

CITATION: Wintercorn v. Global Learning Group Inc., 2026 ONSC 2728
COURT FILE NO.: CV-17-00583573-00CP
DATE: 20260703

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LYNN WINTERCORN, PETER NEWMAN and ALEX KEPIC, Plaintiffs

– and –

GLOBAL LEARNING GROUP INC., GLOBAL LEARNING TRUST SERVICES INC., as TRUSTEE OF GLOBAL LEARNING TRUST (2004), ROBERT LEWIS, IDI STRATEGIES INC., JDS CORPORATION, ESCROWAGENT INC., JAMES PENTURN, RICHARD E. GLATT, DENIS JOBIN, ALLAN BEACH, MORRIS KEPES & WINTERS LLP, FASKEN MARTINEAU DUMOULIN LLP, CASSELS BROCK & BLACKWELL LLP, WISE, BLACKMAN LLP, EVANS & EVANS INC., GRAHAM TURNER, ROBERT KEPES and MORRIS & MORRIS LLP, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Margaret Waddell, Matthew W. Taylor, Karine Bédard, Maria Arabella Robles, and David Fogel*, for the Plaintiffs

Richard B. Swan, Gannon G. Beaulne, Ethan Schiff, and Laura Schwartz, for the Defendants, Allan Beach and Fasken Martineau DuMoulin LLP

Paul-Eric Veel, Bonnie Greenaway, and Militza Boljevic, for the Defendant, Cassels Brock & Blackwell LLP

Nikita Rathwell and Katie Newman, for the Defendant, Evans & Evans Inc.

HEARD: May 11-15, 2026

MOTIONS FOR SUMMARY JUDGMENT

I. Background

[1] Three sets of Defendants each bring a motion for summary judgment under Rule 20.01(3) of *Rules of Civil Procedure* seeking to dismiss the claim against them.

[2] The claim is a class action brought by the donors to a charitable tax shelter scheme that operated from 2004 to 2014. The program was ultimately held by the Tax Court of Canada to be a “sham”: *Mariano v. The Queen*, 2015 TCC 244, at paras. 84-89. The tax shelter was designed as a somewhat complicated arrangement, as described in *Mariano*, at para. 6:

[6] The donation program known as the Global Learning Gift Initiative (the “Program”) involved an offshore entity, Phoenix Learning Corporation (“Phoenix”), which was a Bahamian corporation, acquiring software licenses consisting of 6 different courseware titles, at nominal value, ranging from 13.3 cents per licence to 26.7 cents per licence, from a Florida corporation, Infosource Inc. (“Infosource”), and in turn, gifting most of such licenses to a Canadian trust, Global Learning Trust 2004 (the “Trust”), and directly or indirectly selling the balance to such Trust in order to fund its purchase of licences from Phoenix. The Trust was settled by a Mr. Morris, a Bahamian resident and expat Canadian under the laws of Ontario and of which Global Learning Trust Services Inc., an Ontario corporation, was the appointed trustee (“Trustee”). The Trust then distributed them to the participants, like the Appellants, who, after submitting a predetermined set of documents described later, were accepted as capital beneficiaries of the Trust; who in turn donated them to a select charity, Canadian Charities Association (“CCA”), and received a donation receipt having a purported value that exceeded the donation receipt received for their cash outlay to another charity, Millenium Charitable Foundation (“Millenium”), by a factor of 3 or more times.

[3] The Plaintiffs and roughly 40,000 class members claimed charitable tax credits pursuant to section 118.1 of the *Income Tax Act*. They were all eventually reassessed by CRA and were denied those credits. The within action was commenced by Statement of Claim on September 28, 2017 and certified on consent on June 26, 2019.

[4] The Plaintiffs have settled with some of the Defendants. In addition, the action has not proceeded against other of the Defendants due to their insolvency and/or death. Most significantly, this includes the corporate entity that embodied the now defunct tax scheme along with the individual who was the directing mind of the scheme: Global Learning Group Inc., Global Learning Trust Services Inc, as Trustee of Global Learning Trust (2004), and Robert Lewis (collectively, “GLGI”). There is one set of Defendants who did not participate in the hearing of the present set of motions and against whom the action will continue regardless of the outcome of these motions: the company and its principals that provided back-office administrative services to GLGI: IDI Strategies Inc., James Penturn, and Richard Glatt (collectively, “IDI”).

[5] The present motions are brought by three sets of Defendants, including (a) the law firm that issued the tax opinion on which the scheme was premised: Cassels Brock & Blackwell LLP (“Cassels”); (b) the law firm and its partner tasked with designing the donation scheme and creating the corporate documentation and escrow service entity needed to sign up donors and administer it: Fasken Martineau DuMoulin LLP and Allan Beach (together, “Fasken”); and an appraiser firm that provided valuations in support of the tax deductions which the failed scheme was supposed to produce: Evans & Evans Inc. (“Evans”) (collectively, the “Moving Defendants”).

