.

[164] While there is no question that directors of a not-for-profit corporation owe a duty of care and a fiduciary duty to the corporation, they do not owe a duty to the corporation's shareholders or other stakeholders. In *Re. London Humane Society*, [2010] O.J. No. 4827, 2010 ONSC 5775 (S.C.J.), Granger J. observed, at para. 19:

> Directors of not-for-profit and charitable organizations are subject to fiduciary duties at common law. The Supreme Court of Canada has held that directorial fiduciary duties are owed primarily to the corporation, not to the corporation's shareholders or other stakeholders (See *Re BCE Inc.*, 2008 SCC 69 at paras. 36-38). While most litigation in this area focuses on for-profit corporations, various academic texts apply the same concept to the directors of not-for-profit corporations (See McCarthy Tétrault, *Directors' and Officers' Duties and Liabilities in Canada*, M.P. Richardson, Ed. (Toronto: Butterworths, 1997)).

[165] Officers and directors may have a liability to persons other than the corporation where they engage in "fraud, dishonesty, want of authority or other conduct specifically pleaded which justified piercing the corporate veil": *Alvi v. Misir* (2004), 73 O.R. (3d) 566, [2004] O.J. No. 5088 at para. 52 (S.C.J.). In this case, however, there is no pleading of fraud, dishonesty, want of authority or other conduct of FFC Foundation or the FFC Directors that would justify the piercing of the corporate veil: see *Budd v. Gentra Inc.*, [1998] O.J. No. 3109 (C.A.); *McKenna v. Gammon Gold Inc.*, above.

[166] In fact, the plaintiff has assiduously avoided lumping the FFC Directors into the allegations of malfeasance and fraud made against the other defendants.

[167] The plaintiff argues that the claim against the FFC Directors should be allowed to proceed because it falls within the principle that "novel" claims should be allowed to proceed. There is nothing novel about this area of the law. The principle that directors owe a duty to the corporation and not to others goes back to *Foss v. Harbottle* (1843), 67 E.R. 189.

[168] The plaintiff therefore has no cause of action in negligence against the FFC Directors and that claim will be struck.

(iv) The Gleesons

[169] It is pleaded that the Gleesons, together with the ParkLane Defendants and the Bermuda Trust, created the FFC Foundation and the Donations Canada Trust for the purpose of facilitating the operation of the Gift Program. It is also alleged that GMA, as agent for ParkLane and Gleeson, promoted, marketed and sold the Gift Program to Class members. There are also allegations that all of the defendants, other than the FFC Directors, negligently planned and created the Gift Program and negligently distributed or permitted the distribution of the promotional materials when they knew or ought to have known that the representations were false.

[170] Counsel for Gleeson and GMA makes vigorous objections to the pleading against his clients. He submits that the pleading is devoid of material facts against Gleeson, that it contains broad sweeping allegations that lump Gleeson and GMA together with the other defendants and that the claim for negligence is subsumed in the claim for negligent misrepresentation.

[171] For the reasons set out in relation to the claim against ParkLane, I find that there is a properly pleaded claim in negligence against Gleeson and GMA. Although the pleading against Ms. Gleeson lumps her in with all the other defendants, as having negligently planned and created the Gift Program, the pleading is broad enough to include her.

(v) The Lawyers

[172] For the reasons set out below, dealing with the Lawyers' summary judgment motion, I find that there is a properly pleaded cause of action against the Lawyers in negligence.

(vi) Appleby

[173] There is no separate pleading of negligence or negligent misrepresentation against Appleby – Appleby is simply bundled together, in the statement of claim, with "all of the Defendants", other than the FFC Directors.

[174] Appleby contends that the statement of claim does not disclose a cause of action against it in negligence, because the plaintiff fails to plead the existence of a duty of care. It says that

there is no duty of care, since the claim is for pure economic loss and does not fall within one of the relationships that have been recognized as giving rise to such a duty: see *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, [1992] S.C.J. No. 40 at para. 31.

[175] To establish a new duty of care, the plaintiff must meet the test set out in *Attis v. Canada (Minister of Health)* (2008), 93 O.R. (3d) 35 (C.A.), which in turn confirmed the approach described in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562. See also: *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] S.C.J. No. 22.

[176] I will discuss the duty of care analysis at length when I consider the Lawyers' summary judgment motion. This approach requires, at the first stage, that the plaintiff establish that the harm that occurred was a reasonably foreseeable consequence of the defendant's conduct and that there is sufficient proximity arising from the relationship between the parties to justify imposing a duty of care on the defendant. At the second stage, if the court has made findings of foreseeability and proximity, the onus shifts to the defendant to show that there are residual policy considerations that negative the imposition of a duty of care.

[177] I do not accept Appleby's submission. There is a pleading that the Bermuda Trust, for which Appleby is the trustee, is affiliated with the ParkLane defendants and that it acted in concert with them in the creation, administration, marketing and sale of the Gift Program. Accepting these allegations as true for the purposes of the s. 5(1)(a) test, Appleby as a creator of the Gift Program arguably owed a duty of care to a prospective donor to ensure that the program would work and that the donor would receive a valid charitable donation receipt in return for his or her gift. I conclude that there is a properly pleaded cause of action against Appleby for negligence.

(b) Negligent Misrepresentation

[178] A claim for negligent misrepresentation is made in para. 1(d) of the statement of claim against the ParkLane Defendants[1], the Lawyers and the Gleesons.

[179] In *Queen v. Cognos Incorporated*, [1993] 1 S.C.R. 87, the Supreme Court of Canada set out the requirements of the tort of negligent misrepresentation:

> (a) there must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (b) the representation in question must be untrue, inaccurate, or misleading;
>
> (c) the representor must have acted negligently in making the representation;

[1] The pleading in the statement of claim is actually against ParkLane and Trafalgar Trading Associates Limited, which appears to be a typographical error. The plaintiff's chart, set out earlier, indicates that the claim is against all the ParkLane Defendants.

(d) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

(e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[180] Misrepresentation must be pleaded with particularity. The pleading must set out, with "careful particularity": (a) the alleged representation; (b) when, where, how and by whom it was made; (c) its falsity; (d) the inducement; (e) the intention that the plaintiff should rely on it; (f) the alteration by the plaintiff of his or her position relying on the misrepresentation; and (g) the resulting loss or damage to the plaintiff: see *Lysko v. Braley* (2006), 79 O.R. (3d) 721, [2006] O.J. No. 1137 at para. 30 (C.A.).

[181] As I have noted, in attempting to dance around the difficulties associated with certifying a class action based on negligent misrepresentation, the statement of claim has bundled together allegations of both negligence and negligent misrepresentation under the single heading of "Negligence". The pleading of negligent misrepresentation is lacking in "careful particularity", but, read generously, it does include allegations that the defendants, other than the FFC Directors:

- owed a duty of care to the Class;
- negligently created the Gift Program promotional materials;
- knew or ought to have known that Class members would be relying on the accuracy of those materials;
- knew or ought to have known that the materials were inaccurate;
- failed to take steps to correct the inaccuracy;
- failed to explain that the cash and in kind donations were granted to the charities conditionally and on terms limiting their use;
- failed to disclose to Class members that there was no charitable intent to the Gift Program and that the primary purpose was to financially benefit the defendants; and
- that Class members relied on the representations contained in the promotional materials to their detriment.

[182] The plaintiff says in his factum that "[T]he facts alleged in the Claim that support the claim for negligent misrepresentation are included, above, in the facts that support the claim in negligence, *simpliciter*." He says that the defendants created promotional materials that contained

material misstatements and omissions when they knew or ought reasonably to have known that the Class members would rely on these misrepresentations to their detriment, which in fact occurred.

[183] Reading the pleading generously, as I must, with due allowance for drafting deficiencies, including the lack of particulars, I find that the plaintiff has adequately pleaded a cause of action for negligent misrepresentation against the defendants identified above.

(c) Fraud and Fraudulent Misrepresentation

[184] The plaintiff pleads that the Gift Program was an elaborate fraud, planned and created by the ParkLane Defendants, Appleby and the Gleesons for the purpose of profiting themselves by approximately $100 million at the expense of Class members. He also pleads that these defendants fraudulently misrepresented to the Class that they would receive tax benefits, which they knew or ought to have known would not occur, and that the Class members relied on these representations. He alleges that the defendants knew, or were reckless or willfully blind to, the fact that the representations in the promotional materials were untrue.

[185] ParkLane does not contest that there is an adequately pleaded cause of action for fraudulent misrepresentation. It submits, however, that the claims in fraud are, in substance, claims for fraudulent misrepresentation and disclose no separate cause of action. The other defendants make similar submissions and also assert that the plaintiff has failed to provide sufficient particulars of the alleged fraud.

[186] A pleading of fraudulent misrepresentation (also referred to as deceit) requires that there be: (a) a false representation of fact; (b) made with knowledge of its falsehood or recklessly, without belief in its truth; (c) with the intention that it should be acted upon by the plaintiff; and (d) that actually induces the plaintiff to act on it to his or her detriment: *Parna v. G & S Properties Ltd.*, [1971] S.C.R. 306, 15 D.L.R. (3d) 336; *McKenna v. Gammon Gold Inc. et al.*, above (S.C.J.), aff'd on this issue on motion for leave to appeal, 2010 ONSC 4068 at para. 20 (Div. Ct.).

[187] Fraud is the deprivation of another's property by dishonest means. While many of the classic definitions of fraud have a component of false representation (see *Parna v. G. & S. Properties Ltd.*, above, at S.C.R. 316) or deceit (see *Re London and Globe Finance Corp*., [1903] 1 Ch. 728, [1900-3] All E.R. Rep. 891, 88 L.T. 194, 10 Mans. 198 at 732-33 [cited to Ch.]), other cases have held that these definitions are not exhaustive and fraud can simply mean the dishonest deprivation of someone else's property. For example, in *Scott v. Commissioner of Police for the Metropolis*, [1974] 3 All E.R. 1032, [1975] A.C. 819, 60 Cr. App. Rep. 124, 181 Sol. Jo. 863 (H.L.) [cited to All E.R.], Viscount Dilhorne held at p. 1038:

> The definition of "defraud" in the *London and Globe Finance case* is not exhaustive and the word ordinarily means: "... to deprive a person dishonestly of something which is his or of something to

> which he is or would or might but for the perpetration of the fraud, be entitled."

[188] This is consistent with the definition of the criminal offence of fraud set out in s. 380 of the *Criminal Code*, R.S.C. 1985, c. C-46:

> Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security …[is guilty of an offence]. [emphasis added].

[189] In *Harland v. Fancsali* (1993), 13 O.R. (3d) 103, [1993] O.J. No. 961 (Gen. Div.) at paras. 15-17, Ferguson J. pointed out that fraud is broader than deceit and there is no need to prove a false representation:

> Many of the texts and cases are not very clear about the relationship and differences between a civil claim based on fraud and one based on deceit. It would appear that a remedy for fraud was originally only available in equity but that in current theory it would be more helpful to simply consider it as a category of liability based on unjust enrichment (Klar, *Remedies in Tort*, vol. 1 (Toronto: Carswell, 1987), at pp. 5-11; Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983), pp. 280-82) (where the defendant has benefited at the expense of the plaintiff) or, more generally, as simply a tort for which the court will grant a remedy to restore the plaintiff to his original position or compensate him for any loss caused.
>
> As a theory of liability, fraud is much broader in scope than deceit. There is no need to prove a false representation. Indeed, the courts have recognized that it is difficult, if not impossible, to define fraud because it is capable of being committed in endless forms and new forms continually arise: see Klar, *Remedies in Tort*, supra, pp. 511-12.
>
> Justice Montgomery reviewed the definitions of fraud in *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1990), 75 O.R. (2d) 513 (Gen. Div.). Perhaps the most general definition he quoted was that "defraud" means to deprive a person dishonestly of something which is his or of something to which he is or would or might, but for the perpetration of the fraud, be entitled.

[190] Fraud, in its widest sense, may include a component of deceit or misrepresentation, but it need not necessarily do so.

[191] In this case, the pleading of fraud refers not only to the alleged fraudulent misrepresentation (which was in essence, “you will receive a valid charitable receipt much greater than your cash contribution”), but also to the allegation that the defendants constructed and participated in a dishonest scheme to siphon the plaintiff’s charitable donations out of the charities and into their own pockets. The allegations in the statement of claim, read generously, are broad enough to include fraud by deceit and fraud by other dishonest acts.

[192] I agree with the submission of counsel for the plaintiff that some of the defendants could be found liable for having committed a fraud, without necessarily having made fraudulent misrepresentations, and other defendants could be liable for both fraud and fraudulent misrepresentation.

[193] I therefore conclude that there are sufficient pleadings of fraud and fraudulent misrepresentation against the defendants identified above. The role of each defendant in the alleged fraud is sufficiently spelled out in the pleading to make it clear what acts made up the fraud.

(d) Conspiracy

[194] The plaintiff pleads that all the defendants, other than the Lawyers, the FFC Foundation and the FFC Directors, engaged in a conspiracy to cause harm to the plaintiff and the Class. He also says that they agreed to act unlawfully, the predominant purpose of which was to cause injury to the plaintiff and the Class and that they did in fact cause injury. Alternatively, the plaintiff says that the defendants entered into an agreement to engage in unlawful conduct directed towards the Class, which they knew or ought to have known would cause injury, and which in fact caused injury to the Class by the loss of their donations. The allegations of conspiracy, and the particulars, are set out in paras. 95 to 106 of the statement of claim.

[195] A pleading of conspiracy must include the following particulars:

(a) the parties and their relationship;

(b) an agreement to conspire;

(c) the precise purpose or objects of the alleged conspiracy;

(d) the overt acts that are alleged to have been done by each of the conspirators; and

(e) the injury and particulars of the special damages suffered by reason of the conspiracy.

See *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 at para. 90, rev'd on other grounds (2009), 96 O.R. (3d) 252, [2009] O.J. No. 1874 (Div. Ct.); *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97,

[1998] O.J. No. 391 (C.A.); *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd*., [2002] O.J. No. 1465 (S.C.J.); *Cineplex Corporation v. Viking Rideau Corporation* (1985), 28 B.L.R. 212, [1985] O.J. No. 304 (Ont. H.C.J.).

[196] There are two different ways that the tort of conspiracy may be established:

> (a) by proof of "simple motive conspiracy," e.g. that the defendants had a purpose of injuring the plaintiff; or
>
> (b) by proof of "unlawful conduct conspiracy" or "unlawful means conspiracy" - that the defendants were engaging in unlawful conduct that they knew or ought to have known would injure the plaintiff.

[197] In *Harris v. GlaxoSmithKline Inc.* (2010), 101 O.R. (3d) 665, [2010] O.J. No. 1710, Perell J. identified the elements of the tort of conspiracy and the two different ways in which a conspiracy may be committed, and therefore pleaded, at para. 74:

> In Canada, the tort of conspiracy can be committed in two discrete ways that may arise on the same set of facts; namely, (1) by two or more persons using some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff; and (2) by two or more persons using unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff. The other elements of the tort of conspiracy are: (a) an agreement to injure between two or more persons; (b) acts in furtherance of the agreement to injure; and (c) the plaintiff suffering damages as a result of the defendants' conduct.

[198] Perell J. referred to the leading Canadian case of *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, in which the Supreme Court of Canada defined the tort of conspiracy as follows, at para. 33-34:

> …[T]he law of torts does recognize a claim against [Defendants] in combination as the tort of conspiracy if:
>
> (1) whether the means used by the Defendants are lawful or unlawful, the predominant purpose of the Defendants' conduct is to cause injury to the Plaintiff; or
>
> (2) where the conduct of the Defendants is unlawful, the conduct is directed towards the Plaintiff (alone or together with others), and the Defendants should know in the circumstances that injury to the Plaintiff is likely to and does result.

> In situation (2) it is not necessary that the predominant purpose of the Defendants' conduct be to cause injury to the Plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the Defendants should have known that injury to the Plaintiff would ensure. In both situations, however, there must be actual damage suffered by the Plaintiff.

[199] In *Agribrands Purina Canada Inc. v. Kasamekas*, [2011] O.J. No. 2786, 2011 ONCA 460, the Court of Appeal identified the following elements of the tort of unlawful conduct conspiracy:

> (a) they act in combination, that is, in concert, by agreement or with a common design;
>
> (b) their conduct is unlawful;
>
> (c) their conduct is directed towards the respondents;
>
> (d) the appellants should know that, in the circumstances, injury to the respondents is likely to result; and
>
> (e) their conduct causes injury to the respondents.

[200] The Court of Appeal confirmed that the "unlawful conduct" component of this form of conspiracy may include conduct that is "wrong in law", but not necessarily actionable in private law. This could include, for example, breach of a criminal statute or breach of a statute that does not confer a civil cause of action. The Court of Appeal stated, at paras. 37-38:

> It is clear from that jurisprudence that quasi-criminal conduct, when undertaken in concert, is sufficient to constitute unlawful conduct for the purposes of the conspiracy tort, even though that conduct is not actionable in a private law sense by a third party. The seminal case of *Canada Cement LaFarge* is an example. So too is conduct that is in breach of the *Criminal Code*. These examples of "unlawful conduct" are not actionable in themselves, but they have been held to constitute conduct that is wrongful in law and therefore sufficient to be considered "unlawful conduct" within the meaning of civil conspiracy. There are also many examples of conduct found to be unlawful for the purposes of this tort simply because the conduct is actionable as a matter of private law. In Peter T. Burns & Joost Blom, *Economic Interests in Canadian Tort Law* (Markham: LexisNexis, 2009), the authors say this at p. 167-168:

> There are two distinct categories of conduct that can be described as comprising "unlawful means": conduct amounting to an independent tort or other actionable wrong, and conduct not actionable in itself.
>
> ...
>
> Examples of conspiracies involving tortious conduct include inducing breach of contract, wrongful interference with contractual rights, nuisance, intimidation, and defamation. Of course, a breach of contract itself will support an action in civil conspiracy and, as one Australian court has held, the categories of "unlawful means" are not closed.
>
> The second category of unlawful means is conduct comprising unlawful means not actionable in itself.
>
> ...
>
> The first class of unlawful means not actionable in themselves, but which nevertheless supports a conspiracy action, is breach of a statute which does not grant a private right of action, the very instance rejected in *Lonrho* (1981) by the House of Lords. A common case is a breach of labour relations legislation, and another is the breach of a criminal statute such as the Canadian *Criminal Code*.
>
> What is required, therefore, to meet the "unlawful conduct" element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort.

[201] The plaintiff's pleading sets out a proper cause of action for unlawful conduct conspiracy. It is alleged that the ParkLane Defendants, "Trustee Gleeson", and the Gleesons:

(a) acted by agreement;

(b) to engage in unlawful conduct, namely the allegedly fraudulent Gift Program;

(c) which was directed at Class members;

(d) which they knew or ought to have known would cause injury to the Class;

(e) and that injury did, in fact, result.

[202] The primary objection made by the defendants is that the conspiracy claim adds nothing, is "merged" in the underlying torts, and should be struck – see Lord Denning M.R. in *Ward v. Lewis*, [1955] 1 All E.R. 55 (C.A.) at 56:

> It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort means nothing. The prior agreement merges in tort.

See also *McKenna v. Gammon Gold Inc.* (Div. Ct.), above, at paras. 62-76; *Normart Management Ltd v. West Hall Redevelopment Co.* [1996] O. J. 3655 (S.C.J.), aff'd [1998] O.J. No. 329 (C.A.).

[203] Put another way, where the plaintiff complains that the defendants planned to do something and then did it, the pleading of conspiracy adds nothing: *Apple Bee Shirts Ltd. v. Lax* (1988), 27 C.P.C. (2d) 226 (Ont. H.C.J.).

[204] Lord Denning amplified on the rationale of the merger principle in *Ward v. Lewis*, above, at p. 56:

> The prior agreement merges in the tort. A party is not allowed to gain an added advantage by charging conspiracy when the agreement has become merged in the tort. It is sometimes sought, by charging conspiracy, to get an added advantage, for instance in proceedings for discovery, or by getting in evidence which would not be admissible in a straight action in tort, or to overcome substantive rules of law, such as here, the rules concerning republication of slanders. When the court sees attempts of that kind being made, it will discourage them by striking out the allegation of conspiracy on the simple ground that the conspiracy adds nothing when the tort has in fact been committed.

[205] In para. 96 of the statement of claim, the plaintiff pleads that the defendants conspired to make fraudulent representations. There are pleadings in paragraphs 98 and 99 that the defendants agreed to participate in a "scheme" to acquire the Class member's money and, in para. 104, that the defendants conspired to commit a fraud. The plaintiff relies upon the same conduct for the claims for fraud and fraudulent misrepresentation.

[206] The defendants say that in substance the pleading of conspiracy is that the defendants conspired to engage in a fraudulent scheme to separate the Class members from their money. The underlying facts supporting the conspiracy claim are the same facts that are pleaded in relation to the fraud and fraudulent misrepresentation claims.

