

Court File No. **CW-09-376511**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JEFFERY LIPSON

Plaintiff

- and -

CASSELS BROCK & BLACKWELL LLP and LORNE H. SALTMAN

Defendants

Proceeding under the *Class Proceedings Act*, 1992

**STATEMENT OF CLAIM**

TO THE DEFENDANTS:

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

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

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE

TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO  
PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A  
LOCAL LEGAL AID OFFICE.

Date April 15, 2009

Issued by

  
Local registrar

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

TO: **Cassels Brock & Blackwell LLP**  
Scotia Plaza, Suite 2100,  
40 King Street West,  
Toronto, ON M5H 3C2

AND TO: **Lorne H. Saltman**  
Cassels Brock & Blackwell LLP  
Barristers & Solicitors  
Scotia Plaza, Suite 2100,  
40 King Street West,  
Toronto, ON M5H 3C2

## CLAIM

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

- (a) an order pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 certifying this action as a class proceeding and appointing Jeffrey Lipson ("**Lipson**") as representative plaintiff for the Class Members;
- (b) damages in the amount of \$55,000,000 for professional negligence and negligent misrepresentation;
- (c) special damages for accounting, legal and other professional fees and expenses that have been or will be incurred, in an amount to be provided prior to the trial of this action;
- (d) an order directing a reference or providing such other directions as may be necessary to determine any issues not determined at the trial of the common issues;
- (e) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (f) costs of this action on a full indemnity basis; and
- (g) such further and other relief as this Honourable Court may deem just.

## I ~ OVERVIEW

2. This action concerns a series of tax opinions (the "**Legal Opinions**") negligently prepared by the defendants, Cassels Brock & Blackwell LLP ("**Cassels Brock**") and Lorne H. Saltman ("**Saltman**"), a partner at Cassels Brock, and relied upon by the Class Members (including Lipson) to their detriment. The Legal Opinions were prepared by Cassels Brock knowing that they would be relied on by the Class Members (including Lipson) and the Class Members (including Lipson) did rely on the Legal Opinions.

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

4. The Legal Opinions addressed the Canadian federal income tax consequences of making donations under the Timeshare Program. More particularly,

they advised the Class Members that donations made under the Timeshare Program would entitle the Class Members to the tax credits advertised by the Athletic Trust.

5. Contrary to the Legal Opinions, the Canada Revenue Agency ("CRA") concluded that the Class Members (including Lipson) were not entitled to **at least** the majority of the tax credits that they had been promised and which they had claimed in connection with the Timeshare Program. As detailed more fully below, initially, CRA denied **all** of the tax credits claimed by the Class Members (including Lipson) in connection with the Timeshare Program. Later, as part of a settlement with the Class Members, CRA allowed a deduction in respect of the tax credits claimed by the Class Members for the amount of their cash donations to the RCAAAs, but continued to disallow the Class Members any tax credits for their donations of Timeshare Weeks. The value of the tax credits which were disallowed far surpassed the value of those which were not.

6. As a result, the Class Members were collectively required to pay millions of dollars in arrears interest.

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

8. In providing the Legal Opinions, Cassels Brock and Saltman were negligent. Further, the Legal Opinions contained misrepresentations (both express and implied) that were negligently made by the defendants and relied on by the Class

Members. Cassels Brock and Saltman repeatedly breached their duty to the Class Members (including Lipson) to exercise the care and skill to be expected of a reasonably competent tax solicitor by, among other things:

- (a) failing to properly and fully consider and explain the tax consequences of the Timeshare Program to the Class Members;
- (b) making misleading, inaccurate and/or incorrect statements, both expressly and impliedly, concerning the operation of the Timeshare Program and its tax consequences; and
- (c) failing to warn the Class Members of the material risks associated with participating in the Timeshare Program.

## II ~ THE PARTIES

9. The plaintiff, Lipson, is an individual residing in Toronto, Ontario.
10. Lipson brings this action under the *Class Proceedings Act, 1992* on behalf of a class consisting of all individuals who participated in the Timeshare Program in 2000, 2001, 2002 and/or 2003 by receiving Timeshare Weeks from the Athletic Trust and donating them, together with a cash donation, to one or more RCAA (the "**Class Members**").
11. The defendant, Cassels Brock, is a full-service law firm with nearly 200 lawyers carrying on business in Toronto, Ontario. Cassels Brock holds itself out as having and applying "expertise, knowledge and skills in both technical and practical aspects of taxation".