[6] Each of the Moving Defendants claim that, as a matter of law, there can be no cause of action against it as the only duty of care that they owed was to their client, GLGI, and not to the class composed of GLGI’s own clients/donors. In response, the Plaintiffs submit that but for the actions of Cassels, Fasken, and Evans, the class members would not have suffered the losses that

they have incurred, and that these three Defendants should therefore be held accountable for those losses.

II. The adjournment request and solicitor-client privilege

[7] At the outset of the hearing, Plaintiffs' counsel rose to submit that the summary judgment motions should be adjourned. I refused that request and all counsel proceeded to argue the motions on their merits over the next five days.

[8] In the ordinary course I would not include in my substantive reasons for decision the reasons for declining a requested adjournment. However, the debate over the adjournment is intimately connected with the substance of the motions. In the circumstances, understanding the Plaintiffs' request goes a long way toward explaining the central controversy between the parties.

[9] As already indicated, two of the three moving parties here are law firms. The client of those firms was GLGI, who retained Cassels for a tax opinion and Fasken for commercial structuring and documentation. GLGI has not responded to the action; it is now insolvent and its principal, Robert Lewis, is deceased.

[10] Neither GLGI nor anyone authorized to do so on its behalf has ever waived the solicitor-client privilege that attaches to its correspondence with and documents flowing to and from its lawyers. In an earlier motion, *Wintercorn v. Global Learning Group Inc.*, 2022 ONSC 4576, leave denied 2023 ONSC 199 (Div Ct), Justice Glustein held that the privilege belongs to GLGI and that it cannot be and has not been waived at any time. GLGI's privilege over communications with the two law firms survives until today such that no privileged correspondence or documentation flowing between GLGI and either Cassels or Fasken can be produced to the Plaintiffs. Justice Glustein specifically found that the so-called "future crimes/fraud exception" that might otherwise vitiate GLGI's privilege does not apply: *Ibid*, at para. 5(ii).

[11] The preservation of privilege has impacted greatly on all parties. As an essential part of the claim, the Plaintiffs allege that the firms' undertaking went beyond advice to GLGI and included an awareness that it had a duty to protect the rights of the participants in the tax program. Plaintiffs' counsel submit that without access to the documents and correspondence flowing between the law firms and GLGI it is impeded in establishing this relationship.

[12] Counsel for Cassels and for Fasken likewise submit that their respective clients are impeded in their defenses to the claim. They argue that without the ability to disclose the correspondence and understandings between the lawyers and GLGI, it is more difficult for them to establish that their advice was limited to GLGI alone and could not be the basis for any reasonable reliance by the participants in the tax program.

[13] As indicated, the Divisional Court denied leave to appeal the privilege decision, making it final for the purposes of this case. Moreover, the same principle – that the "future crime" or "fraud" exception to solicitor-client privilege is a very narrow and rarified exception to an otherwise strictly enforced privilege – has been followed and reiterated on a number of occasions. Most recently, in *Sakab Saudi Holding Company v. Al Jabri*, 2025 ONSC 35, Justice Matheson on behalf of Divisional Court reiterated that in a string of cases the Supreme Court has repeatedly underscored that solicitor/client privilege must be as close to absolute as possible: *Chambre des*

notaires du Québec, [2016] 1 SCR 336, at para. 82, citing *R. v. McClure*, [2001] 1 SCR 445, at para. 35; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 SCR 574, at para. 9, citing *R. v. McClure* and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 SCR 209, at para. 36; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, at para. 18, citing *Lavallee* and *R. v. McClure*, [2001] 1 S.C.R. 445. Justice Matheson went on to state in *Sakab Saudi*, at para. 14(e):

The future crime or fraud exception to solicitor/client privilege did not apply, following the principles of horizontal *stare decisis* and *Wintercorn v. Global Learning Group Inc.*, 2022 ONSC 4576, motion for leave to appeal dismissed, 2023 ONSC 199, for the principle that the exception does not apply to civil wrongs, including civil fraud (Decision, at para. 68).

[14] In seeking an adjournment, Plaintiffs’ counsel advised the court that it had only recently learned that leave to appeal to the Court of Appeal has been granted in the *Sakab Saudi* case. It is the Plaintiffs’ view that the present case ought to await the Court of Appeal’s ruling, since a change in the privilege analysis in that case might import a change in the privilege analysis in the present case. That, they submit, could then represent a substantive change in the positions of the respective parties to this motion.

[15] After taking a short break to review this case law, I advised all counsel that the arguments about adjourning to wait for an appellate decision in an unrelated case were very familiar to me, and that I had managed to locate a decision on a similar point that I had rendered roughly a year ago. *Dagher v. CDSPI Advisory Services Inc.*, 2025 ONSC 3380, dealt with a so-called “Pierringer agreement” in which the plaintiff had reached a settlement with one defendant but wished to continue the action against the second defendant. The second defendant contended that the settlement had not been disclosed to it in a sufficiently timely fashion, and moved under the rule in *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324 to stay the entire action. Counsel for the plaintiff had sought an adjournment, as they had been alerted to the fact that the Court of Appeal had already scheduled a hearing in an unrelated case in which it could potentially reconsider the strict disclosure requirement set out in *Handley Estate*.