[207] The plaintiff relies upon *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, a leading case on the pleading of conspiracy, and on the "plain and obvious" test on a motion to strike a pleading as disclosing no cause of action. In that case, Wilson J. refused to give effect to an argument that the conspiracy claim had merged with the tort claim, concluding that the issue should be left to the trial judge to determine after considering all the evidence. She stated at paras. 53-55:

> Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in paragraph 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.
>
> In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.
>
> This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other

> nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

[208] *Hunt v. Carey Canada Inc.* was discussed recently by the Divisional Court in an appeal from a certification decision in *McKenna v. Gammon Gold Inc.*, [2011] O.J. No. 3240, 2011 ONSC 3782, a case involving alleged misrepresentations affecting the price of the shares of a publicly-traded company. I had adjourned the motion for certification, pending the delivery by the representative plaintiff of particulars of the special damages allegedly sustained that were separate and distinct from the damages arising from the underlying tort. Leave to appeal on this issue was granted, as well as on an issue related to the conspiracy claim on behalf of purchasers in the secondary market. The Divisional Court (Herman and Swinton JJ., Wilton-Siegel J. concurring in the result) held that the plaintiff was not required to provide particulars as a precondition to certification of the conspiracy claim.

[209] The Divisional Court reviewed a number of authorities on the issue, including *Hunt v. Carey Canada Inc*. It noted that in *Yordanes v. Bank of Nova Scotia*, [2006] O.J. No. 280 (S.C.J.), Cullity J., following *Hunt v. Carey Canada Inc.*, had rejected the idea that a conspiracy plea would only be certified if the damages claimed relate to losses not covered by the damages claimed in respect of the other pleaded torts. In *Dean v. Mister Transmission (International) Ltd.* (2008), 66 C.P.C. (6th) 287, [2008] O.J. No. 4372 (S.C.J.), Gray J., following the decision of the Court of Appeal in *Smith v. National Money Mart Co.*, [2006] O.J. No. 1807 (C.A.), had also left this issue for trial.

[210] On the other hand, in *Normart Management Ltd. v. West Hall Redevelopment Co.*, the Court of Appeal upheld a decision to strike a conspiracy claim on the basis that it would have no impact on the success or failure of the action. The Court of Appeal held, per Finlayson J.A.:

> [T]his court must determine whether the allegations relating to the claim of conspiracy and the ensuing damages are substantially the same as those of the cause of action for breach of contract and fiduciary duty, such that the two causes of actions relate to the same underlying factual foundation and no significant differences between the two causes of actions emerge.

[211] The Divisional Court in *McKenna v. Gammon Gold Inc.* concluded that these decisions could be reconciled by the application of the principle set out immediately above. It stated, at para. 62:

> … at the pleadings stage of a conspiracy claim, the court's task is to determine whether the allegations relating to the claim of conspiracy and the ensuing damages are substantially the same as those pleaded in another cause of action such that the conspiracy claim adds nothing.

[212] The Divisional Court put the test as follows, at para. 64:

> The question the court needs to consider is whether it is plain and obvious that the conspiracy claim adds nothing to the other claims. Is it plain and obvious that if the [other cause(s) of action] claim does not succeed, the conspiracy claim cannot succeed; and if the [other cause of action] claim does succeed, is it plain and obvious that the conspiracy claim adds nothing further?

[213] It will be helpful for the analysis to juxtapose this test with the observation of Wilson J. in *Hunt v. Carey Canada Inc.* at para. 55 that:

> If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy.

[214] I take the test set out by the Divisional Court to require me to determine whether it is plain and obvious that if the other causes of action do not succeed, the conspiracy claim could also not succeed, or that if the other cause of action does succeed, the conspiracy claim could add nothing.

[215] In applying that test, I am required to construe the pleading generously, having regard, among other things, to the plaintiff's lack of access to key documents and discovery information at the pleadings stage. This observation is particularly apt in a conspiracy pleading, where the conduct complained of is invariably outside the plaintiff’s knowledge. Cumming J. commented on this very point in *North York Branson Hospital v. Praxair Canada Inc.*, [1998] O.J. No. 5993, 84 C.P.R. (3d) 12 (Gen. Div.), at para. 22:

> In truth, the very nature of a claim of conspiracy is that the tort resists detailed particularisation at early stages. The relevant evidence will likely be in the hands and minds of the alleged conspirators. Part of the character of a conspiracy is its secrecy and the withholding of information from alleged victims. The existence of an underlying agreement bringing the conspirators together, proof of which is a requirement borne by a plaintiff, often must be proven by indirect or circumstantial evidence. A conspiracy is more likely to be proven by evidence of overt acts and statements by the

> conspirators from which the prior agreement can be logically inferred. Such details would not usually be available to a plaintiff until discoveries. These considerations and the general theme of Hunt, instructing courts not to shy away from difficult litigation, also militate against holding pleadings in civil conspiracy cases to an extraordinary standard.

[216] This is a case in which several causes of action are asserted against five sets of defendants. The allegations of conspiracy in the pleading are general and it is impossible to speculate what constellation of facts or combination of facts may ultimately be proven at trial and what underlying causes of action may ultimately be established against which defendants. It is possible, for example, that the unlawful conduct of the defendants might be sufficient to support the underlying cause of action, such as misrepresentation, fraud, or breach of the *Consumer Protection Act, 2002*, but that the cause of action itself might fail for any number of reasons, leaving the cause of action for conspiracy still standing.

[217] I am unable to say that it is plain and obvious that if none of the several causes of action succeeds, the conspiracy claim could not succeed, or, that if one of those claims does succeed, the conspiracy claim would add nothing.

[218] I prefer, therefore, in this complex and multi-party action, to adopt the course suggested by Wilson J. in *Hunt v. Carey* and to leave it to the trial judge to determine, after all the evidence is in, whether conspiracy and any of the other causes of action have been made out and, if so, whether the conspiracy claim adds anything.

[219] Ms. Gleeson submits that there is no cause of action against her for conspiracy, in her capacity as an officer of GMA, for her actions on behalf of the corporation.

[220] In *Normart Management Ltd. v. West Hill Redevelopment Co..*, above, the Court of Appeal observed, at para. 18:

> It is well established that the directing minds of corporations cannot be held civilly liable for the actions of the corporations they control and direct unless there is some conduct on the part of those directing minds that is either tortious in itself or exhibits a separate identity or interest from that of the corporations such as to make the acts or conduct complained of those of the directing minds: see *Scotia McLeod Inc. v. Peoples Jewellers Ltd*. (1995), 26 O.R. (3d) 481 at 491 (C.A.).

See also: *Craik v. Aetna Life Insurance Co. of Canada*, [1995] O.J. No. 3286 at para. 23 (Gen. Div.), aff'd. [1996] O.J. No. 2377 (C.A.); *Accord Business Credit Inc. v. Bank of Nova Scotia*, [1997] O.J. No. 2562 at para. 34 (Gen. Div.).

[221] In *Normart*, however, the Court of Appeal noted that there was no factual basis for the allegation that the individual directors were acting outside their corporate capacities. In the case before me, there are allegations that the Gleesons were acting in their own personal capacities, with a view to their own enrichment. That is sufficient to make out a cause of action in their personal capacities.

[222] As I will explain when I discuss the breach of contract claim against Gleeson, there is no cause of action against Gleeson, referred to as "Trustee Gleeson", in his capacity as Trustee of the Donations Canada Trust, as he is no longer a trustee of that trust. The cause of action against him for conspiracy, in his personal capacity as opposed to his capacity as a trustee, will be certified.

[223] In summary, a cause of action in conspiracy will be certified against the ParkLane Defendants, Appleby and the Gleesons.

(e) Breach of Consumer Protection Legislation

[224] The plaintiff pleads that the Gift Program was a "consumer transaction" and as such, was governed by the *Consumer Protection Act, 2002* and comparable legislation in other provinces. The claim under the statute is asserted against all defendants other than Appleby and the Lawyers.

[225] There are broad pleadings that:

- the ParkLane Defendants and the Gleesons marketed and sold the Gift Program to the Class;
- these defendants made misrepresentations to the Class concerning the Gift Program; and
- these defendants had a duty to comply with the *Consumer Protection Act, 2002*, and failed to do so.

[226] The plaintiff alleges that these defendants engaged in unfair practices prohibited by s. 17(1) of the *Consumer Protection Act, 2002*, by making false, misleading or deceptive representations and unconscionable representations concerning the Gift Program, giving rise to a remedy in rescission or damages under s. 18.

[227] The *Consumer Protection Act, 2002* applies to "consumer transactions" if the "consumer" or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place (s. 2(1)). A "consumer" is defined as "an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes" and a "consumer transaction", means "any act or instance of conducting business or other dealings with a consumer, including a consumer agreement" (s. 1).

[228] The substantive and procedural rights conferred by the statute apply despite any agreement or waiver to the contrary (s. 7(1)).

[229] The statute prohibits, among other things, an "unfair practice" (s. 17(1)). This includes making a "false, misleading or deceptive representation", defined by s. 14(1) to include a variety of statements, including:

> 1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.
>
> …
>
> 6. A representation that the goods or services are available for a reason that does not exist.
>
> …
>
> 8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.
>
> …
>
> 13. A representation that the transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.
>
> 14. A representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive.

[230] It is also an unfair practice, and therefore prohibited, to make an "unconscionable representation" (s. 15(1)). Section 15(2) provides:

> Without limiting the generality of what may be taken into account in determining whether a representation is unconscionable, there may be taken into account that the person making the representation or the person's employer or principal knows or ought to know,
>
> …

> (c) that the consumer is unable to receive a substantial benefit from the subject-matter of the representation;
>
> …
>
> (e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer;
>
> (f) that the terms of the consumer transaction are so adverse to the consumer as to be inequitable;
>
> (g) that a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment; or
>
> …

[231] An unfair practice gives rise to a remedy in rescission under s. 18(1) or where rescission is not possible, damages, including exemplary or punitive damages, under s. 18(2).

[232] To qualify for rescission or damages, section 18(3) requires that notice of rescission or recovery of damages must be given within one year. However, the Court has jurisdiction under s. 18(15) to waive this requirement if it is in the interests of justice to do so.

[233] Cannon's argument on this cause of action is, in summary, as follows:

> (a) he and Class members fall within the definition of "consumer" in the *Consumer Protection Act, 2002*, because they are "an individual acting for personal, family or household purposes … s. 1;
>
> (b) a "consumer transaction", is "any act or instance of conducting business or other dealings with a consumer, including a consumer agreement": s. 1;
>
> (c) a "consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment": s.1;
>
> (d) a "consumer transaction" is necessarily broader than a "consumer agreement" and can include agreements that are for something other than the supply of goods or services;
>
> (e) the general "anti-avoidance" section of the statute provides that, in determining whether the statute applies to an "entity or transaction", the court is required to "consider the real substance of the entity or transaction and in so doing may disregard the outward form": s. 3;

(f) the defendants engaged in conduct that was an unfair practice and also engaged in making unconscionable representations;

(g) the *Consumer Protection Act, 2002* applies to "all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place.": s.2; and

(h) since all the Defendants against whom the Plaintiff claims this relief are located in Ontario, except for TTL, the *Consumer Protection Act, 2002* will apply to all Class members' claims against all these Defendants, except TTL. The *Consumer Protection Act, 2002* will apply in respect of the claims of Ontario Class members as against TTL, as well. Only the consumer protection claims asserted against TTL on behalf of Class members located in other provinces will require reference to the legislation in the other provinces.

[234] The plaintiff states no authority or precedent for the proposition that a claim such as this, which involves no sale of goods or provision of services, falls within the *Consumer Protection Act, 2002*. Nor is he required to do so. The novelty of the cause of action is not a factor in the application of the s. 5(1)(a) test: *Khanna v. Royal College of Dental Surgeons of Ontario* (2000), 47 O.R. (3d) 95, [2000] O.J. No. 946; *Hunt v. Carey Canada Inc.*, above at S.C.R. p. 980:

[235] The ParkLane Defendants, FFC Foundation and the Gleesons have advanced some cogent arguments in support of the proposition that the plaintiff has no cause of action under the *Consumer Protection Act, 2002.* In summary, these arguments are:

(a) in substance, Cannon's donation to the program was a "gift" – it had to be a gift, with the requisite donative intent, in order to qualify for a tax credit – and the *Consumer Protection Act, 2002* is plainly not intended to apply to gifts;

(b) Cannon was not entering into an agreement requiring the payment by a "consumer" to a "supplier" in exchange for the supply of "goods" or "services";

(c) a "consumer transaction" is generally associated with the exchange of goods and services and a "consumer" is defined in the *Canadian Oxford Dictionary* as "(i) a person who consumes, esp. one who uses a product and (ii) a purchaser of goods and services" – the ordinary grammatical reading of the statute is inconsistent with its application to charitable donations; and

(d) the overall scheme of the *Consumer Protection Act, 2002* is intended to regulate ordinary consumer agreements for the supply of

> goods and services, as well as specific sectors of the consumer market, such as internet agreements (sections 37-40), repair services for motor vehicles and goods (sections 55-65), credit agreements (sections 66-76) and leases (sections 86-90) – the fact that charitable giving is not included in the regulated transactions suggests that the statute was intended to regulate only ordinary and well-understood forms of consumer agreements.

[236] There are some equally compelling answers to the defendants' submissions. First, the *Consumer Protection Act, 2002* is, as its name suggests, designed for the protection of the public – it is remedial legislation and should be liberally construed in order to give effect to its objects: *Weller v. Reliance Home Comfort Limited Partnership*, 2011 ONSC 3148, [2011] O.J. No. 2344 at para. 38.

[237] Second, it is relatively new legislation and the Court should be reluctant to define its scope on a pleadings motion. Horkins J. made the observation recently in *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044, [2011] O.J. No. 3936 at para. 134:

> For most of the *Consumer Protection Act* causes of action, the jurisprudence is either unsettled or non-existent. As a result, it is important to respect the principle that matters of law not fully settled in the jurisprudence be permitted to proceed.

[238] Third, s. 3 of the statute requires the Court to consider the substance and not the form of the transaction. While the form of Cannon's contribution to the Gift Program was a "gift", there is certainly an argument, which was advanced by C.R.A., that the substance of his contribution was not a gift, because he lacked the necessary donative intent. That is an issue of fact that will require an evidentiary record. It is also arguable that in providing an elaborate structure that would ramp up Cannon's donation by a multiple of four, the defendants were in fact providing a "service" or that, at the very least, the arrangement was a "consumer transaction" within the scope of the statute.

[239] Fourth, while the ordinary dictionary definitions of "consumer" or "consumer transaction" are more limited, the statute contains its own definitions which expand the ordinary meaning of these terms. Cannon is arguably a "consumer" within the meaning of the statute because he was "acting for personal … purposes" and the defendants were arguably engaged in a "consumer transaction", because they were "conducting business" or had "other dealings" with Cannon.

[240] Fifth, it may not be stretching the scope of the language to say that, in substance, the Gift Program was selling a financial product or service, other than a product or service covered by the exceptions outlined in s. 2(2), below. ParkLane's own literature referred to the Gift Program as part of its "suite of products".

[241] Sixth, the broad scope of the statute is illustrated by the exceptions set out in s. 2(2), which include:

> (a) consumer transactions regulated under the *Securities Act*, R.S.O. 1990, c. S.5;
>
> (b) financial services related to investment products or income securities;
>
> (c) financial products or services regulated under the *Insurance Act*, the *Credit Unions and Caisses Populaires Act, 1994*, the *Loan and Trust Corporations Act* or the *Mortgage Brokerages, Lenders and Administrators Act, 2006;*
>
> (d) consumer transactions regulated under the *Commodity Futures Act*;
>
> (e) prescribed professional services that are regulated under a statute of Ontario;
>
> (f) consumer transactions for the purchase, sale or lease of real property, except transactions with respect to time share agreements as defined in section 20; and
>
> (g) consumer transactions regulated under the *Residential Tenancies Act.*

[242] Many of these exceptions, such as transactions in securities, investment products, financial products and commodity futures, would not normally be thought of as dealings in "goods and services" or as "consumer transactions". The fact that they have been specifically excluded from the scope of the *Consumer Protection Act, 2002*, suggests that other financial products or plans, such as a charitable donation program with enhanced tax benefits, might well be covered by the statute.

[243] While an ordinary charitable donation would be highly unlikely to fall within the *Consumer Protection Act, 2002*, the Gift Program itself was far from ordinary. Bearing in mind the liberal test under s. 5(1)(a) of the *C.P.A.*, the caution that the novelty of the cause of action is not a bar, and the importance of allowing unsettled questions to be determined on a full record, it would be wrong, in my view, to resolve this issue at this stage.

[244] I therefore find that the plaintiff has pleaded a tenable cause of action under the *Consumer Protection Act, 2002* against the defendants identified above. All those defendants, other than TTL, are located in Ontario and are therefore subject to the application of the statute. The statute will apply to TTL insofar as the claims of Ontario Class members are concerned. The liability, if any, of TTL in relation to Class members outside Ontario will fall to be determined

under the consumer protection legislation of the particular province in which the class member resides. If necessary, this can be determined as a sub-issue.

[245] Insofar as Appleby and the Bermuda Trust are concerned, I have previously ruled that there is no evidence of a contractual relationship between Cannon and Appleby to support service of the statement of claim under the *Consumer Protection Act, 2002* out of the jurisdiction on Appleby in Bermuda: see *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 3486, 2010 ONSC 4517.

(f) Breach of Contract

[246] The plaintiff asserts a claim against ParkLane "and the Donations Canada Trustees" for breach of contract, rescission, and return of monies paid under the Gift Program. The pleading alleges that there was a contract between the plaintiff and ParkLane and the Donations Canada Trustees and that ParkLane and the trustees breached the contract, causing damages to the plaintiff and Class members. It further alleges that the terms of the contract between the plaintiff and ParkLane and the Donations Canada Trustees were set out in the promotional materials. The terms included, among other things, that in exchange for the donor's cash donation, he or she would receive a charitable receipt that would be accepted by C.R.A. as a valid and legitimate claim for charitable donation tax credits.

[247] The pleading continues that there was a fundamental and material breach of the terms of their contracts by ParkLane and the Donations Canada Trustees, that the Gift Program was a fraud and that virtually none of the Class Members' donations were gifted to charities and the Class members did not receive valid receipts recognized by C.R.A.

[248] The plaintiff claims rescission of the contract and return of all monies paid under the Gift Program.

[249] In *Banyan Tree*, the plaintiffs had made a similar pleading to the effect that it was an express or implied term of the contract between participants and the gift program that participants would receive a charitable tax receipt that would be recognized by C.R.A. In that case, the gift program defendants did not oppose certification of that cause of action.

[250] ParkLane does not contest the cause of action for breach of contract. It does, however, take issue with the proposition that the claim gives rise to common issues, a subject I will discuss below.

[251] As noted earlier, and as pleaded, Gleeson was the original trustee of the Donations Canada Trust and the pleading asserts that Sarah Stanbridge became the trustee in 2006. She continued in that role until the action was dismissed against her on June 27, 2011, as a result of a settlement with the plaintiff, whereby she agreed to produce all documents in her possession or control relating to the Donations Canada Trust.

[252] I agree with the submission on behalf of Gleeson that the only possible breach of contract claim against him would be in his capacity as a trustee of the Donations Canada Trust, a position that he no longer holds and that, on the face of the pleading, he ceased to hold in 2006.

[253] In an earlier decision in this proceeding, relating to the Bermuda Trust, *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 3486, 2010 ONSC 4517, I noted at para. 65 that a trust does not have an independent legal status. It operates through its trustees and it is held accountable through its trustees – referring to *Foo v. Yakimetz*, [2002] O.J. No. 3958 at para. 72 (S.C.J.); *Kingsdale Securities Co. v. Canada (MNR)*, [1974] 2 F.C. 760, [1974] F.C.J. No. 182 (C.A.).

[254] In this case, the substance of the pleading is that the plaintiff and the Class members entered into a contract with Donations Canada Trust through its trustees. A breach of contract claim can only be asserted by suing the trust through its current trustees. Gleeson was not a trustee at the time the proceeding was commenced. There is no claim against him in his personal capacity in relation to his activities as trustee and there is no claim that he acted outside his duties. For this reason, any pleading against Gleeson in his capacity as trustee of the Donations Canada Trust should be struck.

(g) Unjust Enrichment

[255] Cannon's pleading, under the heading "Restitution, Unjust Enrichment, Waiver of Tort, Constructive Trust", is a hodgepodge of allegations against "the Defendants, or some of them". It mixes causes of action and remedies to assert an entitlement to "damages on the basis of unjust enrichment and constructive trust." I remind myself, however, that I am required to read the pleading generously and with due allowance for drafting deficiencies.

[256] The plaintiff claims that the actions of the defendants, other than the Lawyers and the FFC Directors, were intended to induce the plaintiff and Class members to invest in the Gift Program and that those defendants have received some or all of the money paid by the Class to the Gift Program. It is alleged that the Gift Program was a fraud, that the Class members have suffered a deprivation and that there has been enrichment of the defendants without juristic reason. The plaintiff pleads waiver of tort and seeks an order for restitution or a declaration that the defendants hold the proceeds on constructive trust.

[257] The Supreme Court of Canada set out the essential elements to establish a claim for unjust enrichment in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, [2004] S.C.J. No. 21, at para. 30. The plaintiff must show that:

> (a) the defendant was enriched;
>
> (b) there was a corresponding deprivation to the plaintiff; and
>
> (c) there was no juristic reason for the enrichment.