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

13. For convenience, Cassels Brock and Saltman will be referred to hereafter as "Cassels Brock", unless otherwise indicated.

### III ~ THE TIMESHARE PROGRAM

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

#### A. Athletic Trust and Timeshare Weeks

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

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

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

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

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

- (a) in the 2000, 2001, 2002 and 2003 taxation years (the "Taxation Years") the Settlor acquired a total of approximately 8,396 Timeshare Weeks with an aggregate, appraised fair market value of approximately \$144,702,175. The Settlor satisfied the purchase price for these Timeshare Weeks by (temporarily) paying approximately \$96,991,725 in cash to the Developers and by granting the Liens for the balance of the purchase price; and
- (b) every dollar of the approximately \$96,991,725 in cash paid by the Settlor to the Developers was (indirectly) repaid by the Developers to the Settlor. In fact, each time the Settlor made a cash payment to the



Developers to acquire a Timeshare Week, that cash was repaid to the Settlor within approximately 60 days of the date of the payment in question.

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

**B. Distribution and Donation of the Timeshare Weeks**

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

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

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

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

- (b) a receipt in the amount of the appraised fair market value of the donated Timeshare Weeks, as evidenced by two independent valuations, less the amount of the Liens, (*i.e.*, \$8,575 to \$18,900 per Timeshare Week).

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

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

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

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

- (a) the "**Purchase Price**" being the appraised fair market value of a Timeshare Week less a marketing allowance equal to 60% of the appraised fair market value; or
- (b) if the Developers purchased 100 or more Timeshare Weeks, the "**Discounted Purchase Price**" of US\$1,000 for a one bedroom Timeshare Week and US\$1,100 for a two bedroom Timeshare Week (the "**Put Option**").

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

**D. The Cassels Brock Legal Opinions**

28. Starting in or about October 2000, CAA retained Cassels Brock, and specifically Saltman, to prepare legal opinions (previously defined as the "**Legal Opinions**") regarding the Canadian federal income tax consequences of making donations under the Timeshare Program. More particularly, Cassels Brock and Saltman were retained to prepare the Legal Opinions in order to advise prospective Beneficiaries, including Lipson and the other Class Members, and/or their advisors that such donations would entitle Beneficiaries to claim and receive the tax credits under the *Income Tax Act* advertised in the promotional materials relating to the Timeshare Program.

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

30. Cassels Brock prepared a Legal Opinion every time the Athletic Trust made Timeshare Weeks available to the Beneficiaries, including Lipson and the other Class Members. In total, over the life of the Timeshare Program, Cassels Brock prepared at least six Legal Opinions, dated October 6, 2000, May 18, 2001, September 7, 2001, May 13, 2002, November 8, 2002 and April 8, 2003, respectively.

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

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

33. In addition, copies of the Legal Opinions were provided to Lipson and the other Class Members and/or their advisors as part of the marketing of the Timeshare Plan. Each of the Legal Opinions was expressly directed at potential Beneficiaries, including Lipson and the other Class Members:

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

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

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

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

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

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

*(i) Valuation of the Timeshare Weeks*

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

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

38. In each of the Legal Opinions, however, Cassels Brock identified and considered only two factors as relevant to ensuring that the valuations used for the

donations under the Timeshare Program would be defensible: (i) the qualifications and attributes of the selected valuers and (ii) whether CRA would take the position that the fair market value of the Timeshare Weeks should be reduced by the commission "that may have to be paid by the RCAAAs in the course of disposing of the Timeshare Weeks".

