

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE
MR. JUSTICE EDWARD BELOBABA

) *Thursday* THE *13* DAY
) OF *March*, 2014
)

BETWEEN:

MICHAEL CANNON

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**

Defendants

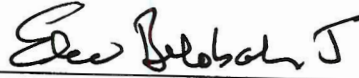
Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made in writing by the Defendants, ParkLane Financial Group Limited, Trafalgar Associates Limited and Trafalgar Trading Limited, for an Order amending the Order of Justice Belobaba, dated February 18, 2014 attached hereto as Schedule "A" (the "**Subject Order**"), was read this day at the Osgoode Hall Court House, 130 Queen St. W. Toronto, Ontario.

ON BEING ADVISED of the consent of the parties present at the hearing of the motion to which the Subject Order relates:

1. **THIS COURT ORDERS** that the date of the Subject Order, be and is amended to March 4, 2014.



E. BELOBABA J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAR 14 2014

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:



SCHEDULE "A"

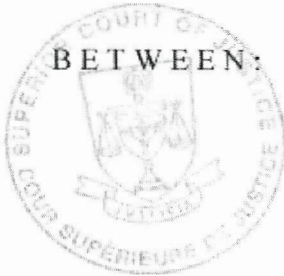
Court File No. CV-08-362807-00 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE
JUSTICE BELOBABA

)
)
)

FRIDAY, THE 18th DAY
OF FEBRUARY, 2014



BETWEEN:

MICHAEL CANNON

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**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the Plaintiff for an order amending the common issues and staying the Third Party Claim bearing Court File No. CV-08-362807-CPA3 was heard on October 17, 2013, January 30, 2014 and February 14, 2014 at the Osgoode Hall Court House, 130 Queen St. W., Toronto, Ontario.

ON READING the Plaintiff's motion records, the responding motion records of the ParkLane Defendants, the Third Parties represented by Crawley MacKewn Brush LLP and by Rochon Genova LLP, and Appleby Services (Bermuda) Ltd. as trustee for the Bermuda Longtail Trust, the facts, further written submissions and authorities of these parties, and the written submissions of other Third Parties who did not attend at the hearings, and upon this Court delivering its Direction of February 18, 2014;

1. **THIS COURT ORDERS** that the common issues certified by order of the Honourable Justice Strathy dated January 18, 2012 are varied in the form attached hereto as Schedule A.
2. **THIS COURT ORDERS** that, subject to the terms hereof, the third party claim bearing Court File No. CV-08-362807-CPA3 (the "Third Party Claim") brought by ParkLane Financial Group Limited ("ParkLane"), Trafalgar Associates Limited ("TAL") and Trafalgar Trading Limited ("TTL") in this action bearing action no. CV-08-362807-CP (the "Action") against certain distributors (the "Distributors") including the Distributors' defences in the Action are stayed until the final resolution of the common issues trial (the "Common Issues Trial"), at which time this stay is automatically lifted without further order of this Court.
3. **THIS COURT ORDERS AND DECLARES** that any findings made at the Common Issues Trial in respect of any acts or omissions of the Distributors shall not be binding on the Distributors, individual Class Members, or the Defendants in any individual issues trials in the Action, or in the Third Party Claim.
4. **THIS COURT ORDERS AND DECLARES** that nothing in this order is intended to nor does it in any way limit, restrict or preclude the Defendants from pursuing any defences (including set-off and contributory negligence), crossclaims or counterclaims, or from leading or

seeking any evidence relating thereto in the Action, including, without limiting the generality of the foregoing, defences, crossclaims, counterclaims and/or evidence relating to any acts or omissions of the Distributors or relating to any interactions between the Class Members and Distributors, or between the Donors and any other financial, legal, tax or other advisor relating to the Gift Program.

5. **THIS COURT ORDERS AND DECLARES** that nothing in this order is intended to, nor does it in any way amend or vary the Orders of the Honourable Justice Belobaba dated 18 October 2013 (the “Settlement Approval Orders”).

6. **THIS COURT ORDERS** that notwithstanding the stay of the Third Party Claim, the Distributors and the Defendants:

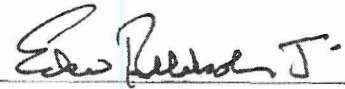
- (a) shall retain all discovery and related rights granted in the Settlement Approval Order; and
- (b) shall have the right to access and use in the Third Party Claim all productions and examinations for discovery transcripts in the Action.


7. **THIS COURT ORDERS** that notwithstanding the stay of the Third Party Claim, the Distributors have standing to make submissions at any motions for settlement approval in the Action.