[258] The ParkLane Defendants do not challenge the pleading of a cause of action for unjust enrichment. For reasons discussed later, however, they take the position that the common issues based on unjust enrichment are not appropriate for certification.

[259] Claims for unjust enrichment against FFC Foundation and the Gleesons have been lumped together with claims against the ParkLane Defendants. There is also a claim against Appleby as trustee of the Bermuda Trust. There is no pleading of unjust enrichment against the FFC Directors.

[260] These defendants argue that the plaintiff's claim for unjust enrichment must fail, because, as pleaded, any enrichment they received was indirect and ancillary, rather than direct.

[261] FFC Foundation argues that this is a case like *Boulanger v. Johnson & Johnson Corp*. (2003), 174 O.A.C. 44, [2003] O.J. No. 2218 or *Singer v. Schering-Plough Canada Inc.*, above, because there is no direct *nexus* between the alleged deprivation of the plaintiff and the alleged enrichment of FFC Foundation and Ms. Gleeson. It says that the re-assessment of Cannon by C.R.A. is not, in itself, indicative of a lack of juristic reason for the funds being retained by FFC Foundation.

[262] Gleeson and GMA make similar submissions, although most of their submissions are based on factual assertions that are not relevant on a motion of this kind. They say that, at best, any benefit or enrichment they may have received was indirect and ancillary and that, at best, the pleading alleges that at some point they received payments from FFC Foundation and other charities.

[263] Appleby makes much the same point. Appleby says that the claim cannot succeed because any benefit to it was only *indirectly* conferred. It submits that for there to be a cause of action for unjust enrichment, the enrichment must be direct, relying on *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, [1992] S.C.J. No. 101 at para. 58; *Boulanger v. Johnson & Johnson Corp*. (2003), 174 O.A.C. 44, [2003] O.J. No. 2218 at para. 20 (C.A.). See also *Singer v. Schering-Plough Inc*., above, at para. 111. It says that on the plaintiff's case as pleaded, the enrichment was indirect, because it is alleged that the plaintiff's funds went initially to ParkLane, then to the charity, then to TTL and finally, to Appleby. In the course of this route, the funds flowed through the charities, which are not even parties to the proceeding and against which the plaintiff makes no allegation of wrongdoing.

[264] The requirement that the benefit to the defendant be "direct" is to ensure that the plaintiff does not recover twice – once from the party who received a direct benefit and again from those who received indirect, incidental or collateral benefits. This point was addressed by Chief Justice Lamer in *Peel (Regional Municipality) v. Canada*, at para. 58:

> While not much discussed by common law authorities to date, it appears that a further feature which the benefit must possess if it is to support a claim for unjust enrichment, is that it be more than an incidental blow-by. A secondary collateral benefit will not suffice.

> To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice -- once from the person who is the immediate beneficiary of the payment or benefit (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. … It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do.

[265] It was on this basis that claims for unjust enrichment were not permitted to proceed against manufacturers where the plaintiffs had purchased the product from retailers: *Boulanger v. Johnson & Johnson Corp*. (C.A.), above, at para. 20 and *Singer* v. *Schering-Plough Canada Inc.*, above.

[266] This case is different. The core allegation in this case is that the defendants engaged in a course of conduct that was conspiratorial and fraudulent, that they intended to enrich themselves at the expense of the donors and that the elaborate structure of the Gift Program was contrived for that very purpose. The funds may have passed through various pockets before they got to any individual defendant, but that is all it was – a pass through. Reading the pleading generously, it cannot be said that the benefit to the defendants was an "incidental blow-by" or a "secondary collateral benefit", to use the words of Chief Justice Lamer in *Peel (Regional Municipality) v. Canada.*

[267] The plaintiff pleads that the donors' money "travelled in a giant circle". Allegedly, some of it was retained by FFC Foundation, some was paid to ParkLane for fees, some was paid to the Gleesons, and some was paid to TTL, which in turn passed on most of what it received to Appleby for the Bermuda Trust.

[268] Whether the benefit, if any, received by these defendants is sufficiently direct to give effect to a successful claim for unjust enrichment is an issue requiring proof at trial, but the pleading itself is sufficient.

[269] Additionally, the allegation that FFC Foundation was enriched by its receipt of funds extracted from the Class due to the fraudulent conspiracy with the defendants is sufficient to meet the "absence of juristic reason" requirement.

[270] Construing the pleading generously, again as I must, there is a pleading that the plaintiff suffered a deprivation, that there was an enrichment of Appleby in its capacity as trustee of the Bermuda Trust and that there was a fraud, which is the antithesis of a juristic reason.

[271] As the ParkLane defendants have conceded that a cause of action of unjust enrichment is made out against them, I conclude that this pleading meets the test under s. 5(1)(a). The claims of unjust enrichment against the other defendants also meet s. 5(1)(a).

(h) Summary Concerning cause of Action

[272] My conclusions concerning the cause of action requirement in section 5(1)(a) is that the plaintiff has pleaded the following causes of action against the defendants set out below:

(a) Negligence: the ParkLane Defendants, Appleby, FFC Foundation, the Gleesons and the Lawyers;

(b) Negligent Misrepresentation: the ParkLane Defendants, the Gleesons, and the Lawyers;

(c) Fraud and Fraudulent Misrepresentation: the ParkLane Defendants, Appleby, and the Gleesons;

(d) Conspiracy: the ParkLane Defendants, Appleby and the Gleesons;

(e) *Consumer Protection Act, 2002*: the ParkLane Defendants, FFC Foundation, and the Gleesons;

(f) Breach of Contract: ParkLane; and

(g) Unjust enrichment and constructive trust: the ParkLane Defendants, FFC Foundation, the Gleesons, and Appleby.

[273] The plaintiff has not pleaded a tenable cause of action against Gleeson in his capacity as a former trustee of the Donations Canada Trust and the action against him in that capacity will be dismissed.

[274] The plaintiff has failed to plead a tenable cause of action against the FFC Directors and the claim against them will be dismissed.

[275] To state the obvious, my conclusions on the cause of action requirement are not to be taken as conclusions on the merits of the plaintiff's cause of action against any defendants. Some of the defendants have made submissions going to the merits of the plaintiff's claims, raising numerous factual arguments to show why, in their view, the plaintiff's claims are bound to fail. That issue is not before me on the certification motion. I will deal with the specific motions for summary judgment of the ParkLane Defendants and the Lawyers later in these reasons.

2. Identifiable Class

[276] Section 5(1)(b) of the *C.P.A.* requires that "there be an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant."

[277] The Class is described above. It consists of residents of Canada who participated in the Gift Program during the period January 1, 2005 to December 31, 2009, the years in which it was offered. The identity of the Class members is readily ascertainable from the records of ParkLane.

[278] The defendants do not dispute that there is an identifiable class. A class similar to this was certified by Justice Lax in *Banyan Tree*. I approve the Class definition.

3. Common Issues

[279] Section 5(1)(c) of the *C.P.A.* requires that the claims of class members raise "common issues". These are defined in section 1 as:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[280] The plaintiff refers to the principles applicable to the common issues analysis, which I summarized in *McKenna v. Gammon Gold* at paras. 125 and 126. No party has taken issue with those principles, but there is considerable disagreement about how they should be applied in this case. I do not propose to re-state those principles, which are well-understood and oft-quoted. The first principle, however, bears repeating: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis. This principle derives from the judgment of Chief Justice McLachlin in the important case of *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 39 and 40:

> Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

> … with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent

[281] The considerations mentioned in the second half of the first paragraph of this extract are properly factors to be considered in the preferability analysis under s. 5(1)(d). The Chief Justice's comment that the analysis should be approached purposively reminds us that the ability to engage in fact finding or legal analysis on a common basis drives the resolution of the claims of the class members and achieves both access to justice and judicial economy. If the issues put forward are simply not capable of resolution on a common basis, these goals cannot be achieved.

[282] I would also emphasize the point that an issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (Sup. Ct.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

[283] I turn to the common issues proposed by the plaintiff.

(a) Did ParkLane and Matt Gleeson as Trustee of the Donations Canada Trust ("Trustee Gleeson") breach their contracts with the Class Members?

[284] I have found that there is no cause of action against Gleeson in his capacity as a former trustee of the Donations Canada Trust, but I have certified a cause of action against ParkLane for breach of contract.

[285] The plaintiff claims that the contract for the Gift Program for the years 2005 to 2009 included substantially the same documents, all of which were executed by Class members when they participated in the program. The Tax Risk Disclosure Statement was not introduced until 2006.

[286] ParkLane's submission on this issue is, essentially, that properly interpreted, the contract documents are clear and unambiguous and do not support Cannon's claims. It says that there is a disconnect between what Cannon says he was "promised" and what the contract actually says. As a result, ParkLane argues, that the breach of contract claim will ultimately have to be determined based on what Cannon, and every other Class member, understood about the contract and the individual circumstances that lead him or her to that understanding. I disagree. The meaning of the contract will be determined objectively, not by what a party may have thought it means.

[287] ParkLane relies upon *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242, 19 C.C.L.I. (4th) 35 (S.C.J.), in which Nordheimer J. declined to certify a breach of contract claim concerning the interpretation of an insurance policy because he found that the plaintiff's claim was fundamentally a "point of sale" misrepresentation case.

[288] In effect, ParkLane's submission is really to interpret the contract and to say that the plaintiff's interpretation is so manifestly wrong that it cannot succeed, so there can be no common issue. This argument actually concedes that there is a common issue of contractual interpretation that is capable of providing an answer applicable to all donors.

[289] I agree with the submission of the plaintiff that the issue is not who will ultimately win the breach of contract issue. The only issue is whether the proposed issue is common to the Class and whether its resolution will advance the proceeding. If ParkLane is correct in its interpretation, there will be a binding determination of the contractual rights of all Class members. If ParkLane is wrong, there will be an equally binding determination in favour of the entire Class.

[290] In *Banyan Tree*, Lax J. certified common issues dealing with the existence of contract terms and whether the contract had been breached by the defendants.[2] She found that the gift program in that case was marketed in common to class members and sold by agents, many of whom were trained in a standard way and were given information that was prepared by the defendants and intended to be used to promote the program. She found that variations from year to year did not detract from the commonality. That is precisely the case here. There are common contractual materials and the Distributors were supplied with standardized information and training.

[291] In this case, the plaintiff pleads that it was an express or implied term of the contract between the plaintiffs and Donations Canada Trust that the charitable tax receipts received by Class members "would be accepted by C.R.A. as valid and legitimate claims for charitable donation tax credits" and that Class members "would receive the tax savings as stated in the promotional materials and the contract."

[292] In my view, the existence of such an implied term is an appropriate common issue. The case is not unlike *Hickey-Button v. Loyalist College of Applies Arts & Technology* (2006), 211 O.A.C. 301, [2006] O.J. No. 2393 at para. 47 and *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019, [2010] O.J. No. 1411 (S.C.J.), in which implied terms of a contract arising out of a university calendar were certified to be determined on a common basis.

[293] To the extent there is an issue of an implied term, this case is similar to *Glover v. Toronto (City)*, [2009] O.J. No. 1523, 70 C.P.C. (6th) 303, in which there was an implied term to provide clean air, which would not depend on individual circumstances. The contract material, although varying slightly from year to year, was substantially the same in each year. To the extent there may be variations that might affect the answers, sub-issues can be developed.

[2] The common issues were: (a) Was it a term of the contract of participation in the Gift Program that participants would receive a charitable donation receipt that would be recognized by Canada Revenue Agency for tax credit purposes? (b) Was it a term of the contract of participation in the Gift Program that participants would not be at risk to repay loans obtained from Rochester? (c) If the answer to (a) and/or (b) is yes, has the contract been breached by the Gift Program Defendants?

(b) Are the Class Members entitled to rescind their contracts with ParkLane and the Donations Canada Financial Trust?

[294] The plaintiff claims rescission, as an alternative to damages, on the grounds of fraud, total failure of consideration, and material misrepresentation inducing the contract. As I have found that the plaintiff has properly pleaded these causes of action, that these pleadings give rise to common issues of fact and law, it is appropriate to certify a common issue of whether Class members are entitled to the remedy of rescission if their claims are made out.

[295] As I have found that the Donations Canada Trust is not properly before the Court, this common issue relates solely to ParkLane and is confined to the common law claim for rescission, as opposed to the claim under the *Consumer Protection Act, 2002*, which is addressed below.

(c) Common Issues Relating to Negligence

[296] The plaintiff proposes the following common issues relating to negligence:

> (i) Did the Defendants owe the Class a duty of care?
>
> (ii) What is the applicable standard of care? Did the Defendants' acts and omissions breach the applicable standard of care?
>
> (iii)Was the gift program so poorly conceived that Harris and the other defendants, or some of them, should have determined that the Class were always unlikely to have received the stated tax benefits? Against those defendants against whom fraud is pled, was this failure to determine that the tax benefit would never be received the result of dishonesty and fraud?
>
> (iv)Was material information about the "back end" transaction missing from the Gift Program documents? If so, was the omission negligent or fraudulent?
>
> (v) Did the Gift Program documents fail to disclose other material information? Was the failure due to negligence? Was the failure due to fraud?

[297] It seems to me that the second sentence in para. (iii) as well as paras. (iv) and (v) relate to fraud and fraudulent misrepresentation and are subsumed under those common issues.

[298] I have found that there is a proper pleading of negligence against the ParkLane Defendants, Appleby, FFC Foundation and the Gleesons. In essence, the pleading against those defendants is that the Gift Program was negligently constructed and that the defendants failed to ensure that C.R.A. would recognize charitable receipts issued pursuant to the Gift Program. It also alleges that the defendants were negligent in continuing the Gift Program after they knew or ought to have known that it was defective.

[299] I have also found that there is a properly pleaded cause of action in negligence against the Lawyers.

[300] In *Banyan Tree*, Lax J. certified similar common issues relating to the existence of a duty of care and whether the duty of care had been breached.[3]

[301] The essence of the defendants' objections relating to the negligence common issues is that the action is, at its core, about express misrepresentations and implicit misrepresentations by omission. The defendants say that liability cannot be established without determining what misrepresentations were made, whether those misrepresentations were material, whether there was reasonable reliance by the donor and whether that reliance caused each Class member's damages. Thus, they say, the issue of liability for negligence will require individual inquiries to determine each Class member's knowledge, motivations and sensitivity to risks.

[302] The defendants focus, as they do throughout this motion, on the role played by the Distributors in the marketing of the Gift Program. ParkLane says that it had no direct dealings with Class members and that it was really the Distributors who were responsible for the "point of sale" representations to the donors. Thus, the defendants all say that each Class member's knowledge depends on the information about the Gift Program that he or she received from the Distributor and other financial advisors. In my view, those objections are not applicable to negligence common issues, but may be applicable to the negligent misrepresentation common issues.

[303] In my view, the first three common issues above are appropriate. The question of breach of duty focuses on whether the Gift Plan was negligently designed. It can be examined by focusing on the structure of the Gift Program and the conduct of the defendants in putting the Program together. It does not require individual inquiries into the actions of particular Class members.

(d) Are ParkLane, Trafalgar Associates, TTL, Appleby Services, the Donations Canada Trustees, GMA, Matt Gleeson and Ms. Gleeson (or any combination thereof) liable to the Class Members for conspiracy?

[304] I have set out above my conclusion that the plaintiff has pleaded a tenable cause of action for conspiracy. The elements of tort of unlawful conduct conspiracy focus on the conduct of the defendant. At the risk of repetition, as noted in *Agribrands*, the Court asks the following questions:

(a) did the defendants act in concert, by agreement or with common design?

(b) was their conduct unlawful?

[3]The common issues were: (d) Did the Gift Program Defendants owe a duty of care to participants? (e) If the answer to (d) is yes, what was the nature and extent of that duty? (f) Has the duty of care owed by the Gift Program Defendants to participants been breached?

(c) was their conduct directed toward the plaintiff and the Class?

(d) did the defendants know that injury to the plaintiff and the Class was likely to result?

(e) did the conduct in fact cause injury to the plaintiff and the Class?

[305] The first four requirements focus exclusively on the defendant's conduct and knowledge. Only the last requirement needs an examination of the effect of the defendant's conduct on the plaintiff and the Class. One could say that a conspiracy claim is ideally suited to class action treatment, because it focuses substantially on the conduct of the defendant.

[306] It is not surprising, therefore, that common issues of conspiracy have been certified in a number of class proceedings – see, for example: *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46 (S.C.J.); *Silver v. Imax Corp.*, above; *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (S.C.J.); *Carom v. Bre-X Minerals* (2000), 51 O.R. (3d) 236 (C.A.), [2000] O.J. No. 4014;*Chadha v. Bayer* (2003), 63 O.R. (3d) 22, [2003] O.J. No. 27 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106.

[307] In this case, it is unlikely that individual inquiries will be required to determine injury to the Class, because the tax deductions claimed by all Class members have been treated in the same manner – all have been disallowed and all Class members have received no deduction in return for their donations.

[308] The defendants argue that the conspiracy claim is not suitable for certification, because the unlawful conduct at issue is fraudulent misrepresentation, which necessitates individual findings of reliance, materiality, reasonableness and causation. They also say that conspiracy requires proof of causation and damages, neither of which can be determined on a common basis, because the Court would have to examine whether the defendants' fraudulent misrepresentation actually caused the plaintiff to take actions that resulted in damages.

[309] I do not agree that the unlawful conduct must necessarily be the fraudulent misrepresentation. It could be fraud by other dishonest acts or a breach of the *Consumer Protection Act, 2002*. The answer to the common issue will focus on the conduct of the defendants, without a need for individual inquiries.

[310] Moreover, the nature of the allegedly unlawful misrepresentation – telling people that in exchange for a $2,500 donation, they would get a $10,000 tax deduction – is such that reliance, materiality, reasonableness and causation would be presumed. Even if it cannot be presumed, the determination of common issues of fact relating to the conduct of the defendants would significantly advance the claim of every Class member.

[311] While the evidence is sparse, as it necessarily will be at this stage, I am satisfied that there is a basis in fact for a common issue of conspiracy in relation to the ParkLane Defendants, the Gleesons and Appleby.

(e) Are ParkLane, Trafalgar Associates, TTL, Appleby Services or the Bermuda Longtail Trust, the Donations Canada Trustees, GMA, Matt Gleeson and/or Ms. Gleeson liable to the Class Members on the basis of fraud or fraudulent misrepresentations?

[312] I have found that there are properly pleaded causes of action against the ParkLane Defendants, Appleby and the Gleesons for fraud and for fraudulent misrepresentation.

[313] In arguing that these claims do not give rise to common issues, the defendants treat the claims as one and then attempt to demonstrate that the fraudulent misrepresentation claim is not an appropriate common issue. They argue that if the fraudulent misrepresentation claim fails then fraud must fail as a common issue as well. They say that claims based on negligent misrepresentation or fraudulent misrepresentation cannot give rise to common issues, due to the presence of individual issues of reliance, materiality, reasonableness and causation that could not be determined in common: see *Williams v. Mutual Life Assurance Co.* (2003), 226 D.L.R. (4th) 112, [2003] O.J. No. 1160 (C.A.), *Zicherman v. The Equitable Life Insurance Company of Canada* (2003), 226 D.L.R. (4th) 131, [2003] O.J. No. 1161 (C.A.), app. for leave to appeal dismissed, [2003] S.C.C.A. No. 280; *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68, [2004] O.J. No. 2242 (S.C.J.) and *Moyes v. Fortune Financial Corp.* (2002), 61 O.R. (3d) 770, [2002] O.J. No. 4297 (S.C.J.), aff'd. (2003), 67 O.R. (3d) 795, [2003] O.J. No. 4731 (Div. Ct.).

[314] Applying the reasoning of the Court of Appeal in *Carom v. Bre-X Minerals Ltd*.(1999), 44 O.R. (3d) 173, [1999] O.J. NO. 1662, aff'd. (19991), 46 O.R. (3d) 315, [1999] O.J. No. 5514, (Div. Ct.), rev'd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.)., to which I will turn in a moment, the defendants say that if their arguments about negligent misrepresentation not being an appropriate common issue are accepted, the same fate should befall the fraudulent misrepresentation claim.

[315] ParkLane and FFC Foundation argue that the claims in this case will require examination of what each Class member was told by one of the 455 "Independent Financial Advisors" (the Distributors) over a period of five years, an analysis of each Class member's particular knowledge, experience, sophistication and risk tolerance and a determination of whether each Class member was induced to act as a result of these representations. Similar arguments, ultimately unsuccessful, were made in *Carom v. Bre-X Minerals Ltd.*

[316] In *Carom v. Bre-X Minerals Ltd.*, there was a claim in fraudulent misrepresentation. It was argued by the defendants there that there was no conceivable commonality since the plaintiff was relying on numerous representations contained in statements originating from Bre-X and some of the defendants over a period of almost four years. The plaintiffs said that these representations were, in effect, a single representation, namely "gold was present in mineable quantities in the Busang." There, as here, it was argued that the statements were received by investors of vastly different sophistication, knowledge and investment strategies.