39. Although each of the Legal Opinions refers to the Option Agreements (which Cassels Brock calls the "Marketing and Sales Agreement with PVIL"), and although it is clear from the Legal Opinions that Cassels Brock was aware that "contemporaneous transactions in the timeshare market" would be relevant to the likelihood that CRA (and the courts) would accept the donations made by Lipson and the other Class Members in the amounts receipted by the RCAAAs, in **none** of the Legal Opinions did Cassels Brock:

- (a) refer to the Put Option under the Option Agreements pursuant to which the Developers would reacquire the Timeshare Weeks from the RCAAAs for the Discounted Purchase Price of US\$1,000 or US\$1,100 per Timeshare Week;
- (b) refer to the fact that CAA always intended to or, alternatively, always did, in fact, exercise the Put Option in respect of all of the Timeshare Weeks donated to the RCAAAs by Lipson and the other Class Members with the result that the Developers always paid the Discounted Purchase Price for the Timeshare Weeks;

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

(i) the Put Option, and

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

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

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

(i) the fact that the RCAAAs would and did, in fact, receive US\$1,000 or US\$1,100 per Timeshare Week, less the 5%



commission payable to CAA, while Lipson and the other Class Members would and did, in fact, receive charitable receipts of between \$13,275 and \$28,600 for each Timeshare Week they donated to the RCAAAAs; and

- (ii) the fact that the RCAAAAs paid substantially more to discharge the Liens on the Timeshare Weeks than they received for selling the Timeshare Weeks to the Developers. In particular, the RCAAAAs paid between \$4,600 and \$9,700 per Timeshare Week to discharge the Liens, in circumstances where they knew or ought to have known that they would (and did in fact) receive only US\$1,000 or US\$1,100 per Timeshare Week from the Developers, less the 5% commission payable to CAA;
- (e) consider whether, upon reacquiring the Timeshare Weeks from the RCAAAAs, the Developers ever sold the Timeshare Weeks to members of the general public or consider and explain to the Beneficiaries, including Lipson and the other Class Members, the implications of those actual sales, or lack thereof, for the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAAs;
- (f) consider any other "contemporaneous transactions in the timeshare market" or consider and explain to the Beneficiaries, including Lipson and the other Class Members, the implications of those transactions, or

lack thereof, for the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs; and

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

**(ii) *Meaning of "Gift"***

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

**(iii) *GAAR***

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

**"[W]e are of the opinion that a good argument can be made that it cannot reasonably be said that there is a pre-ordained series of transactions that results in a misuse or abuse of the provisions of the Tax Act.**

In our opinion, and based on the foregoing, a donation of the Timeshare Weeks in these circumstances **would not likely be successfully attacked under GAAR.**"  
(emphasis added)

#### **IV ~ LIPSON'S PARTICIPATION IN THE TIMESHARE PROGRAM**

42. Starting in the fall of 2000, and at least once in each of the Taxation Years, the trustee of the Athletic Trust made Timeshare Weeks available for distribution to potential donors. As noted above, in connection with each intended distribution, Cassels Brock prepared a Legal Opinion which was referred to in the promotional materials in respect of the Timeshare Program and was provided to potential donors, including Lipson and/or his advisors.

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

- (a) Lipson decided to participate in the Timeshare Program and receive Timeshare Weeks pursuant to the distribution in the 2000 Taxation Year in reliance upon the October 6, 2000 Legal Opinion;
- (b) Lipson decided to participate in the Timeshare Program and receive Timeshare Weeks pursuant to the distributions in the 2001 Taxation Year in reliance upon the May 18, 2001 Legal Opinion;

- (c) Lipson decided to participate in the Timeshare Program and receive Timeshare Weeks pursuant to the distributions in the 2002 Taxation Year in reliance upon the May 13, 2002 Legal Opinion; and
- (d) Lipson decided to participate in the Timeshare Program and receive Timeshare Weeks pursuant to the distribution in the 2003 Taxation Year in reliance upon the April 8, 2003 Legal Opinion.

44. In total, over the course of the Taxation Years, 276 Timeshare Weeks (with an aggregate appraised fair market value of approximately \$2,342,580) were distributed by the Athletic Trust to Lipson who in turn donated them to RCAAAs. The appraised fair market value of the Timeshare Weeks and the amount of the applicable Liens, as described in the Legal Opinions, are set out in **Schedule "A"** to this Claim.

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

#### **V ~ REASSESSMENTS BY CRA**

##### **A. Initial Reassessments Denying All Donation Tax Credits**

46. Beginning in or about October 2004, CRA reassessed Lipson's charitable tax credit claims in each of the Taxation Years in connection with his donations under the Timeshare Program, denying the full amount of the tax credits claimed by Lipson in respect of **both** his cash donations and his Timeshare Week donations (based on the appraised fair market value of the Timeshare Weeks, less

the value of the Liens) to the RCAAAs. As a result, Lipson was required to pay, as at February 10, 2008, approximately \$697,535 in arrears interest.