8. **THIS COURT ORDERS** that notwithstanding the stay of the Third Party Claim, at the Common Issues Trial a Distributor shall have the right, subject to the discretion of the Common Issues Trial Judge:

- (a) to be represented by counsel if the Distributor is called as a witness, and that such counsel shall have the right, following all cross-examinations, to examine the Distributor in the form of a re-examination, before any re-examination by the party who called that Distributor as their witness; and


- (b) to make submissions in respect of: (1) the liability of Edwin C. Harris Q. C., Patterson Kitz (Halifax), Patterson Kitz (Truro), Paterson Palmer aka Patterson Palmer Law and McInnes Cooper as contemplated by the terms of the Settlement Approval Order, and (2) on any other issue permitted by the Common Issues Trial Judge.



E. BELOBABA J. 

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ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

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Schedule A

Refined Common Issues

1. DEFINITIONS

“**Additional Materials**” means the written opinions of Edwin C. Harris to ParkLane dated August 26, 2005, March 14, 2006 and March 2, 2007, the Distributor Reference Manuals prepared by ParkLane, and the PowerPoint presentations for Distributors prepared by ParkLane

“**ASBL**” means Appleby Services (Bermuda) Limited as Trustee of the Bermuda Longtail Trust.

“**Class Member**” means any person who participated in the Gift Program while resident in Canada during the period between January 1, 2005 and December 31, 2009, 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.

“**Contract**” means, in respect of a Class Member’s participation in the Gift Program, a Class Member’s:

- a. Pledge to a Charity directed to ParkLane as escrow agent;
- b. Enduring Property Pledge to a Charity directed to ParkLane as escrow agent;
- c. Application to be Designated as a Beneficiary of the Donations Canada Financial Trust;
- d. Transfer of Units of Sub-trust to Charity;
- e. Donor Declaration; and
- f. (after 2005) Tax Risk Disclosure Statement.

“**Distributor**” means a person who referred one or more Class Members to the Gift Program, including the parties named as Third Party Defendants in the third party action Court File No. CV-080362807-CPA3.

“**FFCF**” means the Funds for Canada Foundation.

“**Gift Program**” means the ParkLane Donations for Canada Charitable Gift Program for the years 2005 to 2009 inclusive.

“**Gift Program Materials**” means the Contract and the Promotional Materials.

“**Gleesons**” means Matt Gleeson and Mary-Lou Gleeson.

“**Harris Defendants**” means Edwin C. Harris, Patterson Palmer (aka Patterson Palmer Law), Patterson Kitz (Halifax), Patterson Kitz (Truro) and McInnes Cooper.

“ParkLane” means ParkLane Financial Group Limited.

“Promotional Materials” means the promotional brochures in respect of the Gift Program which were intended to be given to the Class Members.

“TAL” means Trafalgar Associates Limited.

“TTL” means Trafalgar Trading Limited.

2. Contract

- a. Was there an express or implied term in the Contract that the charitable tax receipts received by the Class Members would be accepted by Canada Revenue Agency as valid and legitimate claims for charitable donation tax credits, and that the Class Members would receive the tax savings referred to in the Gift Program Materials?
- b. If the answer to 2(a) is yes, did ParkLane breach this implied or express term in the Contract, and in what respect?
- c. If the answer to 2(b) is yes, was there a total failure of consideration?
- d. If the answer to 2(c) is yes, is rescission of the Contract available as a remedy for Class Members as a result of the total failure of consideration, and if so, in what circumstances is it available?

3. NEGLIGENCE¹

- a. Did any one or more of ParkLane, TAL, TTL, the Harris Defendants, the Gleesons, FFCF and/or ASBL have a role in the design of the Gift Program?
- b. Did any one or more of ParkLane, TAL, TTL, the Gleesons, FFCF, the Harris Defendants and/or ASBL participate in the Gift Program from and after the time that each Class Member’s Application to be Designated as a Beneficiary of the Donations Canada Financial Trust was accepted (the “Post-Donation Implementation of the Gift Program”)?
- c. If the answer to 3(a) or (b) is yes in respect of any one or more of ParkLane, TAL, TTL, the Harris Defendants, the Gleesons, FFCF and/or ASBL, did any such defendant(s) owe the Class Members a duty of care?
- d. If the answers to 3(a) or (b) and (c) are yes, what is the applicable standard of care for each such defendant?