[317] Winkler J., who heard the certification motion, found at paras. 78 and 79 that the claim for negligent misrepresentation was not suitable for certification, but that the claim for fraudulent misrepresentation was suitable:

> A reduction of the numerous representations to a common representation requires analysis and characterization of each individual representation, the plaintiff's perception of the representation and the circumstances in which it was made. This is, of necessity, an individual inquiry. Thus, the plaintiffs contention that a multitude of statements can be reduced to a single core representation is antithetical to the essence of a common issue in a class proceeding. That is to say, that the common trial in the class proceeding is intended to resolve issues which have been determined to be common between the defendants and the plaintiff class. As such, a resolution binds every class member. The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which will have to be made at individual trials, nor can it be based on an assumption to circumvent the necessity for the individual inquiries. As such, there is no prospect of a resolution in a trial on common issues which would advance this litigation in any manner as it relates to the claim in negligent misrepresentation.
>
> However, I am of the view that the claim in fraudulent misrepresentation raises common issues. The plaintiffs' allegation is that the Bre-X operation was fraudulent. Therefore, it is contended, every representation, whenever made, is tainted by the fraud. The allegation that the fraud permeates every statement raises common issues regardless of whether individual issues may arise from the actual communications made to the class members.

[318] The decision of Winkler J. was upheld by the Divisional Court. It observed at para. 4:

> There is a complex, overlapping, differing and sometimes inconsistent tissue of representations made by different people at different times. As Winkler J. pointed out, the case of each individual plaintiff requires an individual inquiry as to what representations he or she relied upon and how he or she was affected by the particular representation. These individual inquiries cannot be circumvented.

> The common issue cannot be dependent upon findings which have to be made, as here, at individual trials.

[319] The Court of Appeal reversed, holding that the claim for negligent misrepresentation should have been certified.

[320] MacPherson J.A., giving the judgment of the Court, observed as a preliminary matter at para. 41 that the courts have been wary of setting the bar too high on the common issues test. He noted the observation of Cumming J.A. in *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1 (B.C.C.A.), at p. 18:

> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible. [emphasis added].

[321] The observation above that I have emphasized is particularly apt in a case such as this, where there are multiple defendants, each taking a run at the commonality of the common issues.

[322] MacPherson J.A. went on to find that it was appropriate to certify common issues dealing with both fraudulent misrepresentation and negligent misrepresentation and that a class action was the preferable procedure for the resolution of those claims. On the first point, the common issues, he noted at para. 44 that there were substantial similarities between the definitions of the two torts and they shared some requirements:

> There are substantial similarities in these definitions of the two torts. A fraudulent misrepresentation is "a false representation of fact"; a negligent misrepresentation is one that is "untrue, inaccurate or misleading". A fraudulent misrepresentation can be one that is made "recklessly, without belief in its truth"; a negligent misrepresentation is one that is made "negligently" or, to employ the standard non-conclusory word, "carelessly".

[323] He went on to find that there was sufficient overlap in the two claims to justify certification of both and there was a substantial overlap of factual issues common to both torts – in fact, there were two core issues in the entire proceeding: Was there gold in mineable quantities in the Busang and, if not, what was the various defendants' knowledge of the true state of affairs. The latter inquiry might be complex and might require an examination of the state of mind and conduct of each defendant, but that was not a question for the common issues analysis.

[324] In my view, there are some parallels between the *Bre-X* case and this case. As I have suggested earlier, it is arguable that there was a single misrepresentation: "you will receive a valid charitable receipt much greater than your cash contribution" that permeated every other representation about the Gift Program. If the donation program was a fraud, the Court could find that every representation, no matter how it was made or who made it, was tainted by the fraud. The question would then be: what did each defendant know and what did each defendant do in relation to the fraud? These are issues that can be addressed without reference to the behaviour of individual Class members.

(f) *Have ParkLane, Trafalgar Associates, TTL, the Bermuda Longtail Trust, Trustee Gleeson, the Funds for Canada Foundation ("FFC Foundation"), GMA, Matt Gleeson, Ms. Gleeson or any one or more thereof, been unjustly enriched?*

(i) If so, are the Class Members entitled to an order imposing a constructive trust over the funds held by or for the benefit of FFC Foundation, or by TTL, or by Appleby in the Bermuda Longtail Trust and an order requiring restitution of the aforesaid funds to the Class?

(ii) If so, are the Class Members entitled to a tracing order tracing any amounts paid by the Class Members into the Gift Program to the current holders of such funds?

[325] The requirements for unjust enrichment have been discussed earlier. The defendants do not dispute that the issues of "deprivation" of the plaintiffs and "enrichment" of defendants are capable of determination on a common basis.

[326] The defendants say, however, that there are three reasons why unjust enrichment is not a proper common issue.

[327] First, they say that the issue of "juristic reason" cannot be determined on a common basis. They say that individual inquiries will be required to determine whether some donors had a "donative intent" to benefit a charity, thereby giving rise to a juristic reason for the enrichment. They argue that those donors who had no donative intent might be entitled to assert a claim for unjust enrichment, whereas those who had a true donative intent (including those who have appealed their tax re-assessments) would have no claim, because their intent to benefit a charity would be a juristic reason for the enrichment.

[328] Second, the defendants say that there is a juristic reason for the enrichment, namely a valid contract between the donors and ParkLane and Donations Canada Financial Trust.

[329] Third, they raise a concern about the pending appeals by some of the Class members. If those appeals are successful and the Class members' deductions are restored, they say there would in fact be no "deprivation" and therefore no claim. If, on the other hand, the appeals are disallowed, they say there will have been a deprivation.

[330] Turning to the first concern raised by the defendants, it is the absence of a juristic reason for the enrichment of the defendant that makes that enrichment "unjust". An enrichment of the defendants as a result of a class member's intent to benefit a third party, the charity, is not a juristic reason for the enrichment of the defendant. The juristic reason for the enrichment must be linked to the party that receives the enrichment – the defendants, not the charities. It is no answer for the enriched parties – the defendants – to say that "there is a juristic reason for our enrichment because you intended to enrich the charities."

[331] I turn to the second concern. The question of whether the contracts are sufficient juristic reasons for the enrichment of ParkLane and Donations Canada Trust will depend upon whether they are found to be valid and enforceable, an issue that is likely to be capable of determination on a common basis. If the contracts are rescinded or voidable, the contracts cannot serve as "juristic reason" for the enrichment of the contracting party: *MacKinnon v. Ontario Municipal Employees Retirement Board et al.* (2007), 88 O.R. (3d) 269, [2007] O.J. No. 4860 at para. 82; *Windisman v. Toronto College Park* (1996), 28 O.R. (3d) 29, [1996] O.J. No. 552 (Gen. Div.) at para. 69; *Larson v. Charron*, 2007 BCSC 675, [2007] B.C.J. No. 1012; *Metzler Investment GMBH v. Gildan Activewear Ltd.*, [2009] O.J. No. 5695 (S.C.J.) at para. 30, referring to *Windisman v. Toronto College Park*: "a contract rendered unenforceable by law or equity does not qualify as a juristic reason for the purposes of the test for unjust enrichment."

[332] The third issue only arises in the event a donor's tax appeal is allowed, and the deduction is restored. That issue can be dealt with as an individual issue, if necessary.

[333] In my view, this is a case in which the determination of the "deprivation" and "enrichment" aspects of unjust enrichment would move the claims of individual Class members well towards a resolution.

(g) *Did ParkLane, Trafalgar Associates, TTL, Trustee Gleeson, FFC Foundation , GMA, Matt Gleeson, and/or Ms. Gleeson engage in unfair and unconscionable practices in respect of the marketing and sale of the Gift Program, contrary to s. 17 of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?*

(i) If so, is it in the interests of justice to waive any requirement for giving notice under s. 18(15) of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?

(ii) If so, are the Class Members entitled to an order rescinding the Gift Program contracts and granting to the Class Members: (a) damages, and/or (b) exemplary and/or punitive damages pursuant to s. 18 of the Ontario Consumer Protection Act (and the comparable sections of consumer protection legislation in

> *other provinces as set out in Schedule A to the Fresh Further Fresh as Amended Statement of Claim)?*

[334] As noted earlier, the plaintiff claims that the Gift Program was a consumer transaction governed by the *Consumer Protection Act, 2002* and comparable legislation in other provinces. I have concluded that there is a tenable cause of action under the *Consumer Protection Act, 2002* against the ParkLane Defendants, the Gleesons and FFC Foundation. I have noted that the claim against TTL on behalf of Class members in jurisdictions other than Ontario falls to be determined under the law of the provinces in which they reside.

[335] The plaintiff requests the following remedies:

> (a) a declaration that these Defendants engaged in unfair and unconscionable practices with respect to the marketing and sale of the Gift Program;
>
> (b) a declaration that it is in the interests of justice to waive the statutory notice requirement; and
>
> (c) an order granting rescission of the Gift Program contracts and granting damages to the Class, including exemplary and punitive damages.

[336] The defendants' primary argument against the certification of a common issue under the *Consumer Protection Act, 2002* is that establishing liability for an unfair practice or an unconscionable transaction will require the Court to look behind the marketing materials and make individual inquiries into what each Class member knew about the Gift Program and what advice the Class member obtained from his or her financial advisor. Moreover, they say that there is evidence before the Court from six donors that they were aware of the "back half" of the Gift Program but that the information was not material to them.

[337] I do not accept this submission. Common issues under the *Consumer Protection Act, 2002* have been certified by the Court in similar circumstances: *Ramdath v. George Brown College of Applied Arts and Technology* (2010), 93 C.P.C. (6th) 106, [2010] O.J. No. 1411 (S.C.J.); *Matoni v. C.B.S. Interactive Multimedia Inc.* (2008), 163 A.C.W.S. (3d) 701, [2008] O.J. No. 197 (S.C.J.).

[338] It is not necessary under the *Consumer Protection Act, 2002* to establish that the consumer was induced to enter into the contract due to the unfair practice or that the consumer relied on the representation. In *Matoni,* Hoy J. held at para. 149 that a false, misleading or deceptive representation, defined under the *Consumer Protection Act, 2002* as including "a failure to state a material fact if such failure deceives or tends to deceive", can be determined objectively, by reference to what would be conveyed to a reasonable person. She went on to state that "[T]he determination of whether the defendants engaged in an unfair practice under these statutes involves common issues of fact and common issues of law." She held that issues of breach of the

statute, the remedies for the breach, and a potential waiver of the notice requirement were appropriate common issues. I certified substantially similar common issues in *Ramdath*, noting at para. 110 that the common issues were "ideally suited for resolution on a class-wide basis".

[339] I conclude that these common issues are appropriate for certification.

(h) *Are Harris, ParkLane, Trafalgar Associates, TTL, GMA, Matt Gleeson and/or Ms. Gleeson liable to the Class Members for negligent misrepresentations made to the Class?*

[340] In *McKenna v. Gammon Gold Inc.*, I set out at some length, commencing at para. 129, the problematic issue of the certification of common issues in misrepresentation claims, pointing to the difficulties associated with proving reliance on a class-wide basis. I noted, however, that there have been cases such as *Hickey-Button v. Loyalist College of Applies Arts & Technology*, above, where there is a single representation or a number of representations are made, all having had a common import. I would add to this list: *Ramdath v. George Brown College of Applied Arts & Technology*, [2010] O.J. No. 1411, 2010 ONSC 2019 (S.C.J.); *McCann v. CP Ships Ltd. et al*, [2009] O.J. No. 5182 (S.C.J); *Silver v. Imax Corp.*, above. I also noted that there may be cases where proof of reliance could be made by inference: *Mondor v. Fisherman,* (2001), 15 C.P.R. (4th) 289, [2001] O.J. No. 4620 (S.C.J); *Kripps v. Touche Ross & Co.*, [1997] B.C.J. No. 968, 89 B.C.A.C. 288 at para 101; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 at 547, [1999] O.J. No. 4749 (C.A.).

[341] The plaintiff says that this case falls within the relatively narrow range of misrepresentation cases that raise common issues because there was one overarching representation and reliance can be inferred.

[342] Alternatively, the plaintiff says that the misrepresentations allegedly made by the defendants will be examined in any event in connection with the claim under the *Consumer Protection Act, 2002*, which asks whether, on an objective basis, the representation was false, misleading, deceptive or unconscionable. It therefore makes sense, as a matter of efficiency, to certify common issues in relation to both. He makes the same point with respect to the negligent misrepresentation claim and the claims for fraud and fraudulent misrepresentation.

[343] The plaintiff's submission is supported by the decision of the Court of Appeal in *Carom v. Bre-X Minerals Ltd*. In that case, the Court of Appeal reversed the decisions of the motion judge and the Divisional Court to certify common issues of fraudulent misrepresentation, but not common issues of negligent misrepresentation. MacPherson J.A., writing for the Court, noted that there was substantial overlap in the legal requirements for and factual issues raised by the two torts. At the core of both torts were the following issues: (1) what was the true state of affairs? and (2) what did the defendants know about the true state of affairs? Accordingly, he observed, at para. 47, there was no principled basis for treating the two torts differently. Both will focus on the knowledge and conduct of the defendants.

[344] Precisely the same point can be made here. The negligent misrepresentation claim and the *Consumer Protection Act, 2002* claim will traverse much of the same legal and factual ground as the fraudulent misrepresentation claim. They will focus on the knowledge and conduct of the defendants. Having these issues addressed in a single trial will avoid duplication of fact-finding and legal analysis.

[345] The defendants' primary attack on this common issue is in relation to the requirement of reliance, including issues of whether the representation was a material one, whether it was reasonable to the plaintiff to rely on the representation and whether in fact the representation was causative of each Class member's decision to participate in the Gift Program. They point out that in order to succeed in an action for negligent misrepresentation, it must be shown that the misrepresentation is a material one, in the sense that it "would be likely to influence the conduct of the plaintiff or would be likely to operate upon his judgment": *White v. Colliers Macaulay Nicholls Inc.* (2009), 95 O.R. (3d) 680, 2009 ONCA 444 at para. 25, citing *Humbruff v. Ontario Municipal Employees Retirement Board* (2006), 78 O.R. (3d) 561, [2005] O.J. No. 4667 at paras. 87-89 (C.A.); *Canada Trustco Mortgage Co. v. Bartlet & Richardes et al*. (1996), 28 O.R. (3d) 768 at 773, [1996] O.J. No. 1551 (C.A.).

[346] The defendants rely on *Williams v. Mutual Life Assurance Co. of Canada*, [2003] O.J. No. 1160 (C.A.), *Zicherman v. Equitable Life Insurance*, [2003] O.J. No. 1161(C.A.), *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (S.C.J.) and *Moyes v. Fortune Financial Corp.*, [2002] O.J. No. 4297 (S.C.J.) as cases in which certification of negligent misrepresentation common issues was refused due to the need to make individual inquiries concerning reliance, causation and damages, and in some cases, such as *Zicherman*, the need to separate out which representations were made by the defendants and which were made by others. As well, the defendants say that in this case, the decision of each Class member was informed by information and recommendations of his or her "Independent Financial Advisor" (the Distributor) and this information would have to be sifted through in order to determine whether the alleged representations were both material and causative. The individual donor's personal experience would also have to be examined to determine the person's sophistication, experience, risk tolerance and financial goals.

[347] ParkLane relies on the evidence of the six donors who said that they were aware of the "back half" of the Gift Program and nevertheless decided to participate.

[348] As well, ParkLane says that the Donor Declaration signed by Cannon expressly excludes a duty of care owed to Class members. It says that whether these terms should or should not apply will depend on individual circumstances.

[349] The plaintiff replies that the alleged representations made by the Distributors would not have to be examined to determine what information the Class members relied upon, because the Distributors were expressly prohibiting from giving information to the donors other than the standardized materials that ParkLane had specifically approved in advance.

[350] As I have indicated above, in my view, this is a case, like *Ramdath* and *Hickey-Button*, in which there is effectively one, or perhaps two representations, contained in written materials supplied by ParkLane to every Class member: "This is a legitimate tax avoidance program that has been designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation."

[351] This is also a case in which it may be possible to infer that each donor relied on the representation. The entire purpose of the elaborate structure was to achieve the ramped-up tax deduction. It can reasonably be inferred that taxpayers did not participate in the Gift Program only because they wanted to make a gift to the underlying charity. They did so due to the representation that they would receive an enhanced tax deduction.

[352] By the same token, damages can reasonably be inferred, at least in the amount of the donor's cash donation and potentially for the amount of any re-assessment, penalties, interest and costs.

[353] Even if there are some aspects of the misrepresentation claim that have to be determined as individual issues, this is a consideration for the preferability stage of the inquiry, not for this stage: *Hickey-Button* at para. 53.

(i) *Are Patterson Kitz (Halifax), Patterson Kitz (Truro), Patterson Palmer also known as Patterson Palmer Law [for 2005] and/or McInnes Cooper [for 2006 – 2009] vicariously liable for Harris' negligence or negligent misrepresentations?*

[354] This is an appropriate common issue. It has not been suggested otherwise. The answer focuses entirely on the relationship between Harris and the law firms with which he was associated at the material times.

(j) *Are the Class Members entitled to pursue a restitution claim based upon waiver of tort as against ParkLane, Trafalgar Associates, TTL, Appleby Services or the Bermuda Longtail Trust, Trustee Gleeson, FFC Foundation, GMA, Matt Gleeson, and Ms. Gleeson?*

[355] The plaintiff asks for a disgorgement of the defendants' profits based on what he describes as the "remedy" of waiver of tort. As a remedy, he claims either an order for restitution or a declaration of constructive trust. I certified such a claim as a common issue in *Pollack v. Advanced Medical Optics*, [2011] O.J. No. 2556, 2011 ONSC 1966, noting that common issues arising out of claims in waiver of tort have been certified in a number of class actions.

[356] The ParkLane Defendants submit that waiver of tort is a remedy, not a cause of action. This seems to be conceded by the plaintiff. I am not quite so sanguine: see *Aronowicz v. Emtwo Properties Inc.*, [2010] O.J. No. 475, 2010 ONCA 96 (C.A.) at paras. 80-82. The availability of waiver of tort, and its scope, is an open question that may not be conclusively resolved for some time.

[357] If waiver of tort is a remedy, it will only be of interest if the plaintiff establishes a cause of action or other wrongdoing: *Aronowicz v. Emtwo Properties Inc.* at para. 82. The nature of the cause of action and the damages recoverable will then determine whether the plaintiff and Class members have any interest in waiving their damages and claiming disgorgement.

(k) *If so, can the damages based upon a waiver of tort claim be assessed in the aggregate, and if so, in what amount?*

[358] I noted in *Pollack v. Advanced Medical Optics*, [2011] O.J. No. 2556, 2011 ONSC 1966 at para. 25, there have been numerous cases in which the amount to be disgorged, if waiver of tort is available, has been stated as a common issue. I will not repeat that lengthy list.

[359] In some cases, the *quantum* of waiver of tort damages has been bifurcated to proceed after a common issues trial. I followed that course of action in *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 1942, [2011] O.J. No. 1381, adopting the decision of the Divisional Court in *Robinson v. Medtronic*, 2010 ONSC 3777, [2010] O.J. No. 3056. In *Robinson v. Medtronic*, the Divisional Court affirmed the decision of Perell J. to bifurcate the issue. Perell J. had noted, at para. 21 of his reasons, [2009] O.J. No. 4364, that the case before him was "one of the extraordinary and rare cases where it would be fair and just to have divided discovery and to bifurcate the common issue of the quantification of the amount of the waiver of tort claim."

[360] While I have discretion to bifurcate the issue, I must exercise this discretion with regard to the factors summarized by Nordheimer J. in *Air Canada v. Westjet Airlines Ltd.* (2005), 20 C.P.C. (6th) 141, [2005] O.J. No. 5512 (S.C.J.) at para. 31. Having regard to those factors, I consider that:

> (a) the issues of liability are not clearly separate from the issues of remedies. In particular, the fraud and unjust enrichment claims will require an examination of the benefits that the defendants have received from their actions, the same questions that will be asked in the waiver of tort claim;
>
> (b) there is no obvious advantage to having the liability issues tried first;
>
> (c) nor will it result in a substantial saving of time and expense;
>
> (d) it will in fact likely lengthen the overall time frame of the proceeding; and
>
> (e) there is no agreement between the parties that bifurcation is appropriate.

[361] In this case, I am not satisfied that the claim falls within the "rare and extraordinary" category, so as to justify a departure from the general rule that litigation by installments is to be avoided. While class actions are inherently bifurcated, addressing common issues before individual issues, the usual rule is that all common issues should be resolved at the same time.

There is no reason to think that the aggregate assessment of waiver of tort damages will be particularly complicated or time-consuming in this case.

[362] I conclude that this common issue should be approved and that it should not be bifurcated.

(l) *Are the Class Members entitled to damages and prejudgment interest, including:*

(i) The amount of their cash donations?
(ii) The fair market value of any in kind donations?
(iii) The interest and/or penalties payable to the Canada Revenue Agency ("C.R.A.") in respect of their tax reassessments?
(iv) Their out of pocket expenses incurred in responding to the C.R.A. tax reassessments?

[363] The Defendants take the position that damages are not an appropriate common issue. They say that issues of mitigation, penalties, out-of-pocket expenses and interest will require individual inquiries. They note that there are allegations that Cannon and the Class members were contributorily negligent and that ParkLane has asserted a counterclaim against donors who participated in the Gift Program in 2008 and 2009, based on an indemnity given by those donors to ParkLane.