(i) ***Valuation of the Timeshare Weeks***

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

48. In refusing to accept the donations in any amount, let alone the full amounts receipted by the RCAAAs, CRA placed heavy emphasis and reliance upon the Put Option, the existence and tax consequences of which are nowhere discussed or even mentioned in any of the Legal Opinions. It is also clear that the optics of the Timeshare Program – which, again, are not even referred to, much less considered or explained, in any of the Legal Opinions – were viewed extremely unfavourably by CRA. CRA took the position that:

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

**(ii) Meaning of "Gift"**

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

- (a) Lipson and the other Class Members did not have the required donative intent to make a gift to the RCAAAs and, instead, entered into a series of predetermined transactions merely to obtain a tax benefit; and
- (b) Lipson and the other Class Members received consideration for their donations in the form of, among other things, having Timeshare Weeks distributed to them without cost through a predetermined series of transactions.

**(iii) GAAR**

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

51. In response to these reassessments, Lipson and the other Class Members sought legal and accounting advice at significant personal expense, the

particulars of which will be provided prior to the trial of this action. Lipson and the other Class Members also each filed Notices of Objection challenging their reassessments.

**B. Litigation in the Tax Court of Canada**

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

53. In response to the Notices of Appeal filed by Messrs. Peters and Gregory, CRA filed Replies wherein it took the position the appellants were not entitled to **any** of the tax credits claimed by them in connection with their donations under the Timeshare Program for the reasons set out above (see paragraphs 47 to 50), among others.

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

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

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

## **VI ~ NEGLIGENCE AND NEGLIGENT MISREPRESENTATIONS**

### **A. Professional Negligence of Cassels Brock and Saltman**

57. In the circumstances described herein, Cassels Brock and Saltman owed Lipson and the other Class Members a duty to exercise the care and skill to be expected of a reasonably competent tax solicitor. At a minimum, this duty required them to provide Lipson and the other Class Members with carefully researched and drafted legal opinions which (i) fully considered and accurately explained "the tax consequences relating to a donation [of Timeshare Weeks] by individual Canadian resident taxpayers"; (ii) warned Lipson and the other Class Members of any material tax risks associated with participating in the Timeshare Program; and (iii) advised Lipson and the other Class Members that there was a real likelihood that the tax credits claimed by them under the Timeshare Program (or **at least** the portion of those credits relating to their donation of the Timeshare Weeks) would be successfully denied by CRA.

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



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

- (a) failing in each of the Legal Opinions to refer to the Put Option under the Option Agreements pursuant to which the Developers would reacquire the Timeshare Weeks from the RCAAAs for the Discounted Purchase Price of US\$1,000 or US\$1,100 per Timeshare Week;
- (b) failing in each of the Legal Opinions to refer to the fact that CAA always intended to exercise the Put Option and/or did, in fact, exercise the Put Option in respect of all of the Timeshare Weeks donated to the RCAAAs by Lipson and the other Class Members, with the result that the Developers always paid the Discounted Purchase Price for the Timeshare Weeks;
- (c) failing in each of the Legal Opinions to refer to, consider or explain to prospective Beneficiaries, including Lipson and the other Class Members, the importance of and the significant and material risk created by
  - (i) the Put Option, and
  - (ii) the fact that it was always intended to be and/or was, in fact, exercised in respect of **all** of the Timeshare Weeks donated to the RCAAAs (with the consequences described in paragraphs 59(d)(i) and (ii), below),

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

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

- (i) the fact that the RCAAAs would and, in fact, did receive US\$1,000 or US\$1,100 per Timeshare Week, less the 5% commission payable to CAA, while Lipson and the other Class Members would and, in fact, did receive charitable receipts of between \$13,275 and \$28,600 for each Timeshare Week they donated to the RCAAAs; and
  - (ii) the fact that the RCAAAs paid substantially more to discharge the Liens on the Timeshare Weeks than they received for selling the Timeshare Weeks to the Developers. In particular, the RCAAAs paid between \$4,600 and \$9,700 per Timeshare Week