¹ The Plaintiff’s claim is limited to the design, implementation and operation of an improper or defective Gift Program. Common issues as to whether any defendant identified in paragraph 3(a) owed a duty of care or breached a standard of care in respect of participation in the Gift Program during the Post-Donation Implementation of the Gift Program should only be considered if it has been established that any one or more of such defendants has breached a standard of care in the design of the Gift Program. If there is no finding that a standard of care with respect to the design of the Gift Program has been breached by any such defendant, the common issues determination with respect to negligence should proceed no further

- e. If the answers to 3(a) or (b) and (c) are yes, did any such defendant(s) breach the applicable standard of care?

4. CONSPIRACY

- a. Did any of ParkLane, TAL, TTL, the Gleesons and/or ASBL act in concert, by agreement or with common design in respect of the design of the Gift Program and/or the Post-Donation Implementation of the Gift Program?
- b. If the answer to 4(a) is yes, was their conduct unlawful, and in what respect?
- c. If the answer to 4(b) is yes, was the unlawful conduct directed towards the Class?
- d. If the answer to 4(c) is yes, did the defendants who engaged in such unlawful conduct know or did they act with reckless disregard to whether injury to the Class was likely to result?
- e. For the purposes of the cause of action in conspiracy, can injury to the Class be determined on a class-wide basis, and if so, did the aforesaid unlawful conduct, excluding any acts or omissions of the Distributors, cause injury to the Class?

5. FRAUD²

- a. Did any one or more of ParkLane, TAL, TTL, the Gleesons and/or ASBL design the Gift Program?
- b. Did any one or more of ParkLane, TAL, TTL, the Gleesons and/or ASBL participate in the Post-Donation Implementation of the Gift Program?
- c. If the answer to 5(a) or (b) is yes, did any one or more of ParkLane, TAL, TTL, the Gleesons and/or ASBL commit a fraudulent act in respect of:
 - (i) the design of the Gift Program; or
 - (ii) their participation in the Post-Donation Implementation of the Gift Program?
- d. If the answer to 5(c) is yes, did any such defendant have a fraudulent intent?
- e. If the answer to 5(d) is yes, is rescission of the Contract available as a remedy for Class Members, based solely on the conduct of ParkLane, TAL, TTL, the Gleesons and/or ASBL?

² See footnote 1. Common issues as to whether any defendant identified in paragraph 5(a) committed a fraudulent act and/or had a fraudulent intent in connection with their participation (if any) in the Gift Program during Post-Donation Implementation of the Gift Program should only be considered if it has been established that any one or more of such defendants i) committed a fraudulent act and ii) had a fraudulent intent with respect to the design of the Gift Program. If there is no finding that any such defendant committed a fraudulent act with fraudulent intent with respect to the design of the Gift Program, the common issues determination with respect to fraud should proceed no further.

6. FRAUDULENT MISREPRESENTATION

- a. Did any one or more of ParkLane, TAL, TTL, the Gleesons and/or ASBL make representations in the Gift Program Materials?
- b. Did any one or more of ParkLane, TAL, TTL, the Gleesons and/or ASBL make representations in the Additional Materials?
- c. For the purposes of the causes of action in Fraudulent Misrepresentation and Negligent Misrepresentation, did Class Members acknowledge and agree in the Donor Declarations that except for what is contained in the Gift Program Materials, no other promise, representation or warranty was relied on by them?
- d. For the purposes of the causes of action in Fraudulent Misrepresentation and Negligent Misrepresentation, were Class Members precluded by the Donor Declaration from relying on oral or written representations from any sources other than the Gift Program Materials in deciding to participate in the Gift Program?
- e. For the purposes of the causes of action in Fraudulent Misrepresentation and Negligent Misrepresentation, were Class Members precluded by the Donor Declaration from relying on oral or written representations from any sources other than the Gift Program Materials and the Additional Materials in deciding to participate in the Gift Program?
- f. If the answers to 6(c) and 6(d) are yes, were any of the representations in the Gift Program Materials made by ParkLane, TAL, TTL, the Gleesons and/or ASBL false?
- g. If the answer to 6(e) is yes, were any of the representations made by ParkLane in the Additional Materials false?
- h. If the answer to 6(f) is yes, can each Class Member's reliance on the Gift Program Materials be inferred?
- i. If the answer to 6(g) is yes, can each Class Member's reliance on the Gift Program Materials and the Additional Materials be inferred?