[364] In *Banyan Tree*, Lax J. declined to certify common issues asking whether the defendants were liable to Class members for damages and, if so, the amount of such liability. She concluded that a damage assessment would require individual determinations.

[365] I am not convinced that damages are an appropriate common issue in this case. This will not mean that a class proceeding is not a preferable procedure for the resolution of the issues. Section 6 of the *C.P.A.* stipulates that the fact that damages will require individual assessment after the common issues trial is not, on its own, a bar to certification.

(m) *Can or should the damages under paragraph (13)(i) be assessed in the aggregate?*

[366] In *Singer v. Schering-Plough*, above, I pointed out at paras. 189 to 191 that it is possible, but not necessary, to certify the aggregate assessment of damages as a common issue, referring to *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 70 (C.A.); *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171, [2007] O.J. No. 46 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Div. Ct.); *Lee Valley Tools Ltd. v. Canada Post Corp.* (2007), 57 C.P.C. (6th) 223, [2007] O.J. No. 4942 (S.C.J.).

[367] In this case, although it might be concluded that the cash donations of all Class members can simply be aggregated, the expert evidence adduced by the Lawyers suggests that it may not be quite such a simple exercise. It may be necessary, for example, to offset any loss incurred by a donor against the benefit he or she received from the initial tax credit. There will also be

questions about whether all Class members have been re-assessed, and whether some have settled with C.R.A.

[368] It is not necessary to decide whether these are bars to an aggregate assessment. I have sufficient concerns about the availability of an aggregate assessment in this case to leave the issue to the common issues judge.

(n) *Are the Class Members entitled to an award of punitive or exemplary damages against any one or more of the Defendants, and if so, in what amount?*

[369] The defendants, led by the Lawyers, say that punitive damages are not an appropriate common issue, because there are numerous individual issues of liability and damages that will have to be determined before liability for punitive damages can be determined or the quantum of such damages assessed. They point, in particular, to observations in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, that punitive damages are only appropriate when the defendant's conduct would otherwise go unpunished or where other sanctions, including compensatory damages, are inadequate to achieve the goals of retribution, deterrence and denunciation.

[370] In *Schick v. Boehringer Ingelheim (Canada) Ltd.*, [2011] O.J. No. 1381, 2011 ONSC 1942, I certified the following common issue:

> Does the conduct of the defendant justify an award of punitive damages?

[371] I concluded that, notwithstanding the concerns expressed by Perell J. in *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87, [2009] O.J. No. 4366, aff'd 2010 ONSC 3777, [2010] O.J. No. 3056 (Div. Ct.), flowing from the observations of Binnie J. in *Whiten v. Pilot Insurance Co.*, a common issue focusing solely on the defendant's conduct would avoid duplication of fact-finding and legal analysis, even though it would not establish either liability for punitive damages or the *quantum* of such damages. If the Court found that the defendant's conduct was not of such a nature as to justify an award of punitive damages, this would be the end of the inquiry. If, on the other hand, there was a finding of "high-handed, malicious, arbitrary, or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour", the application of the other *Whiten* factors could be addressed after the common issues trial.

[372] A somewhat similar approach was taken by Hoy J. in *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828, leave to appeal denied, [2008] O.J. No. 1916.

[373] Additionally, Justice Lax discussed the case law in *Banyan Tree* and certified the following issue:

> Should an award of punitive damages be made against the defendants? If so, in what amount?

[374] She concluded, however, that although the issue could be certified, it could only be answered after the conclusion of all individual proceedings and the quantification of general damages.

[375] Dambrot J., in granting leave to appeal in *Robinson v. Medtronic*, [2010] O.J. No. 1479, 2010 ONSC 1987 (Div. Ct.), noted that a compelling argument could be made for a common issue concerning the *prima facie* entitlement to punitive damages, notwithstanding that the ultimate liability for and *quantum* of punitive damages might have to await an assessment of compensatory damages.

[376] I also note that, notwithstanding the concerns that he expressed in *Robinson v. Medtronic*, Perell J. in his recent decision in *Blair v. Toronto Community Housing Corp*, [2011] O.J. No. 3347, 2011 ONSC 4395, concluded that a common issue of punitive damages, focusing on the defendant's conduct, would be appropriate. He stated, at para. 49:

> For the Reasons I expressed in *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (S.C.J.), aff'd [2010] O.J. No. 3056 (Div. Ct.), a claim for punitive damages will not be suitable for a common issue when the court cannot make a rational assessment about the appropriateness of punitive damages until after individual assessments of the compensatory losses of class members has been completed. However, where the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the common issues trial: *Chalmers (Litigation guardian of) v. AMO Canada Co.*, 2010 BCCA 560.

[377] As Perell J. noted, a similar conclusion was reached by the British Columbia Court of Appeal in *Chalmers (Litigation guardian of) v. AMO Canada Co.*, 2010 BCCA 560.

[378] I conclude that a common issue should be certified on the same basis as *Schick v. Boehringer Ingelheim (Canada) Ltd.* This issue focuses solely on the conduct of the defendants and avoids duplication of fact-finding and legal analysis.

[379] In summary, I have certified the following common issues

(a) breach of contract, against ParkLane;

(b) rescission, against ParkLane;

(c) negligence, against the ParkLane Defendants, Appleby, FFC Foundation and the Gleesons;

(d) conspiracy, against the ParkLane Defendants, Appleby and the Gleesons;

(e) fraud and fraudulent misrepresentation, against the ParkLane Defendants, Appleby and the Gleesons;

(f) unjust enrichment, against the ParkLane Defendants, Appleby, FFC Foundation and the Gleesons;

(g) *Consumer Protection Act, 2002* claims against the ParkLane Defendants, the Gleesons and FFC Foundation;

(h) negligent misrepresentation, against the ParkLane Defendants, the Gleesons, and Harris;

(i) vicarious liability of the Law Firms;

(j) waiver of tort;

(k) aggregate assessment of waiver of tort damages;

(n) punitive and exemplary damages.

4. Preferable Procedure

[380] Section 5(1)(d) of the *C.P.A.* requires that a class proceeding be the "preferable procedure for the resolution of the common issues". This deceptively simple statement has been explained in different ways, but most decisions refer to the observation that a class proceeding 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 at paras. 73-75 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[381] The preferability analysis is conducted through the lens of the goals of class actions: access to justice, judicial economy and behaviour modification. It also takes into account the importance of the common issues to the claims as a whole, including the individual issues: See *Cloud v. Canada (Attorney General)* at para. 73; *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 at para. 69 (C.A.), 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.

[382] In considering whether a class action would be the preferable procedure, the Court should examine: (a) the nature of the proposed common issue(s); (b) the individual issues that would remain after determination of the common issue(s); (c) the factors listed in the *C.P.A.*; (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 *C.P.A.;* and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.*

(2001), 54 O.R. (3d) 520 at para. 16 (Div. Ct.), 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.

[383] The defendants say that there are a number of individual issues lying at the core of this action that dominate the proceeding and outweigh the significance of the common issues. These include:

> (a) The ParkLane Defendants and the Lawyers have asserted claims against Cannon for contributory negligence and they will do so against all other donors – this is a substantive right that does not yield to certification: *Ranjoy Sales & Leasing Ltd. v. Deloitte, Haskins & Sells Ltd.* (1990), 41 C.P.C. (2d) 280 at paras. 17-18 (Man. C.A.). These claims raise individual issues concerning the knowledge and information possessed by each Class member at the time he or she subscribed to the Gift Program and call for individual inquiry.
>
> (b) ParkLane has asserted a counterclaim against all donors who participated in the Gift Program in 2008 and 2009 based on a written indemnity those donors gave to ParkLane for all claims arising out of the Gift Program. The resolution of these claims will give rise to individual issues.
>
> (c) ParkLane has commenced third party proceedings against every one of the 455 "Individual Financial Advisors" (the Distributors) and other defendants may do so as well – these claims will raise issues concerning the nature and scope of the information that was provided to the donors by their advisors.
>
> (d) The allegations of negligence require individual inquiries concerning the duty of care, the standard of care, causation and damages. The claim of negligent misrepresentation will require similar investigations. The extent and complexity of these investigations, and the costs involved, will outweigh any economy achieved by the resolution of the common issues in a single trial: *Dennis v. Ontario Lottery and Gaming Corp*., [2010] O.J. No. 1223 at para. 238.
>
> (e) Even if the misrepresentation issues are found appropriate for certification, the need to prove reliance and damages, in each case, will make the proceedings unmanageable

[384] The defendants rely on cases such as *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63, [1998] O.J. No. 2786 (Gen. Div.) and *Singer v. Schering-Plough Canada Inc.*, above, in

which the need to prove reliance and damages on an individual basis was found to overwhelm the benefits that would be realized by resolving a few common issues.

[385] In my view, the Court must look with some skepticism on threats of defendants to undertake scorched earth tactics that will make class actions unmanageable. Defences such as contributory negligence, third party proceedings and counterclaims can be addressed efficiently and fairly by a combination of case management and the trial of individual issues if necessary. They will not have to be addressed if the common issues are decided in favour of the defendants.

[386] The need to address individual issues will depend upon which common issues are answered in favour of the Class. If it is found that the Gift Program was a massive fraud, or that there were fraudulent misrepresentations, or that there were unfair or unconscionable practices under the *Consumer Protection Act, 2002*, the need for the trial of individual issues will be substantially reduced or, possibly, eliminated. In any event, this is a case in which the resolution of the common issues of liability will move the action considerably forward.

[387] There is no doubt that certification of this proceeding would further the purposes of the *C.P.A.* The words of Lax J. in *Banyan Tree* at para. 69 are equally applicable to this case:

> … a class action achieves judicial economy by make binding determinations affecting the rights of 2,825 individuals in one proceeding. It achieves behaviour modification by holding corporations and law firms accountable for the promotion of allegedly sham investments and it facilitates access to justice for litigants who would not bring individual claims.

[388] There are really no alternative procedures that would be as effective as a class proceeding in achieving the goals of access to justice, judicial efficiency and behaviour modification. It has been suggested that the Class members could make a complaint to a Judge of the Superior Court under the *Charities Accounting Act*, R.S.O. 1990, c. 10. The judge has the authority to direct the Public Guardian and Trustee to make an investigation. However, this statute does not give the Court the jurisdiction to provide compensation on a class-wide basis.

[389] In terms of access to justice, the defendants suggest that some of the Class members are wealthy individuals, with substantial losses, who could easily afford to bring individual actions. In making this suggestion, the defendants do not really expect individual actions if the action is not certified. What they surely expect and hope is that if the action is not certified, the claims will become dust in the wind. Most Class members will decide that the cost of individual action is prohibitive, as it would be, and they will not throw good money after bad. The result will be that nearly 10,000 people, who have suffered losses allegedly over $100 million, will never have their day in court. In making this observation, I am not making any conclusion on the merits of the plaintiff's case and, indeed, it is quite obvious that the defendants have raised some significant defences.

[390] The rights of defendants are, I agree, an important consideration. The substantive rights of defendants must be protected and it has been noted on many occasions that a class proceeding is procedural and does not change the substantive law. It should not be assumed, however, that the disposition of this action will necessarily require individual trials. If the plaintiff is successful on some common issues, such as fraud or conspiracy, the need for individual trials may be eliminated or reduced. If the defendants are successful on the negligence, contract and *Consumer Protection Act, 2002* common issues, there will be no need for individual trials. Additionally, success for the Class on the *Consumer Protection Act, 2002* or restitutionary claims may open up the availability of remedies that do not call for individual assessments of damages.

[391] As I have noted earlier, some of the defendants say that the presence of a Distributor as an "Independent Financial Advisor" to every Class member raises individual issues of Class member knowledge and reliance that make this action unsuitable for certification. They point to the evidence of some of the Distributors and some of the donors to show that the Distributors were aware of the "back half" of the Gift Program and that, at least in some instances, that information was conveyed to donors.

[392] The statements of defence of both ParkLane and the Lawyers make reference to the role played by Gacich in advising Cannon. In the third party claim asserted by ParkLane against the Distributors, it is alleged that the Distributors had a duty to protect their clients and that they are liable for any losses sustained by their clients as a result of participating in the Gift Program.

[393] It will be interesting to see how the Distributors respond to the third party claim. Will they agree that ParkLane told them everything there was to know about the Gift Program? Will they agree that the information they were provided with made full disclosure of the flow of funds and the risks associated with the Gift Program? Will they agree that they were "independent" of ParkLane? Will they agree that if their clients have a complaint, it was all their (the Distributors') fault for not properly advising them of the risks?

[394] It seems to me that the evidence raises a question of whether the Distributors were truly "independent financial advisors", the term coined by counsel, or whether they were, as described in their agreement with ParkLane, "fundraisers", who were retained to "raise donations" for the Gift Program. The evidence raises questions about exactly whose agents they were. It raises questions about the extent of disclosure made by ParkLane to the Distributors concerning the Gift Program.

[395] I leave for another day, if necessary, the issue of whether these questions can be determined on a common basis. In my view, the questions are serious ones, and they significantly dilute the arguments made by the defendants concerning the role of the Distributors.

[396] I have found that there are substantial common issues, the resolution of which will advance the claim of every class member. It is true that, depending on the resolution of the common issues, some individual issues may remain. I am satisfied, however, that the practical difficulties associated with the resolution of these common issues are not a reason to deprive

Class members of the benefits associated with collective recourse. I am also satisfied that a process can be established to ensure that the rights of the defendants are protected and that the process is fair to both parties.

[397] In light of its potential to promote access to justice and reduce or possibly eliminate the need for individual trials, I find that a class action is a preferable procedure for the resolution of the common issues of the Class.

5. Representative Plaintiff and Litigation Plan

[398] Section 5(1)(e) of the *C.P.A.* requires that there be a representative plaintiff or defendant who (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the Class and of notifying Class members of the proceeding, and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other Class members.

[399] There is no dispute as to the capacity of Cannon to serve as representative plaintiff. The Lawyers, however, supported by some of the other defendants, submit that Cannon has a conflict with other members of the Class that prevents him from being a representative plaintiff. They also submit that the litigation plan he has submitted is deficient and unworkable due to deficiencies in the common issues and a failure to address issues such as production, discovery and damages.

[400] Turning first to the alleged conflict, the Lawyers say that Cannon has acknowledged that he had no "donative intent" when he participated in the Gift Program and that this puts him in conflict with many other Class members who are challenging their C.R.A. reassessments on the ground that they did, in fact, have a "donative intent". Cannon withdrew his notice of objection and paid the C.R.A. reassessment, unlike many donors who have continued to challenge it.

[401] The Lawyers put the argument as follows in their factum:

> Because Cannon has, by denying that he had donative intent, conceded one of the arguments advanced by the C.R.A. against the Gift Program while the vast majority of proposed class members continue to actively oppose that position, he has an actual conflict exists [sic] between Cannon and the vast majority of the proposed class. Success for Cannon in this litigation depends on him establishing the absence of donative intent while the majority of class members who are disputing the C.R.A. reassessments can only succeed if they establish the opposite.

[402] I am not sure that Cannon's evidence that "[W]ithout this promise of a tax credit I would never have participated in the Gift Program" is proof of lack of donative intent. Ordinary taxpayers might also say that they would not have made a charitable donation unless they knew that they would receive a tax credit. Cannon's evidence is consistent with the tax credit being one

reason – but not the only reason - to make the gift. Nor do I agree with the proposition that Cannon can only succeed in this action if he establishes the absence of a donative intent. His case, as pleaded, is that the Gift Program was a fraud and that the money paid out of his own pocket went to enrich the defendants and not to the charity that he wanted to support.

[403] Perhaps more important, section 5(1)(e) of the *C.P.A.* says that the representative plaintiff must not have a conflict with the Class members "on the common issues for the class." All Class members who do not opt out will have the same interest as Cannon on the common issues, regardless of their position on their individual tax appeals and whatever may be the merits of those appeals.

[404] In my view, therefore, Cannon does not have a disqualifying conflict.

[405] I turn to the litigation plan. The defendants say that the plan is deficient because it assumes that the resolution of the common issues will resolve all questions of liability, when individual issues will remain, including contributory negligence and the third party claims. They point out that one purpose of the litigation plan is to ensure that the proceeding will in fact work as a class action.

[406] As I have pointed out under the preferable procedure analysis, the need for examination of individual issues may be substantially circumscribed by the resolution of the common issues. Having concluded that the action is workable as a class proceeding, I am satisfied that issues of production, discovery, proof of damages and the trial of individual issues, if required, can be addressed through case management as the case proceeds to trial, and by directions of the common issues judge who will, by that time, have a full appreciation of what remains to be determined.

6. Conclusions on Certification

[407] In summary, I have:

(a) certified causes of action in negligence, negligent misrepresentation, fraud, fraudulent misrepresentation, conspiracy, breach of the *Consumer Protection Act, 2002*, breach of contract and unjust enrichment against the defendants identified earlier;

(b) approved the class definition, which includes residents of Canada who participated in the Gift Program in any of the years 2005 to 2009, inclusive;

(c) approved the common issues identified in section III.A.3 of these reasons;

(d) found that a class proceeding is the preferable procedure for the resolution of the common issues and the claims of class members; and

(e) found that Cannon would fairly and adequately represent the Class, does not have an interest in conflict with the Class and has produced an appropriate plan for notifying the Class and advancing the proceeding.

[408] For these reasons, the action will be certified under s. 5(1) of the *C.P.A.*

[409] I now turn to the motions for summary judgment.

IV. THE SUMMARY JUDGMENT MOTIONS

A. The Test for Summary Judgment

[410] In January 2010, the test for summary judgment was changed from "no genuine issue for trial" to "no genuine issue requiring a trial." Rule 20.04(2) now provides:

> 20.04 (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence;
>
> …
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence

[411] In *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, released on December 5, 2011, the Court of Appeal, in a unanimous decision, cleared away much of the confusion and conflicting jurisprudence about the circumstances in which summary judgment can be granted. In the process, the Court of Appeal disposed of five jointly-heard appeals of summary judgment decisions through the application of the new "full appreciation test."

[412] The new test focuses on procedural fairness and substantive fairness in reaching a just disposition of the parties' dispute. The Court cautioned that before embarking on the summary judgment analysis, and using the enhanced powers under Rule 20.04(2.1), the motion judge must

apply the full appreciation test: “Can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?”

[413] The Court of Appeal pointed out that some cases, by their very nature, will be more suitable for determination on summary judgment than other cases and the analysis of whether a just result can be obtained must be carried out on a case-by-case basis.

[414] The Court of Appeal summarized its opinion at paras. 72-75:

> We have described three types of cases where summary judgment may be granted. The first is where the parties agree to submit their dispute to resolution by way of summary judgment.
>
> As will be illustrated below, at paras. 101-111, a judge may use the powers provided by rules 20.04(2.1) and (2.2) to be satisfied that a claim or defence has no chance of success. The second class of case is where the claim or defence has no chance of success. The availability of these enhanced powers to determine if a claim or defence has no chance of success will permit more actions to be weeded out through the mechanism of summary judgment. However, before the motion judge decides to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence, the motion judge must apply the full appreciation test.
>
> The amended rule also now permits the summary disposition of a third type of case, namely, those where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1). In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record – as may be supplemented by oral evidence under rule 20.04(2.2) – or if the attributes and advantages of the trial process require that these powers only be exercised at a trial.
>
> Finally, we observe that it is not necessary for a motion judge to try to categorize the type of case in question. In particular, the latter two classes of cases we described are not to be viewed as discrete compartments. For example, a statement of claim may include a cause of action that the motion judge finds has no chance of success with or without using the powers in rule 20.04(2.1). And the same claim may assert another cause of action that the motion judge is satisfied raises issues that can safely be decided using the rule

> 20.04(2.1) powers because the full appreciation test is met. The important element of the analysis under the amended Rule 20 is that, before using the powers in rule 20.04(2.1) to weigh evidence, evaluate credibility, and draw reasonable inferences, the motion judge must apply the full appreciation test in order to be satisfied that the interest of justice does not require that these powers be exercised only at a trial.

[415] The Court of Appeal described, at paras. 51 and 52, the circumstances in which, applying the full appreciation test, summary judgment might be appropriate. It cautioned against the use of summary judgment in cases where it is necessary to make numerous findings of fact based on an extensive testimonial record. In contrast, it said, document cases, or cases in which there are few contentious factual issues, may be more amendable to summary judgment:

> We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.
>
> In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.

[416] The Court of Appeal emphasized that "full appreciation" means more than simply being aware of, familiar with and capable of interpreting the written record. The judge must ask whether he or she can fairly weigh the evidence, draw inferences from the evidence, or evaluate the credibility of witnesses without the "opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first hand" (at para. 55).

[417] Having set out the principles applicable to summary judgment motions, the Court of Appeal proceeded to apply those principles to each of the five appeals before it. Two of those cases are particularly instructive.