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

- (e) failing in each of the Legal Opinions to consider whether upon reacquiring the Timeshare Weeks from the RCAAAs the Developers sold the Timeshare Weeks to members of the general public or to consider and explain to the Beneficiaries, including Lipson and the other Class Members, the implications of those actual sales, or lack thereof, for the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;
- (f) failing in each of the Legal Opinions to consider any other "contemporaneous transactions in the timeshare market" or to consider and explain to the Beneficiaries, including Lipson and the other Class Members, the implications of those transactions, or lack thereof, for the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;
- (g) failing in each of the Legal Opinions to consider the substantial number of Timeshare Weeks that were being donated by Lipson and the other Class Members in each of the Taxation Years or consider and explain to Lipson and the other Class Members the effect the resulting market

glut would have on the likelihood that the donations would be accepted by CRA, or the courts, in the amounts receipted by the RCAAAs;

- (h) failing in each of the Legal Opinions to consider or explain to the Beneficiaries, including Lipson and the other Class Members, that CRA might deny all of the tax credits claimed by Lipson and the other Class Members in connection with the Timeshare Program on the ground that they lacked the required donative intent to make a gift to the RCAAAs because they had entered into a series of predetermined transactions merely to obtain a tax benefit; and
- (i) in permitting Cassels Brock's and Saltman's names and reputations to be used by the Athletic Trust in promoting and legitimizing the Timeshare Program in circumstances where Cassels Brock and Saltman had failed to exercise the requisite reasonable care and skill in assessing the income tax consequences relating to donations under the Timeshare Program.

60. In all of the circumstances, Cassels Brock ought to have known that there was a real likelihood that the tax credits claimed by Lipson and the other Class Members (or **at least** the portion of those credits relating to their donation of the Timeshare Weeks) under the Timeshare Program would be successfully denied by CRA. In this regard, Cassels Brock ought to have known that CRA (and a court) would likely conclude that the Discounted Purchase Price payable pursuant to the

Put Option (and not the appraised fair market value) represented the fair market value of the Timeshare Weeks.

61. Further, and in any event, Cassels Brock had a duty to raise and properly address in the Legal Opinions each of the issues identified in paragraph 59(a) to (h), above, including all of their associated risks, so that the Beneficiaries, including Lipson and the other Class Members, could make informed decisions whether to participate in the Timeshare Program.

62. At all material times, Lipson and the other Class Members relied upon the negligent Legal Opinions in deciding to participate in the Timeshare Program.

**B. Negligent Misrepresentations of Cassels Brock and Saltman**

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

"Based on and subject to the foregoing review, **in our opinion it is unlikely that the [CRA] could successfully deny the deemed adjusted cost base of the Timeshare Weeks to, nor the tax credit claimed by, the Class A Beneficiaries** who receive a distribution of the Timeshare Weeks from the [Athletic] Trust, and subsequently choose to make a voluntary and complete donation of some or all of their Timeshare Weeks to an RCAAA." (emphasis added)

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

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

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

#### **VII ~ DAMAGES**

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

- (a) significant liabilities, including, but not limited to, substantial interest arrears under federal and provincial income tax legislation;
- (b) loss of the opportunity to make other donations and/or participate in other opportunities; and
- (c) special damages, including accounting and other professional fees that have been or will be incurred in order to respond to and defend against

CRA's reassessments of Lipson and the other Class Members arising from their participation in the Timeshare Program.

68. Lipson pleads and relies upon the *Class Proceedings Act, 1992*.

Lipson proposes that this action be tried at Toronto, Ontario.

April 15, 2009

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**SCHEDULE "A"**

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

**2000 – Sandyport**

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

**2001 – Sandyport**

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

**2002 – Sandyport**

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



**2002 – Alexandra**

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

**2003 – Alexandra**

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

PLIPSON

Plaintiff

CASSELS BROCK & BLACKWELL LLP and  
LORNE H. SALTMAN  
Defendants

Court File No:

CV-09-376511

ONTARIO  
SUPERIOR COURT OF JUSTICE  
Proceeding commenced at Toronto

STATEMENT OF CLAIM

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