7. CONSUMER PROTECTION ACTS

- a. Do any one or more of
 - (i) the *Consumer Protection Act* S.O. 2002, c.30, Schedule A (ss. 14, 15, 17 or 18),
 - (ii) the *Fair Trading Act* R.S.A. 2000 C. F-2 (ss. 6 or 7),
 - (Iii) the *Business Practices and Consumer Protection Act* S.B.C. 2004 c.2 (ss 4, 5, 8, 10 or 171),
 - (iv) the *Business Practices Act* C.C.S.M. c. B120 (ss. 2, 5 or 23),
 - (v) the *Consumer Protection and Business Practices Act* S.N.L. 2009, c. C-31.1 (ss. 7, 8, 9 or 10),

- (vi) the *Business Practices Act* R.S.P.E.I. 2007 c.17 (ss. 2, 3 or 4),
 - (vii) the *Consumer Protection Act* R.S.Q., c. P-40.1 (Articles 219, 228, 229, 239 or 272), or
 - (viii) the *Consumer Protection Act* R.S.S. 1996, c. C-30.1 (ss. 5, 6, 7 or 14, 16)
- apply to the Gift Program or to the donations made by the Class Members?
- b. If the answer to 7(a) is yes:
 - i. which *Acts* apply and in respect of which provisions?
 - ii. can the court determine unconscionability or unfair practice in respect of the provisions of the *Acts* that are found to apply without any consideration of the conduct of the Distributors, and if so, in respect of which sections of the *Acts* can such determinations be made?
 - iii. if the answer to 7(b)(ii) is yes in respect of any such provisions of the *Acts*, did any of ParkLane, TTL or TAL breach any one or more of such provisions, and if so, which provisions were breached and by whom?
 - iv. is it in the interests of justice to waive any requirement for giving notice under s. 18(15) of the *Consumer Protection Act* S.O. 2002, c.30, Schedule A, or under [list comparable notice provisions in other Acts]?
 - v. what remedies would Class Members be entitled to seek under the applicable *Acts*?

8. UNJUST ENRICHMENT

- a. Have ParkLane, TAL, TTL, and/or ASBL, or any one or more thereof, been enriched by the Gift Program?
- b. Was there a corresponding deprivation to Class Members?
- c. If the answers to 8(a) and (b) are yes, assuming (without deciding) that there is no juristic reason for the enrichment, are Class Members entitled to an order imposing a constructive trust over the funds held by or for the benefit of FFCF by TTL, or by ASBL in the Bermuda Longtail Trust, and an order requiring restitution of the aforesaid funds to the Class?
- d. If the answers to 8(a), (b) and (c) are yes, and assuming (without deciding) that there is no juristic reason for the enrichment, would Class Members be entitled to a tracing order tracing any amounts paid by the Class Members into the Gift Program to the current holders of such funds?

9. NEGLIGENT MISREPRESENTATION

- a. Did a special relationship exist between any one or more of ParkLane, TAL, TTL, the Gleesons and/or the Harris Defendants, and the Class Members in respect of the Gift Program?
- b. If the answer to 9(a) is yes, did any such defendants owe Class Members a duty of care in respect of the Gift Program?
- c. If the answers to 9(a) and (b) are yes, then what is the applicable standard of care for each such defendant with respect to the contents of the Gift Program Materials and/or the Additional Materials?
- d. If the answers to 6(c) and (d) and 9(a) and (b) are yes, did any of these defendants breach the requisite standard of care with respect to any representations in the Gift Program Materials, and if so how?
- e. If the answers to 6(e) and 9(a) and (b) are yes, did any of these defendants breach the requisite standard of care with respect to any representations in the Additional Materials, and if so, how?
- f. If the answers to either 9(d) or (e) is yes, can each Class Member's reliance on the Gift Program Materials and/or the Additional Materials be inferred?

10. WAIVER OF TORT

- a. Are Class Members entitled to pursue a restitution claim based upon waiver of tort against ParkLane, TAL, TTL, the Harris Defendants, the Gleesons, the Funds for Canada Foundation and/or ASBL?
- b. If the answer to 10(a) is yes, in respect of the waiver of what tort(s) can such a restitution claim be made?
- c. If the answer to 10(a) is yes, can damages based upon the said waiver of tort(s) be assessed in the aggregate?

11. PUNITIVE DAMAGES

- a. Does the conduct of ParkLane, TAL, TTL, the Harris Defendants, the Gleesons, the Funds for Canada Foundation and/or ASBL justify an award of punitive damages?

MICHAEL CANNON
Plaintiff

- and -

Court File No. CV-08-362807-00 CP
FUNDS FOR CANADA FOUNDATION et al.
Defendants

ONTARIO
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Proceeding under the Class Proceedings Act, 1992

PROCEEDING COMMENCED AT TORONTO

ORDER

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Class Counsel

MICHAEL CANNON
Plaintiff and

FUNDS FOR CANADA FOUNDATION
ET AL.
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Court File No: CV-08-362807-00CP

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Proceeding commenced at TORONTO

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