[418] The first case involved two related appeals, *Mauldin v. Hryniak* (C52912) and *Bruno Appliance and Furniture v. Hryniak* (C52913) on appeal from *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2010] O.J. No. 4661, 2010 ONSC 5490 (S.C.J.). The plaintiffs in both actions were investors who claimed that they had been defrauded by the defendant, Hryniak. They sued Hryniak for fraud and his law firm and one of its partners for fraud, conspiracy, negligence and breach of contract. The motion judge granted judgment against Hryniak, disbelieving his evidence and concluding that he had defrauded the plaintiffs. The motion judge concluded that a trial was necessary to determine whether Hryniak's lawyer was guilty of fraud or whether he was an innocent dupe and had liability apart from the claim for fraud.

[419] The summary judgment motion had been lengthy and complex. The hearing lasted four days and there was affidavit evidence from eighteen witnesses. The motion record consisted of twenty-eight volumes and the cross examinations had taken three weeks. The amounts at issue were approximately $1 million and $1.2 million.

[420] The Court of Appeal concluded that cases such as *Mauldin v. Hryniak* will generally require a trial and should not be decided on summary judgment. It noted its observations, at paras. 50 and 51 of its reasons, that a case that calls for "multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record" will not generally be appropriate for summary judgment.

[421] The Court of Appeal found, at para. 148, that the actions had all the hallmarks of the kind of case in which, generally speaking, the full appreciation of the evidence and issues could only be achieved at trial. These included:

- a voluminous motion record;
- numerous witnesses, affidavits and extensive cross-examinations;
- different theories of liability against each of the defendants;
- the need to make numerous findings of fact;
- conflicting evidence of the main witnesses and the need for credibility determinations; and
- the absence of reliable documentary yardsticks to assess the credibility of the witnesses.

[422] The Court of Appeal noted that the motion for summary judgment in that case had not provided access to justice, proportionality and costs savings – on the contrary, it had taken considerable time and resulted in enormous costs to the parties. Any efficiency achieved by the

motion, insofar as Hryniak's liability was concerned, was attenuated by the decision that a trial was required to determine the liability of Hryniak's lawyer.

[423] In spite of the Court of Appeal's conclusion that the case was not appropriate for summary judgment, and as a clear and unique exception to the principles it had stated, the Court considered whether the motion judge was correct in granting partial summary judgment. It concluded that the motion judge was correct, in one of the two actions, because Hryniak's defence had no credibility. In the other action, it concluded that the decision could not stand, because the motion judge had failed to address one of the elements of civil fraud and because it was not clear from the evidence whether Hryniak had obtained the benefit of the plaintiff's funds.

[424] The second case was *394 Lakeshore Oakville Holdings Inc. v. Misek* (C53035), an appeal from a decision reported at [2010] O.J. No. 4659, 2010 ONSC 6007 (S.C.J.). The action involved a claim for a prescriptive easement over the property of the respondent. The motion judge, after reviewing the evidence, had concluded that the appellants simply had a personal licence to pass over the respondent's lands and not an easement that ran with the lands.

[425] In dismissing the appeal, the Court of Appeal described the case as a good example of the kind of case that would be appropriate for summary judgment based on the application of the "full appreciation" test: the documentary evidence was limited and not contentious; there were a limited number of relevant witnesses; and the governing legal principles were not in dispute.

[426] Following the release of the decision of the Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, I invited the parties to make further written submissions concerning the application of the decision in this case. I have now received and considered those submissions, and I now turn to the summary judgment motions.

B. ParkLane's Motion for Summary Judgment

[427] ParkLane moves for summary judgment dismissing Cannon's claim. I will begin by setting out the submissions of the parties. I will then consider whether ParkLane has met the burden of showing that there is no genuine issue requiring a trial.

1. Submissions of ParkLane

[428] ParkLane's argument is simple. It says that by signing the Donor Declaration and the Tax Risk Disclosure Statement, Cannon accepted the risk of his claim for a tax deduction being refused and expressly released ParkLane from liability for the claims advanced in this action. I have summarized these documents earlier, under the heading "Contractual Materials for the Gift Program."

[429] To understand ParkLane's submission, it will be helpful, however, to set out portions of the text of the Donor Declaration signed by Cannon in 2006:

> 1. I have read and fully understand all and any written materials and documents in the marketing and donor kit prepared by [ParkLane] … I acknowledge that, except for what is contained in the Documents, no other promise, representation or warranty has been made by ParkLane to, or relied upon, by the undersigned.
>
> 2. I have received independent professional advice in respect of the Program from my owner personal advisor/lawyer/accountant (my "Advisor"), as the case may be. I fully understand such advice and information provided to me by my Advisor in respect of all and any legal, commercial/business and tax consequences related to my participation in the Program … I am prepared to accept any and all tax risks whatsoever related thereto, including the risk that the charitable donation, or a portion of it, may be reassessed and even denied.
>
> 3. I understand that to facilitate various transactions in connection with the Program, monies have been or will be deposited to and/or transferred from accounts with one or two chartered bank(s) (collectively, the "Bank"). I further acknowledge that *ParkLane is acting, in addition to its role in marketing and facilitating the Program, as escrow agent in connection with the Program, and in such specific capacity as escrow agent,* is authorized to receive funds and to disburse them in accordance with written directions. Aylesworth LLP ("Aylesworth") is also acting as escrow agent in respect of the Program. I hereby unconditionally release the Bank, ParkLane and Aylesworth and their respective partners, officers, authorized agents and employees, from any and all claims or liabilities of any kind whatsoever that I or my executors and assigns, now has or in the future may have with respect to matters occurring on, prior to or after the date hereof, arising out of, based upon, resulting from or in connection with the Declarant participating in the Program. [Underlining in original; italics added].

[430] ParkLane relies on the following facts, which are not in dispute:

- Cannon was a reasonably experienced and sophisticated investor;
- he had no direct dealings with anyone at ParkLane concerning the Gift Program and relied exclusively on Gacich, his "trusted financial advisor";

- Gacich was fully aware of the nature of the Gift Program, including the role of the Bermuda Trust and the royalty agreements between TTL and the charities – he thought that the Gift Program was "well thought out, well put together" and "a brilliant structure" – Gacich himself contributed to the Gift Program and recommended that his 80 clients do so;

- when Gacich originally discussed the Gift Program with him, Cannon thought it was "too good to be true", but after receiving information from Gacich, and Gacich's recommendation, he decided to participate;

- Cannon was aware of and understood the risks of participating in the Gift Program, including the risk that his donation might be re-assessed or denied;

- Gacich reviewed the Donor Declaration and Tax Risk Disclosure statements with his clients, including Cannon, before having them executed;

- Cannon executed and delivered a Donor Declaration in 2005; he executed a second Donor Declaration in 2006, as well as a Tax Risk Disclosure Statement; and

- Cannon read and understood the Donor Declaration and the Tax Risk Disclosure Statement before he signed them.

[431] ParkLane also notes that in the Donor Declarations, Cannon declared and agreed that:

- he had read and fully understood all the Gift Program Materials, including (in 2006) the Tax Risk Disclosure Statement, in respect of his participation in, and donations to the Gift Program;

- except for what was contained in the materials provided by ParkLane, no other promise, representation or warranty had been made by ParkLane to him, or had been relied upon, by him;

- he had received independent professional advice in respect of the Gift Program from his own personal advisor /lawyer /accountant;

- he fully understood the advice and information provided to him by his own personal advisor/lawyer/accountant in respect of all and any legal, commercial/business and tax consequences related to his participation in the Gift Program, including the fact that up to 8% of his aggregate donation amounts would be used to pay charity fundraising fees;

- he accepted any and all tax risks whatsoever related to his participation in the Gift Program, including the risk that the charitable donations, or a portion of them, might be re-assessed and even denied; and

- he unconditionally released ParkLane and its officers and employees from any and all claims or liabilities of any kind whatsoever that he then had, or in the future might have with respect to matters occurring on, prior to or after the date of the Donor Declaration, arising out of, based upon, resulting from or in connection with his participation in the Gift Program.

[432] Gacich has sworn that:

- at no time did he "promise" Cannon that he would receive a tax credit;

- he reviewed the risks associated with the Gift Program with Cannon, including the risk that no tax credit might be allowed;

- Cannon understood the risks and understood the nature and scope of the release that he was giving to ParkLane.

[433] Cannon has not contradicted Gacich's evidence.

[434] ParkLane says that this is exactly the kind of document-driven case, with limited controversial facts, that the Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch* stated would be suitable for summary judgment. It says that the issue is a narrow one, namely the interpretation and application of the release clause in the Donor Declarations signed by Cannon.

[435] ParkLane relies, in particular, on the decision of the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69, [2010] S.C.J. No. 4 ("*Tercon Contractors"*). It says that the language of the exclusion clause is clear and unambiguous, it is not unconscionable and that public policy requires its enforcement.

2. Submissions of the Plaintiff

[436] The plaintiff makes five submissions in response to ParkLane's motion for summary judgment.

[437] *First*, he says that the release clause in the Donor Declaration is based on a factual premise that does not exist, namely the making of a valid charitable gift and, since the premise was not realized, the release is of no effect.

[438] *Second*, referring to the language I have italicized in clause 3 of the Donor Declaration, he says that the release clause is confined to ParkLane's role as an escrow agent, and does not release ParkLane from its liability for misconduct as a promoter and operator of the Gift Program.

[439] *Third*, and alternatively, he says that if the release is not so confined, the release is ambiguous and, applying the *contra proferentem* rule, the ambiguity must be resolved in his favour. This, he says, will require a trial in order to weigh the evidence of the factual matrix underpinning the interpretation of the contract.

[440] *Fourth*, he says that there are "genuine issues requiring a trial" regarding the validity and enforceability of the contract, including issues of (a) whether there has been a total failure of consideration; (b) fraud or fraudulent misrepresentation on the part of ParkLane; (c) negligent misrepresentation by ParkLane; and (d) whether he is entitled to rescission under the *Consumer Protection Act, 2002*. If these issues are determined in his favour, the contract may be vitiated, voidable, rescinded or otherwise unenforceable.

[441] *Fifth*, and finally, the plaintiff says that the *Tercon Contractors* analysis will require a determination of whether the release clause is unconscionable and whether there are public policy considerations that outweigh enforcement and the resolution of these issues requires a trial.

3. Discussion

[442] I do not consider it necessary to consider Cannon's first, second and third submissions concerning the interpretation of the release, because I have concluded that, even if he does not succeed on these issues, a genuine issue requiring trial will remain concerning the enforceability of the contract as a whole.

[443] I will elaborate, but in summary I have concluded that there is a genuine issue, requiring a trial, about whether the contract between Cannon and ParkLane, including the Donor Declaration and the Tax Risk Disclosure Statement, is vitiated by fraud, unenforceable due to unconscionability or for reasons of public policy, or subject to rescission under the *Consumer Protection Act, 2002*. I have concluded that the issues are of such factual complexity, and so dependent on findings of credibility that will require the balancing of the evidence of multiple witnesses, that a full appreciation of the evidence can only be obtained at a trial. Moreover, the potential finding of fraud is so serious that fairness to the parties requires a trial.

[444] In light of these conclusions and because a trial will be required, I do not propose to comment on the issues of contractual interpretation raised by ParkLane. Those issues should be left to the trial judge, who will consider them in light of the entire factual matrix revealed at trial.

[445] I turn to a consideration of the various grounds on which the contract between Cannon and ParkLane may be voided or found unenforceable in this case.

(a) Fraud and Fraudulent Misrepresentation

[446] There is ample authority for the proposition that "fraud vitiates every contract and every clause in it": *Pearson & Son v. Dublin Corp.*, [1907] A.C. 351 at 362. See also: *Ballard v. Gaskill*, [1955] 2 D.L.R. 219, 14 W.W.R. 519 (B.C.C.A.); *1018429 Ontario Inc. v. FEA Investments Ltd.* [1999] O.J. No. 3562, 125 O.A.C. 88 (C.A.); *Francis v. Dingman* (1983), 43 O.R. (2d) 641, 2 D.L.R. (4th) 244 (C.A.), leave to appeal to S.C.C. refused, 23 B.L.R. 234n; *Nepean (Township) Hydro Electric Commission v. Ontario Hydro*, [1982] 1 S.C.R. 347, [1982] S.C.J. No. 15.

[447] If it were determined at trial that the Gift Program was a fraud, intended to enrich the promoters by dishonestly depriving the Class of their donations, then the contracts signed by Cannon, including the release clause in the Donor Declaration, could be considered part of the means used to perpetrate the fraud and therefore unenforceable. The same result would follow if ParkLane were found liable for fraudulent misrepresentation.

[448] The application and effect of the proposition that fraud vitiates the contract is demonstrated by two decisions of our Court of Appeal. The first case is *Francis v. Dingman*, above, in which the defendant had entered into an agreement with the plaintiffs to purchase their shares in a family newspaper business. It was agreed that if, within ten years, the defendant resold the shares to someone outside the family, he would pay the plaintiffs the difference between the price he had paid for their shares and the resale price. About three years later, the defendant received an offer from a third party to purchase all the shares in the newspaper business. He told the plaintiffs that he had received an offer to purchase the shares, and that he wanted to come to an agreement with them concerning the price to be paid for their shares. When the plaintiffs asked about the price at which the shares were being acquired by the third party, the defendant responded, falsely, that the third party would not agree to the disclosure of this information, but he said that it was a fair price. The defendant also said that if the plaintiffs did not accept his offer for the purchase of their shares, he would not sell the newspaper until the expiry of the ten year period and the plaintiffs would get nothing more for their shares.

[449] Predictably, the plaintiffs agreed to sell their shares to the defendant and later discovered that the price paid by the defendant was much less than the amount he had received from the third party.

[450] The trial judge dismissed the plaintiffs' claim for fraudulent misrepresentation and held that, as there was no fiduciary relationship between the parties, a claim for negligent misrepresentation could not be made out. The Court of Appeal reversed. In response to the defendant's submission that the plaintiffs had executed a release of the defendant, Lacourcière J.A. held that the release could not stand in the face of, among other things, the fraudulent

misrepresentation that the third party would not complete the transaction if the share price was disclosed. He stated, at paras. 28-30:

> A misrepresentation is fraudulent and not merely negligent when it can be said that its maker has an absence of honest belief in its truth. In holding that the misrepresentation regarding disclosure of the price to the appellant Francis was not fraudulent, the learned trial judge stated that the respondent seemed to assume that the Thomson group [the purchaser of the shares] would not let him disclose it to anyone, not just the press and the general public. However, there was no evidence to support that statement and it is inconsistent with the evidence of the respondent that he did not think of asking Thomson for permission to disclose the price to the appellant Francis, although it would have been a decent thing to do. It is also inconsistent with the finding of the learned trial judge that the respondent did not ask permission to reveal the price to the plaintiffs because he had no intention of sharing with them the full proceeds of the sale.
>
> I would go further and say that the respondent, who was found to have intended to not share the full proceeds of the share, could not have entertained an honest belief in the truth of the statement that Thomson would not go through with the transaction if the price was disclosed to the appellants. I take the view that this amounted to more than a negligent misrepresentation as found by the learned trial judge and constituted, in fact, a fraudulent misrepresentation within the meaning of Lord Herschell's statement in *Derry et al. v. Peek* (1889), 14 App. Cas. 337 at p. 376:
>
> > ... if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.
>
> Accordingly, the consent and release which are based not only on incomplete information in breach of a fiduciary obligation of full disclosure but also on fraudulent misrepresentation, cannot be allowed to bar the appellants' action: 38 Hals., 3rd ed., pp. 964-6, paras. 1670-72.

[451] Goodman J.A., with whom Zuber J.A. agreed, found that it was “inconceivable” on the evidence that the defendant honestly believed that the third party would cease negotiations if he disclosed the amount of the offer for the shares. He found that the defendant must have known

that the third party would be aware that he would have to reveal the price to all shareholders. He concluded that the release was vitiated by the fraudulent misrepresentation – at para. 52:

> A release obtained by a fraudulent misrepresentation will be set aside: see *Chitty on Contracts*, 24th ed. (1977), p. 643, para. 1359. In my opinion the plaintiff is entitled to rescind the agreement dated December 10, 1973, and to have a declaration that the release given pursuant to the terms thereof is null and void.

[452] The second case is *1018429 Ontario Inc. v. FEA Investments Ltd.*, above. The plaintiff had bought an apartment building from the defendant. The agreement of purchase and sale contained warranties that there was no litigation pending or threatened and that all rent increases had been in accordance with the rent control legislation. The warranties were to survive closing for a period of one year. The agreement contained a disclaimer that the purchaser would have no remedy for breach of warranty or misrepresentation, other than rescission. Shortly after closing, the purchaser discovered that there had in fact been a notice from the Ministry of Housing to the defendant concerning high rent levels. The Ministry subsequently made an order rolling back rents on some of the apartments. The plaintiff brought an action against the vendor for damages for fraudulent misrepresentation. The Court of Appeal affirmed the trial judge's award of damages for fraudulent misrepresentation.

[453] The Court of Appeal adopted the following observation in Waddams, *The Law of Contract*, 4th ed. (1999), at p. 299:

> A fraudulent misrepresentation is a statement known to be false or made not caring whether it is true or false. A person induced to enter into a contract by such a statement is entitled, *prima facie*, to damages for fraud ... and to rescission.

[454] The Court of Appeal accepted the trial judge's conclusion that the defendant either knew that the rents were illegal or was reckless about the legality of the rents being charged and knew that it was not disclosing this fact to the purchaser. The Court of Appeal also accepted the trial judge's conclusion that the purchaser had relied upon the representation made by the vendor.

[455] Turning to the question of remedies, the Court of Appeal held that in cases of fraudulent misrepresentation the innocent party is entitled to avoid the contract and sue for damages. In response to the defendant's submission that the contract excluded any remedy other than rescission, the Court of Appeal cited with approval the following extracts from Professor Waddams' text and from Professor Fridman's work – at paras. 50 and 51:

> The leading contracts scholars and case authorities do not support this proposition. Professor Waddams, in *The Law of Contracts*, supra, at p. 307, states:

> A fraudulent misrepresentation permits the party deceived to avoid the contract and to sue in tort for damages based on the plaintiff's out-of-pocket loss including consequential damages but not expectation or loss of bargain damages.

Professor Fridman, in *The Law of Contract*, 3rd ed. (1994), at p. 294, states:

> A fraudulent misrepresentation is one which is made with knowledge that it is untrue and with the intent to deceive. It may even constitute a term of the contract. Whether it does or not is immaterial, since fraud gives rise to effects in the law of contract and the law of tort. A contract resulting from a fraudulent misrepresentation may be avoided by the victim of the fraud. In such instances the apparent consent by the innocent party to the contract and its terms, is not a real consent. Whether or not the effect of such fraud is to induce a mistake (which might render the contract void), the consent of the innocent party may be revoked at his option.

The case law in Ontario echoes Professors Waddams and Fridman.

[456] The Court of Appeal found that the disclaimer clause in the agreement of purchase and sale, waiving remedies for breach of warranty or misrepresentation, did not immunize the defendant from a claim for damages for fraudulent misrepresentation.

[457] These authorities demonstrate several propositions that are pertinent to this case:

(a) a fraudulent misrepresentation is one that is made with knowledge that it is untrue, or recklessly, without caring whether it is false;

(b) determining whether a fraudulent misrepresentation has been made requires a factual inquiry into the knowledge and state of mind of the representor to determine, among other things, whether the representor had an honest belief in the truth of the statement;

(c) a contract procured by fraudulent misrepresentation may be voided by the innocent party;

(d) if the contract is voided, any release or limitation of liability contained in the contract will also fall; and

(e) the innocent party will be entitled to rescission or damages for fraudulent misrepresentation.

[458] Counsel for ParkLane submits that the exculpatory clause in the Donor Declaration is extremely broad and applies to all claims, including not only claims for breach of contract and misrepresentation, but also claims for fraud and unconscionable conduct. He says that the clause bars all claims, regardless of the potential that the contract may be unenforceable. Suffice to say that the language of the Donor Declaration is general and does not expressly refer to claims for misrepresentation, fraud, or unconscionability. To the extent it did, or did so by implication, there would be a strong argument that such a clause would be a nullity, based on the principles expressed in *Pearson & Son Ltd. v. Dublin Corporation*, above.

[459] As I will explain, the plaintiff's evidence satisfies me that a trial is required to determine whether ParkLane committed a fraud or made fraudulent misrepresentations that would entitle Cannon to void the contract.

(b) Consumer Protection Act, 2002

[460] The *Consumer Protection Act, 2002* stipulates that the procedural and substantive rights afforded by the statute cannot be waived. Section 7(1) provides:

> The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.

[461] If it is determined at trial that ParkLane made false, misleading or deceptive representations, and thereby breached s. 17 of the statute, the release language in the Donor Declaration would be to no avail and Cannon may have a right of rescission.

(c) Unconscionability and Public Policy

[462] In *Tercon Contractors*, the Supreme Court of Canada laid to rest the doctrine of fundamental breach, as it applied to the effect of an exclusion clause. It substituted an analytical framework that requires the Court to determine:

(a) whether, as a matter of interpretation, the exclusion clause applies to the circumstances established in the evidence;

(b) if the exclusion clause applies, whether the clause was unconscionable and therefore invalid, at the time the contract was made; and

(c) if the clause is held to be valid under (b), whether the Court should nevertheless refuse to enforce the exclusion clause, because of an "overriding public policy, proof of which lies on the other party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts" (at para. 123).

[463] The analysis under (b) – unconscionability – will require an examination of the factual circumstances in which the contract was made, including whether there was unequal bargaining

power. As applied to this case, the examination could include the role played by the Distributors and the amount and accuracy of information provided by ParkLane to the Distributors, as well as any limitations on the ability of the Distributors to disclose such information to their clients.

[464] The analysis under (c) – an overriding public policy – will also require close consideration of the circumstances surrounding the making of the contract. As Binnie J. observed in *Tercon Contractors*, at para. 120:

> Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. [emphasis added]

[465] I turn now to the question of whether there is a genuine issue requiring a trial in this matter.

4. Is a Trial Required?

[466] ParkLane does not, in general, contest the propositions of law I have set out above. It submits, however, that Cannon has failed to show that his claims of fraud and unconscionability have a real chance of success and require a trial. It says that he has failed to provide "real evidence to support the finding, not inference and speculation" that ParkLane committed a fraud: see *Vaillancourt v. Watson*, [1994] O.J. No. 214, 69 O.A.C. 227 (C.A.) at para. 21. ParkLane says that Cannon cannot simply rest on his pleading or on assumptions about what the evidence may show at trial.

[467] ParkLane relies on *Canada Trustco Mortgage Co. v. Barclay*, [1996] O.J. No. 2734, 12 C.C.L.S. 286 (Gen. Div.), which it says is on all fours with the facts of this case. Canada Trustco had brought a motion for summary judgment against eleven investors who had borrowed from it in order to finance their investments in a series of tax shelters. The investments went bad and the investors suffered a financial loss.

[468] There was no dispute that the defendants had borrowed money from Canada Trustco or that they were in default. They asserted, however, that Canada Trustco had misrepresented the investment, that the investment breached the *Securities Act* because there was no offering memorandum, and that the representatives of the tax shelter had acted as agents for Canada Trustco.

[469] Chadwick J. found that there was no genuine issue for trial on all three issues. There was no evidence of any close connection between Canada Trustco and the promoters of the tax shelter.

Nor was there evidence of any misrepresentation. There was no evidence that Canada Trustco was aware of the *Securities Act* requirements and no evidence to show any agency relationship between the promoters and Canada Trustco.

[470] ParkLane suggests that these circumstances are similar in the case before me because Cannon had little real contact with ParkLane and obtained his information from Gacich.

[471] In my view, the differences between this case and *Canada Trustco* are significant. They only serve to highlight why this case is not suitable for summary judgment. Canada Trustco was simply a lender. It did not create the tax shelter and it did not market it. It loaned money to the defendants to enable them to make an investment that they had already decided to make. In this case, in contrast, Furtak and ParkLane created the Gift Program and the entire structure that supported it. They created the marketing materials that contain the alleged misrepresentations at issue. They created the marketing structure, recruited the Distributors, trained them and told them what information they could and could not provide to their clients. Furtak also created the "back half" of the Gift Program, which funneled most of the profits of the Gift Program to the Bermuda Trust and to the ParkLane Defendants, which he owned or controlled.

[472] Unlike the situation in *Canada Trustco,* and as I have discussed elsewhere in these reasons, there is evidence in this case to support the existence of an agency relationship between ParkLane and the Distributors, the denial in the distributorship agreement notwithstanding. In this case, unlike *Canada Trustco,* there was also an inextricable link between ParkLane and the donors.

[473] On one view of the evidence, the Gift Program was a *bona fide*, well-designed plan to minimize taxes, the risks of which were clearly understood and accepted by all participants. One of those risks unfortunately came to fruition, as every donor was aware it might.

[474] On another view of the evidence, the Gift Program was a giant shell game and the so-called Independent Financial Advisors (the "Distributors") were the shills. ParkLane's marketing materials created the impression that there really was a pea under the shell when the donor made a contribution, whereas in fact it was whisked away and into ParkLane's pocket as soon as the donor put money on the table. On this cynical view of the evidence, ParkLane's answer is akin to saying, "Well, we may have been playing a shell game, but your trusted financial advisor knew that there was no pea under any shell."

[475] Cannon has demonstrated that there are serious issues to be tried concerning the Gift Program and the conduct of the defendants, including ParkLane, Appleby, the Lawyers and others who were instrumental in the establishment, marketing and operation of the Gift Program. I am satisfied that there is indeed a genuine issue requiring a trial concerning where ParkLane's conduct lies on the scale between the innocent view and the sinister view – between *bona fides* and fraud. One of the issues to be considered, by no means the only one, is whether the disclosure of information concerning the "back half" of the Gift Program by ParkLane to the Distributors, to the extent that disclosure actually occurred, is a defence to the plaintiff's claim.

[476] I am also satisfied that in the particular circumstances of this case, it is in the interests of justice that the weighing of the evidence, the evaluation of the credibility of witnesses and the drawing of inferences from the evidence should only be exercised by a trial judge.

[477] I come to this conclusion for several reasons. First, a finding of fraud is a serious matter and proof of civil fraud, although on a balance of probabilities standard, requires rigorous examination of the totality and quality of the evidence as a whole. This frequently requires an assessment of the credibility of witnesses and, in a case such as this, may require the evaluation, assessment and comparison of the credibility of a number of witnesses. Even using the motion judge's expanded powers under Rule 20.04(2.1) a summary judgment motion is not a suitable forum for this kind of assessment.

[478] Second, as the authorities indicate, the defendant's knowledge and state of mind are vital considerations in cases of fraud and fraudulent misrepresentation. Did the defendant have an honest belief in the truth of the statement? Were the representations made recklessly, not caring whether they were true or false? These issues are best explored through examination and cross-examination in the context of all the other evidence in the crucible of trial.

[479] Third, the very nature of the inquiries in cases of fraud, unconscionability and public policy requires that the factual foundation be carefully examined and reconstructed. This case raises an issue about the validity of a tax planning device that was marketed to almost 10,000 Canadians. It raises issues about the proper use and alleged misuse of the tax laws pertaining to charities. These are matters of public interest and it is desirable that there be a full airing of the issues in the context of a trial.

[480] ParkLane has submitted, relying on *Tercon Contractors* and by way of reply to Cannon's arguments, that the Court has "no discretion to refuse to enforce a valid and applicable contractual exclusion clause" absent "some paramount consideration of public policy sufficient to over-ride the public interest in freedom of contract to defeat the contractual rights of the parties" (*Tercon Contractors* at para. 82). It also submits that Cannon's evidentiary burden is not simply to show that there are triable issues, but rather to show that there is real evidence to support a finding that ParkLane is prevented from relying on the exclusion clause for reasons such as fraud.

[481] The first part of this submission begs the question of whether the exclusion clause is "valid". As I have shown, the authorities support the conclusion that if the contract is vitiated by fraud, the exclusion clause falls with it. The second part of this submission over-states Cannon's burden. He is not required to affirmatively establish that ParkLane cannot rely on the exclusion clause. He is required to show, by real evidence, that there is a genuine issue requiring a trial.

[482] In my view, Cannon has done just this. The ParkLane marketing brochures were the only documents that were designed with the specific purpose that they would be provided to prospective donors. They contained statements such as:

- the Donations Canada Trust had been established "with a funding commitment of $200,000,000 in cash to promote charitable giving in Canada" (emphasis added);

- the Gift Program had, as of January 2, 2007, "raised far in excess of $400,000,000 for various registered charities";

- participation in the Gift Program would enable taxpayers to make "cash donations" to charities;

- the charity would receive "cash" from both the donor and from the redemption of the sub-trust units;

- there would be a $7,500 "cash distribution" to the charity from the redemption of the sub-trust units in addition to the participant's $2,500 "cash donation";

- the Harris Comfort Letter referred to the donor making a "cash donation" and a "donation in kind" to the charity.

[483] These statements are capable of being interpreted as representations that there was $200 million in real cash waiting to be pumped into Canadian charities to match the donors' cash donations and that the charities would be receiving real cash to support the charitable receipt that the donors would receive. Structuring the program so that the charity got next to nothing and most of the money went into the pockets of the promoters, and marketing the program in a way that masked or distorted the truth, raises a serious issue of whether the ParkLane Defendants should be able to rely any of the exclusionary language in their contracts.

[484] In summary, while there is certainly an argument that the exclusion clause in the Donor Declaration bars Cannon's claims under the ordinary principles of contractual interpretation, this will not entitle ParkLane to summary judgment if Cannon is able to establish fraud, unconscionability, a breach of the *Consumer Protection Act, 2002* or a public policy reason not to enforce the contract. The donors have ended up with nothing. The evidence raises real questions about whether the charities have ended up with anything of real value. ParkLane, its Distributors, (a.k.a. "Independent Financial Advisors", a.k.a. "fundraisers"), its founder and its affiliates have ended up with most of the donor's money in their pockets.

[485] Having regard to the evidence adduced by both sides, and for the reasons I have expressed, I am satisfied that the plaintiff has discharged the burden of showing that his claims have a real chance of success and that there is a genuine issue requiring a trial. I am also satisfied that fairness to both parties – not just the plaintiff – requires that there be a trial. It would not be possible to acquire a full appreciation of the evidence on the written record and that it would not be in the interests of justice to decide these issues on a motion.

C. The Lawyers' Motion for Summary Judgment

[486] The Lawyers move for summary judgment dismissing Cannon's claims for negligence and negligent misrepresentation. I will begin by setting out the positions of the parties, followed by my analysis of the evidence and the arguments.

1. Submissions of the Lawyers

[487] The Lawyers say that Cannon is unable to establish that he was in a sufficiently close relationship with Harris and the Law Firms to give rise to the existence of a duty of care. They rely, in particular, on the decision the Supreme Court of Canada in *Cooper v. Hobart*, above, which I will discuss.

[488] The Lawyers submit that the uncontested evidence is that Harris issued each Opinion Letter on the express understanding that:

(a) the Opinion Letter was exclusively for the benefit of ParkLane (this was stated on the face of the letter);

(b) donors and potential donors would not be permitted to view the Opinion Letter;

(c) donors would be receiving independent professional tax advice;

(d) professional advisors to the donors and to potential donors could view the Opinion Letter for the sole purpose of providing advice to their clients (although the ability of such advisors to view the opinion would be subject to strict limits and controls);

(e) donors would be required to execute documentation acknowledging receipt of independent professional advice prior to participating in the Gift Program; and

(f) donors would be required to execute documentation acknowledging the assumption of tax risks, including the risk of C.R.A. reassessment, relating to their participation in the Gift Program.

[489] The Lawyers' argument is that they had no relationship of proximity to Cannon and therefore owed him no duty of care. It follows, they say, that Cannon's claims in negligence and negligent misrepresentation cannot succeed. They point out that Cannon had no direct contact with Harris, never saw the opinions he had written, and obtained advice concerning the Gift Program from Gacich. They say that Cannon's knowledge of the Gift Program was informed by the promotional materials he received in each of 2005 and 2006, by the contractual documents he executed in each of those years, by the advice he received from Gacich and by his own knowledge, in the fall of 2006, before he filed his own tax return, that C.R.A. would be auditing the Gift Program. They say that Cannon knew from the Comfort Letters contained in the ParkLane brochures that Harris and the Law Firms accepted no responsibility to the donors and

Cannon was fully aware of the risk of re-assessment by C.R.A. He executed the Donor Declarations and the Tax Risk Disclosure Statement (in 2006), in which he confirmed his awareness of the risks and the fact that he had received independent advice from Gacich.

[490] The Lawyers say that, as Cannon's claim against them is for pure economic loss and does not fit into one of the recognized duty of care categories, Cannon is required to establish a duty of care based on the principles set out in *Anns v. Merton London Borough Council,* [1978] A.C. 728 (H.L.) and amplified by the Supreme Court of Canada in *Cooper v. Hobart.*

[491] On the first stage of the *Cooper v. Hobart* analysis, *proximity*, the Lawyers say that the relationship between Cannon and Harris was not sufficiently close to make it just and fair to impose a duty of care on Harris. On the second stage of that analysis, *public policy*, the Lawyers say that imposing liability on the Lawyers would give rise to indeterminate liability to an indeterminate class in circumstances where they took deliberate and reasonable steps to avoid such liability.

[492] With respect to the claim in negligent misrepresentation, the Lawyers say that no duty of care was owed to Cannon on the basis of a "special relationship" and that reliance by Cannon was neither foreseeable nor reasonable.

[493] The Lawyers say that this case falls nicely with the category of cases that the Court of Appeal has identified in *Combined Air Mechanical Services Inc. v. Flesch* as being suitable for summary judgment: there are few contentious factual issues, the case is largely documentary and it is not necessary to make findings of fact or to draw inferences based on contentious facts.

2. Submissions of the Plaintiff

[494] Cannon submits that Harris had a broad role in the Gift Program, which was not limited to the preparation of his Opinion Letters and the Comfort Letters. He was involved in drafting some of the Gift Program documents and he reviewed and edited some of the promotional materials. He says that not only was Harris negligent in his preparation of the Opinion Letters and Comfort Letters, but he was negligent in the planning and creation of the Gift Program and the promotional materials, failed to provide appropriate information to Class members once he became aware of the C.R.A.'s position, and failed to allow the Class to view his Opinion Letters.

[495] The plaintiff says that the Opinion Letters given by Harris are deficient in two ways:

(a) they fail to disclose the "back half" of the Gift Program or to consider whether this will have tax consequences for donors;

(b) they fail to address the issue, ultimately raised by the C.R.A. as a reason to disallow the deduction, of the lack of "donative intent" or genuine "impoverishment" of the donors.

[496] As part of his case on certification, the plaintiff has adduced the evidence of Vern Krishna, Q.C., who expresses the opinion that Harris failed to address aspects of the Gift Program that Mr. Krishna considered to be an abuse of the charitable donation provisions of the *Income Tax Act*: the circular flow of funds and the enhanced benefit of a $10,000 deduction that the taxpayer would receive for a charitable donation of only $2,500.

[497] Cannon disputes the assertion that his claim does not fall within a recognized category of economic loss. He says that these categories include negligent misstatement and that in any event, there is a body of authority, including the "disappointed beneficiaries" cases, which holds lawyers liable in negligence where they knew or ought to have known that the third party would be likely to rely on their work. Included in this line of cases, he says, is *Banyan Tree.*

[498] In any case, the plaintiff says that this case can satisfy the test in *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada*, above.

[499] Cannon says that the claim against Harris for negligent misrepresentation meets the test in *The Queen v. Cognos*, discussed above, the requisite proximity is present and the existence of a duty of care is not circumscribed by policy considerations or by the disclaimers and other exclusionary language in the Opinion Letters, Comfort Letters and contract documents.

3. Duty of Care: Is a Trial Required?

[500] The factual foundation for the Lawyers' submission concerning proximity focuses on:

(a) the lack of a direct connection between Cannon and Harris;

(b) the fact that Cannon's knowledge of the Gift Program was informed by the advice he received from Gacich;

(c) the fact that Cannon was aware of the risks associated with the Gift Program, including the risk that his donation would be disallowed, and that he signed documents accepting those risks.

[501] Viewed through a different lens, however, Harris and Gacich were simply accomplices in the marketing pitch for the Gift Program, which was carefully crafted by Furtak and ParkLane to distance themselves from the donors and to give the Gift Program an aura of credibility and respectability.

[502] In the discussion of the facts under the heading of "Marketing Materials", I have described the brochure used by ParkLane to market the Gift Program and the prominent role given to Harris' Comfort Letters, his biography and his photograph. I do not propose to repeat those facts, but the language of the brochure can be interpreted as leading a reasonable reader to conclude that Harris had given opinions that the Gift Program complied with the *Income Tax Act* and that a donor would receive a valid tax credit for the full amount of the donation.

[503] This conclusion could only have been reinforced by Harris' Comfort Letters, which, together with the other statements in the brochure, were manifestly intended to give the donor reassurance, that:

(a) the Gift Program had been reviewed by Harris as a "top Canadian tax and legal professional" or "leading Canadian … tax law professional";

(b) Harris' tax opinion, which the donor's financial adviser would be permitted to review, was that the Gift Program complied with the *Income Tax Act*; and

(c) the donor would receive a valid tax credit for a multiple of his or her personal donation.

[504] In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 at para. 3, the Supreme Court of Canada confirmed the test for negligence as requiring that the plaintiff demonstrate:

> … (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damages; and (4) that the damages were caused, in fact and in law, by the defendant's breach.

[505] In this case, the Lawyers address only the first component of the test – the existence of a duty of care. They are, of course, quite entitled to do so – to show that the claim has no chance of success because one of the critical elements of the cause of action cannot be established.

[506] In *Attis v. Canada (Health)* (2008), 93 O.R. (3d) 35, 300 D.L.R. (4th) 415 (C.A.), the Court of Appeal summarized the test for the existence of a duty of care at para. 26:

> In examining whether a duty of care is present, a court must first inquire whether the harm that occurred was the reasonably foreseeable consequence of the defendant's conduct. If foreseeability is established, the question becomes whether the parties were in a relationship of proximity to support a duty of care. If a court finds both foreseeability and proximity, it must then inquire at the second stage of the analysis whether any residual policy considerations negative the imposition of a duty of care.

[507] In *Cooper v. Hobart*, the Supreme Court of Canada reviewed the test in *Anns v. Merton* and addressed the role of policy concerns in the scope of liability for negligence. The plaintiff had advanced money to a mortgage broker for investment and had lost much of it. She sued the Registrar of Mortgage Brokers, claiming that he negligently failed to supervise the conduct of the mortgage broker. She sought to have her action certified as a class proceeding. The issue was whether the Registrar owed a duty of care to the investing public for alleged negligence in failing to properly supervise the conduct of a company which he had licensed.

[508] The Supreme Court stated that there are two stages in the duty of care analysis. In the first stage of the analysis, the Court looks at whether there is a sufficiently close relationship between the parties, such that it would be foreseeable, in the reasonable contemplation of the defendant, that carelessness on its part might cause damage to the plaintiff.

[509] Foreseeability alone is not sufficient, however. The Court must undertake a proximity analysis to determine whether the relationship is sufficiently close to make it fair and just to impose a duty of care.

[510] The Supreme Court said that proximity is used to describe relationships that give rise to duties of care. Some well-known categories have been considered to give rise to such a duty, but the law is evolving and new categories will be developed, applying a principled approach. Typically, a duty of care arises where the circumstances of the relationship are "of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs": *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, [1997] S.C.J. No. 51 at para. 24.

[511] In *Cooper v. Hobart*, the Supreme Court said that defining relationships that give rise to a duty of care may involve looking at issues of the parties' expectations, representations, reliance and the interests involved – at para. 34:

> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[512] The Court identified, at para. 36, certain categories in which proximity has been recognized. These include:

- the traditional and common case where the defendant's act causes foreseeable physical harm to the plaintiff or the plaintiff's property;
- cases of nervous shock;
- liability for negligent mis-statement;
- misfeasance in public office;
- a duty to warn of the risk of danger;
- a duty owed by municipalities to prospective purchasers;

- a duty of government authorities with respect to road maintenance;
- relational economic loss; and
- joint venture cases.

[513] The Court stated that "when a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited."

[514] If the case does not fall within one of these categories, the Court must determine whether there is sufficient proximity between the parties – such close and direct relationship between the parties, that it is fair and just to impose a duty of care.

[515] The Supreme Court said that if foreseeability and proximity are established, one turns to the question of "whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care" (at para. 30). These considerations look to the overall consequences of recognizing a duty of care. The court explained this inquiry at para. 37:

> This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements*, supra, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

[516] The Supreme Court emphasized that the second stage analysis is particularly important in novel cases that do not fall within existing categories where a duty of care has been historically recognized. Effectively, this analysis determines that even though foreseeability and proximity are present, giving rise to a *prima facie* duty of care, broader considerations of the effect on society of recognizing such a duty make it unwise to impose one.

[517] In the companion case to *Cooper v. Hobart, Edwards v. Law Society of Upper Canada*, the plaintiffs in a proposed class action had paid money into a lawyer's trust account as consideration for gold delivery contracts made with a third party. The plaintiffs were not clients of the lawyer. The contracts turned out to be part of a fraudulent scheme. The lawyer alerted the Law Society of the unorthodox use of his trust account, and the Law Society commenced an

investigation. Unfortunately, it was not completed in time to save the plaintiffs' investments. The plaintiffs alleged that that the Law Society had not acted fast enough and that, having been alerted of potential misconduct, it should have taken steps to ensure that the lawyer's trust account was not dissipated. The issues were: whether the Law Society owed a duty of care to persons, not clients of the solicitor, who deposit money into a solicitor's trust account, in respect of losses resulting from misuse of the account and, if there was such a duty, whether there were grounds rooted in policy that would limit or negate the finding of a duty.

[518] The Supreme Court summarized the *Anns/Cooper v. Hobart* test as follows, at paras. 9 and 10:

> At the first stage of the *Anns* test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. Mere foreseeability is not enough to establish a prima facie duty of care. The plaintiff must also show proximity -- that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.
>
> If the plaintiff is successful at the first stage of *Anns* such that a prima facie duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

[519] The Supreme Court found that the case did not fall within, nor was it analogous to, any category of cases in which a duty of care had previously been recognized. Thus, the plaintiff was required to establish foreseeability and proximity. There was nothing in the *Law Society Act*, R.S.O. 1990, c. L.8, the governing statute, to impose a private law duty of care on the Law Society. Rather, the legislation was geared towards the protection of clients, as opposed to creating a private law duty of care to members of the public who deposit money in a lawyer's

trust account. There were existing mechanisms, through the Law Society's Compensation Fund and lawyers' mandatory professional liability insurance, to compensate clients who suffer losses due to dishonesty or negligence of lawyers. Above all, s. 9 of the *Law Society Act* conferred a statutory immunity on the Treasurer, benchers and officials of the Society for acts done in the performance of their duties. This precluded an inference that the statute was intended to provide protection to members of the public. Accordingly, the Supreme Court found that there was no *prima facie* duty of care. Even if there was a duty of care, it would be negatived by policy considerations.

[520] In this case, the issue is whether a lawyer who provides an opinion concerning the compliance of a charitable donation program with the *Income Tax Act* and regulations owes a duty of care to donors who have not received or read the opinion and who have been informed that the opinion is available for review by their financial advisors without responsibility on the part of the lawyer. The plaintiff argues that this case is analogous to cases that have recognized proximity between a solicitor and investors or between a solicitor and beneficiaries who have suffered loss due to the negligence of the solicitor, even though they were not in a direct solicitor and client relationship.

[521] In *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605, [1999] O.J. 5742 (Gen. Div.), the plaintiff, along with other proposed class members, had invested his RRSPs in mortgages that were syndicated by one of the defendants. The mortgages had been prepared and registered on the subject properties by a solicitor, who was named as a defendant. The investments collapsed and the plaintiff sued the solicitor, alleging that he was negligent and that he knew or ought to have known that the mortgages were part of a fraudulent scheme. Sharpe J. acknowledged that the claim was "somewhat novel", but noted that there was a "developing line of authority" that the plaintiff could draw upon. He referred to *Filipovic v. Upshall* (1998), 19 R.P.R. (3d) 88 (Gen. Div.) as well as the "disappointed beneficiary" cases: *Whittingham v. Crease & Co*., [1978] 5 W.W.R. 45 (B.C.S.C.) and *Linsley v. Kirstiuk* (1986), 28 D.L.R. (4th) 495 (B.C.S.C.). He observed, at para. 8:

> While I agree that the claim against Paul is somewhat novel, there is a developing line of authority the plaintiff can draw upon. As noted by Chapnik J. in *Filipovic v. Upshall* (1998), 19 R.P.R. (3d) 88 (Ont. Gen Div.) at pp. 104-05, there is a line of cases that holds a solicitor may place himself or herself in a sufficient relationship of proximity to a third party to owe that party a duty of care. In *Filipovic*, the solicitor was retained by a corporation with respect to a real property transaction. The issue was whether the solicitor was liable to the plaintiffs who were investors in the transaction. The plaintiffs thought they were acquiring a beneficial interest in property, but in fact they were shareholders in the corporation. While the solicitor was found not liable on the ground that he had not breached any duty, Chapnik J. did find that he owed the plaintiff investors a duty of care: see pp. 105-06. Solicitors have

> been found to owe a duty of care to persons not formally retained as clients in other cases which lend support to the plaintiffs [sic] contention that Paul may have owed him a duty of care. In *Whittingham v. Crease & Co*., [1978] 5 W.W.R. 45 (B.C.S.C.), a solicitor was held to owe a duty of care to the intended beneficiary of a will where the solicitor had been retained by the testator. In *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632, the British Columbia Court of Appeal found that a solicitor, retained by the purchaser in a real estate transaction, owed a duty of care to the vendor, who was unrepresented, with respect to a take-back mortgage. Similarly, in *Linsley v. Kirstiuk* (1986), 28 D.L.R. (4th) 495 (B.C.S.C.), a solicitor retained by the trustee of the estate was found to owe a duty to the beneficiaries of the estate.

[522] In *Delgrosso v. Paul*, Sharpe J. was applying the test under s. 5(1)(a) of the *C.P.A.* and was not making a finding on the merits.

[523] The authorities referred to by Justice Sharpe, and other authorities were referred to by Lax J. in *Banyan Tree* in her consideration of the s. 5(1)(a) analysis in relation to the law firm. In *Banyan Tree,* Justice Lax concluded that there was a sufficient relationship between the plaintiffs and the law firm to give rise to a duty of care – at paras. 30 and 31:

> Notwithstanding the efforts of counsel for [the law firm] to confine these cases to their facts and to distinguish them, there is clearly a developing line of authority in Ontario and elsewhere that have permitted claims of this kind to proceed. FMC pointed to no authority that rejected a third party negligence claim against lawyers at the certification stage. I regard *Hurst v. Price Waterhouse Coopers (PWC) LLP, Canada*, [2009] O.J. No. 1415 on which FMC relies as entirely distinguishable. This was a claim for negligent misrepresentation, reckless misrepresentation, and negligence in which the allegedly wrongful act by PWC amounted only to having its name appear as auditor on an offering memorandum. This was found insufficient to establish a relationship giving rise to a *prima facie* duty of care.
>
> Whether or not the plaintiffs and proposed class members are akin to disappointed beneficiaries, it is certainly arguable that FMC ought reasonably to have foreseen that its tax opinion would be used to market the gift program and that the participants would be "disappointed" and suffer damages if FMC was negligent in giving that opinion. 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. [Emphasis added].

[524] In answer to the law firm's argument that the plaintiffs admitted that they had not read the opinions, Justice Lax noted that the claim was not advanced on the basis that there was a direct relationship with the law firm and whether the plaintiffs read or relied on the opinions was irrelevant to the law firm's liability. The same is true here.

[525] On an application for leave to appeal the decision of Lax J. in *Banyan Tree, Robinson. v. Rochester Financial Ltd.*, [2010] O.J. No. 1481, 2010 ONSC 1899, Dambrot J. stated at para. 24:

> Here, equally, the absence of direct reliance by the plaintiffs on the solicitor's advice may not be determinative. Even without direct reliance on the advice, it remains arguable that when the plaintiffs entered the scheme, they were relying on the legal advisors of the architects of the scheme to ensure that their pledges would qualify as valid charitable donations for tax purposes. If the legal advisors acted negligently in giving their advice to the gift plan defendants, the plaintiffs could have a claim in negligence against those legal advisors.

[526] That is precisely the situation here.

[527] The Lawyers distinguish *Banyan Tree* on the basis that in this case, the Opinion Letters were not permitted to be shown to donors, whereas in *Banyan Tree*, the letters were written in contemplation that they would be provided to donors and specifically stated that they could be relied upon by donors as well as the promoters. They point out as well that Cannon acknowledged that he had received independent advice and was aware of the risk that his donation might be disallowed.

[528] To the contrary, both the distinguishable facts in *Banyan Tree* and the fact that it was concerned not with summary judgment but with the "plain and obvious" test under s. 5(1)(a) of the *C.P.A.* make the case for a duty of care in this case even stronger than in *Banyan Tree* and the disappointed beneficiary cases.

[529] In this case, the Comfort Letters were supplied by the Lawyers with the knowledge that they would be used to market the Gift Program. Harris and the Law Firms also knew, or ought to have known, that the Gift Program could not be launched without a favourable tax opinion by a leading Canadian tax expert. They knew that the existence of such an opinion would be touted by the promoters, as in fact it was. In *Banyan Tree*, Lax J. found that it was "arguable" that the law firm "ought reasonably to have foreseen that its tax opinion would be used to market the Gift Program and that the participants would be 'disappointed' and suffer damages if [the law firm] was negligent in giving the opinion." This case is stronger in that regard than *Banyan Tree* because, in this case, Harris and the Law Firms knew that the Opinion Letters were being used to market the Gift Program.

[530] It is my view, therefore, that a strong argument can be made that this is a case that falls within an existing category in which a duty of care has been recognized –a duty of care owed by a solicitor to third parties who have not formally retained the solicitor but who rely on the solicitor to protect their interests. These would include the "disappointed beneficiary" cases (for example, *Whittingham v. Crease & Co*. and *Linsley v. Kirstiuk*), the investor cases (*Delgrosso v. Paul* and *Filipovic v. Upshall*), and charitable donation or tax shelter cases such as *Banyan Tree*, and *Lipson v. Cassels Brock & Blackwell LLP*.

[531] I will, however, assume that this case does not fall within an existing category in which a duty of care has been recognized and I will ask whether there was a sufficient relationship of proximity between Cannon and Harris to give rise to a duty of care.

[532] The proximity analysis requires the Court to engage in a fact-based examination of the relationship between the parties to determine whether that relationship is sufficiently close that it would be fair and just to impose a duty of care. The touchstones for the analysis were, as I have noted, described by the Supreme Court of Canada as expectations, representations, reliance and the property or other interests involved.

[533] Under these headings, the Lawyers point to the fact that the Gift Program had been carefully word-smithed to bullet-proof ParkLane and the Lawyers from claims by the donors if the program failed to deliver valid tax deductions. They say that the brochures provided to Cannon, the documents he signed and the advice and information he received from Gacich are inconsistent with either an expectation that Harris was looking after his interests or reliance on Harris's opinion. They say that the express representations made by Cannon are inconsistent with a close relationship with Harris and that, in light of those, Harris could not have contemplated that Cannon would rely on his opinion.

[534] In my view, the Lawyers' analysis glosses over the significance of Harris in the successful marketing of the Gift Program – specifically, the significance of allowing his name, his impressive credentials and reputation and his photograph, along with his Comfort Letters, to be held out as having endorsed the Gift Program as being an effective and *bona fide* tax planning device. One over-riding representation that was made by the Gift Program brochure was: "This program has the endorsement of a leading Canadian tax expert, Edwin C. Harris Q.C., who has given an opinion that it is legitimate and that it will work." As I have noted, Harris permitted this representation to be made. He admitted on cross-examination that the Comfort Letter was prepared by him with the intention that it would be included in the Gift Program materials that would be given to potential donors to show that it was a *bona fide* program.

[535] I noted earlier in these reasons that the successful marketing of the Gift Program depended on the existence of a legal opinion that the program complied with the *Income Tax Act* and that donors could expect to receive a tax deduction. Without such an opinion and the ability to publicize the opinion to prospective donors, the Gift Program would never have gotten off the drawing board. It was not enough for the promoters that Harris be an expert, but cloistered, tax "grinder", unlike some of the other lawyers and accountants who worked on the program – it was

essential that they be able to use his name, his photograph, his credentials, his reputation and his opinion, in order to sell the Gift Program. Harris could have refused to permit this. He could have insulated himself from liability in the best way possible, by remaining anonymous, just as the other experts did. In allowing the use of his reputation and opinions, however, he clearly knew that he and his opinions were part of the sales package that was being offered to prospective donors.

[536] By permitting himself and his Comfort Letters to be used in the marketing of the Gift Program, Harris intentionally put himself in a close and direct relationship with every donor.

[537] The Lawyers rely on the bolded warning in the Opinion Letters stating, "**We assume no responsibility to Donors."** As Cannon never saw the Opinion Letters and no donor was supposed to see them, this factor does not go to limit the scope of the representations made to the donor. By the same token, the fact that the Comfort Letters contained statements that the donor's financial advisor was permitted to view the Opinion Letter "without responsibility on our part, for his or her sole use in assessing the Program and in determining its suitability to a donor's specific circumstances" does not go to limitation of the Lawyers' responsibility to the donor – although it might be construed as limiting the Lawyers' responsibility to the financial advisor. Nor is there any representation made by Cannon in the Donor Declarations, that could reasonably be regarded as a representation to the Lawyers. There is no mention of the Lawyers in that document, although there is a release of Aylesworth LLP in its capacity as escrow agent.

[538] It was reasonably foreseeable that if Harris was negligent in his advice to ParkLane, and the Gift Program did not comply with the *Income Tax Act*, donors such as Cannon would suffer harm. The evidence supports the conclusion that Harris knew, or ought to have known, that his Opinion Letters, and his Comfort Letters, were integral parts of the marketing of the Gift Program and that the whole purpose of his Comfort Letters was to assure donors that he had reviewed the Gift Program and that it was, in his words, *bona fide*.

[539] In providing the Comfort Letters, his photograph and his biography, and permitting them to be used in the marketing of the Gift Program, Harris allowed his name and reputation to be put on the line in support of the Gift Program and in so doing became an integral part of the sales pitch. He knew, or ought to have known that his favourable opinion concerning the Gift Program was being used to sell the Gift Program to donors. He could reasonably foresee that the donors would suffer a loss if he was negligent in the preparation of his opinion.

[540] In my view, the evidence in this case raises a genuine issue, requiring a trial, concerning the existence of a duty of care owed by the Lawyers to Cannon. That evidence takes this case well beyond the disappointed beneficiaries cases and the disgruntled investors cases such as *Delgrosso v. Paul¸ Filipovic v. Upshall* and *Banyan Tree*. It does so because, in this case, Harris permitted himself and his opinion to be held out to donors in the marketing of the Gift Program. There is evidence that Harris knew that this was taking place and knew that donors would be given comfort by his involvement. There is some evidence that Cannon was in fact reassured by Harris' involvement. The circumstances suggest that there were expectations on both sides,

representations by Harris and reliance by Cannon, sufficient to give rise to a duty of care and to make it fair and just to impose such a duty.

[541] There is also an argument to be made that, in allowing his Comfort Letters to be included in ParkLane's marketing brochure, knowing that prospective donors would not be permitted to see his Opinion Letters, Harris had a duty to ensure that the brochure itself contained an accurate description of the Gift Program. I have identified some statements in the brochure that are capable of being considered misleading. It is arguable that Harris knew, or ought to have known, that they were misleading and that he owed a duty to Class members to either correct the statements or to refuse to permit his Comfort Letter to be used as part of the marketing materials.

[542] There is also an argument, which I have discussed earlier, that the Donor Declaration and Tax Risk Disclosure Statement will fall by the wayside if it is established that the Gift Program is impeachable on the ground of fraud or misrepresentation. There is no suggestion whatsoever that Harris was implicated in or aware of any misfeasance, but Canon's execution of those documents will not amount to an assumption of risk if the execution was procured by fraud or in breach of the *Consumer Protection Act, 2002*.

[543] I turn to the second stage of the *Cooper v. Hobart* analysis – are there residual policy considerations that would negative the duty of care? These may include such considerations as (a) whether recognizing a duty of care would create the spectre of unlimited liability to an unlimited class; (b) the effect of recognizing a duty of care on other legal obligations, the legal system and society in general; and (c) the existence of other remedies in law: *Cooper v. Hobart* at para. 37.

[544] The Lawyers rely primarily on the first consideration – they say that imposing legal obligations on lawyers in these circumstances will impact the ability of lawyers to freely advise their clients and the ability of clients to disclose the fact that advice has been received. They say that this is an indeterminate liability to an indeterminate class "in circumstances where the Law Firms took active and reasonable steps to avoid any such potential exposure arising." They distinguish this case from *Hercules Management Ltd. v. Ernst & Young,* [1997] 2 S.C.R. 165, because, in this case, the Lawyers could not have known, at the time they gave their opinions, the identity or number of the donors. In *Hercules,* the auditors could have ascertained the identity of the shareholders at the time they prepared their report.

[545] In this case, the concern is not that a tax opinion was provided to ParkLane. The concern is that the opinion was provided with the knowledge that ParkLane would advertise its existence to potential donors and would use its author as part of its marketing program. Imposing liability in these circumstances does not interfere with the ability of lawyers to freely advise clients. It may, however, cause lawyers to exercise caution or control when they give an opinion to a client with knowledge that the client proposes to distribute it to numerous third parties for the business purpose of selling the very product of the lawyer's advice. It seems to me that this is a policy reason that would support, rather than limit, the existence of a duty. As a trial is required to fully explore the duty of care analysis, I believe that conclusions on the policy question should be deferred to trial as well.

4. Negligent Misrepresentation: Is a Trial Required

[546] My conclusions with respect to the existence of a duty of care in negligence apply equally to the claim against the Lawyers for negligent misrepresentation.

[547] The plaintiff pleads that the Lawyers prepared the Comfort Letters on the instructions of ParkLane and "with the intent that they would be read by the Class Members, and relied upon by the Class Members in making their decision to participate in the Gift Program." They go on to plead:

> In particular, these Defendants other that the [FFC Foundation Directors] knew that the only reasonable inference to be drawn from the comfort letters was that the Gift Program was a legitimate charitable giving program and that the tax receipts generated by donations under the Gift Program would be accepted as charitable tax credits by CRA.
>
> But for these comfort letters, the Gift Program would not have been launched and the Class would not have participated in the Gift Program. The comfort letters were designed to induce the Class to invest in the Gift Program without disclosing to the Class all of the material risks of investing in the Gift Program, or the true facts relating to the actual operation of the Gift Program. These Defendants, other than the [FFC Foundation Directors] knew, or ought to have known, that the Class Members receiving the comfort letters (but not the opinion letters), would assume that the opinion letters created by the lawyers would opine that the income tax savings represented in the promotional materials for the Gift Program would be permitted without objection from the CRA.

[548] The Lawyers' motion for summary judgment on negligent misrepresentation is based on the assertion that the Lawyers owed no duty of care based on a "special relationship" between Harris and his law firms on the one hand and Cannon on the other hand, as required by *Queen v. Cognos Inc.*, discussed earlier. Again, they say that it was not reasonably foreseeable that Cannon would rely on the Opinion Letters, given that he was not permitted to see them, he signed documents denying any reliance and he obtained advice from his own financial advisor.

[549] I have found that in providing the Comfort Letter, his biography and his photograph for use in the marketing brochure and as part of the sales pitch for the Gift Program, Harris knowingly brought himself into direct proximity with Cannon and Class members. The only purpose of the Comfort Letter was to help ParkLane sell the Gift Program.

[550] It was foreseeable that a donor would rely on the Comfort Letters and it was entirely reasonable that he or she would do so. In *Hercules Managements Ltd. v. Ernst & Young*, above,

the Supreme Court of Canada set out a list of factors at para. 43 that could be indicative of "reasonableness":

(a) the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.

(b) the defendant was a professional or someone who possessed special skill, judgment, or knowledge.

(c) the advice or information was provided in the course of the defendant's business.

(d) the information or advice was given deliberately, and not on a social occasion.

(e) the information or advice was given in response to a specific enquiry or request.

[551] The Supreme Court made it clear that these factors were not to be considered absolute, exclusive or a strict test of reasonableness.

[552] In this case, most, if not all, of these factors are met in relation to Harris. As the Lawyer for ParkLane, who received fees in relation to the Gift Program year after year, he had an indirect financial interest in the success of the Gift Program. He obviously possessed special skill, a fact that was touted by ParkLane. He provided the Comfort Letters in the course of his business as a lawyer and as counsel for ParkLane. The information was given deliberately, and not casually or socially. Finally, the information was given in response to a specific request by ParkLane with knowledge that it would be conveyed to potential donors whose first question would undoubtedly be – "Is it legal?"

[553] I find, therefore, that there is substantial evidence in support of the existence of a special relationship between Harris and Cannon so as to give rise to a duty of care.

[554] Moreover, on the second aspect of the *Cooper v. Hobart* test, which asks whether there are residual policy considerations that justify denying liability, it seems to me that this is not a case where indeterminate liability would be a concern. Harris knew precisely how his Comfort Letter was going to be used and he knew precisely the class of persons to whom it would be provided. I have discussed this earlier.

[555] As I have said, one reasonable interpretation of ParkLane's brochure was that Harris had expressed the opinion that the Gift Program was *bona fide* and would work. The plaintiff has adduced evidence that the Gift Program was not *bona fide*, was simply a scheme to enrich the promoters, had no real chance of success and that Harris should have known this. There is also a credible argument that if the Gift Program was a fraudulent scheme, none of the exclusionary language in any of the Gift Program documentation is of any value to any of the defendants, the Lawyers included. A trial is required in order to fairly examine these issues.

[556] The Lawyers' motion for summary judgment is therefore dismissed.

V. SUMMARY AND CONCLUSIONS

[557] This was a hearing of both a certification motion against multiple parties and summary judgment motions by two sets of defendants. The evidentiary burden on the motions is obviously different. On the certification motion, the plaintiff was only required to show "some basis in fact" that the action meets the requirement for certification, other than the requirement in s. 5(1)(a) of the *C.P.A.* that there be a cause of action. On the summary judgment motions, the defendants were required to establish that there was no genuine issue requiring a trial. I have found, on the evidence before me, that the plaintiff met his burden on certification and that the defendants have failed to meet their burden on summary judgment. While it has been necessary for me to take a hard look at the evidence, it must be understood that my conclusions are not immutable findings of fact, but simply observations first, that there is a basis in fact that this action is appropriate for certification and second, that the plaintiff's claims have a real chance of success and a trial is required in order to come to conclusive determinations of fact and law.

G.R. Strathy J.

Released: January 18, 2012

Cannon v. Funds for Canada Foundation, 2012 ONSC 399
COURT FILE NO.: CV-08-362807-00 CP
Date: 20120118

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL CANNON

Plaintiff

- and -

FUNDS FOR CANADA FOUNDATION, ET AL.

Defendants

REASONS FOR JUDGMENT

G.R. Strathy J.

Released: January 18, 2012