[16] In a situation bearing a marked resemblance to the present one, I declined the request to adjourn the motion. In doing so, I indicated that, “The settlement approval/stay of proceedings motions have been scheduled for a long time. The date was set last October, which was itself an adjournment of a motion date set months before that. Given a very crowded civil motions docket in Toronto, motions are heard when they can be scheduled and are decided on the basis of the law in force at the time”: *Dagher*, at para. 11.

[17] My endorsement in *Dagher* went on to indicate, at para. 12, that the current scheduling climate in Toronto motions court does not permit judges the luxury of waiting for the possibility of a change in the law that might or might not come and, if it does come about, might operate only prospectively. The orderly scheduling of motions and the rendering of timely decisions by motion court judges are important factors in the administration of civil justice system:

[12] If the law later changes or is the subject of appellate reasoning that sheds new light on the issue, that may or may not be the subject of a further appeal. If it

is, the impact of any new developments in the law will be considered by the Court of Appeal at that time. But the Court of Appeal always has *something* of significance on its agenda; if the parties to every motion had to wait not just for an *ex post* appellate ruling but for a prior appellate ruling on a similar case before their motion could be determined, the motions pipeline would be so clogged, and rulings would be so delayed, that the system would be dysfunctional. [emphasis in the original]

[18] In the present case, the summary judgment motions have been scheduled many months in advance, and were booked for six hearing days. To re-schedule at this stage in order to wait to see what the Court of Appeal does in a case they have not yet heard would wreak havoc with the motions court schedule; and there would, of course, be no guarantee that it would ultimately make any difference. Justice Glustein's decision was denied leave to appeal, and so it stands as correct in its continued enforcement of solicitor-client privilege under the circumstances. If the *Sakab Saudi* case does end up changing the law, and if, unlikely as it seems, that change is declared to be retroactive, the consequences of the change can be revisited at the appropriate time.

[19] Again, I am explaining the adjournment ruling here because the issue of privilege continues to impact on the positions of the two law firms and of the Plaintiffs. All parties have made their summary judgment arguments based on the earlier ruling continuing to be in force and privilege over the law firms' production of documents being maintained.

[20] Accordingly, the record before me contains the Cassels tax opinion itself, as it was sent to certain third parties and thereby became producible. But it does not contain the instructions, retainer agreements, qualifiers, commentary, and other correspondence that might have gone with it. Likewise, the record contains the Fasken agreements and documentation that accompanied the class members' donation to the charitable deduction program as each donor had to review and sign those documents. But the record does not contain the instructions, retainer agreements, qualifiers, commentary, and other correspondence that might have gone with production of the commercial documentation.

[21] The scope of the lawyers' respective undertakings and the entirety of their work for GLGI must be ascertained without access to those privileged documents and communications.

III. Limitation period

[22] This action was commenced with the issuance of a Statement of Claim on September 28, 2017. It was certified as a class action on June 26, 2019. As previously indicated, the GLGI tax shelter program ran from 2004 to 2015. The Moving Defendants contend that the action is statute barred, having been commenced more than two years after the end of the impugned program.

[23] The Plaintiffs make two arguments in response. In the first place, they point out that the action fashioned as a national class action. The moving Defendants rely on the Ontario *Limitations Act, 2002*, SO 2002, c 24, Sch B, s. 5. which provides that a claim must be commenced within two years of a claimant's discovery of the claim.

[24] Other jurisdictions governing class members' claims have varying limitation periods. Plaintiffs' counsel point out that the basic limitation period under the Quebec Civil Code, for

example, is three years, and that it is six years under the limitations statutes of each of Prince Edward Island, Northwest Territories, and Nunavut. Plaintiffs' counsel submit that the Court should not make findings in this motion on the applicability of the limitation periods in other jurisdictions without having the law on those limitation periods before it.

[25] Moreover, the Plaintiffs submit that the discoverability doctrine has pushed the starting point for the limitation period many years forward. In making this argument, they focus on the Ontario statute as representing the paradigm case for the matter at hand. Discoverability is codified in section 5(1) of Ontario's *Limitations Act, 2002*:

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[26] The Supreme Court of Canada set out the standard of analysis for discoverability in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, at para 41, where the Court explained that "a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn". As the Court put it, "it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists": *Ibid.*, at para. 46

[27] The Court went on to elaborate, at para. 46, that a "plausible inference" is more than mere speculation or a suspicion, but is less than a certainty of liability: *Ibid.* In other words, class members did not need to know the exact extent of the harm they suffered, or the precise cause of the injury, for the limitation period to begin to run: *Ibid.*

[28] Pursuing this line of argument, each of the Moving Defendants observes that at least as early as 2008, class members began receiving Notices of Reassessment denying them the tax deductions that the GLGI program was supposed to have generated. From this early date, and thereafter throughout the proposed class period, CRA sent detailed letters to class members explaining the disallowance of GLGI as a charitable deduction and identifying it as the basis for their increased tax liability. It is the Moving Defendants' view that these notices and advisories

would have ensured the class members' awareness of the losses they were suffering, thereby triggering the running of the limitation period.

[29] The Plaintiff and class members take issue with this view. They point out that GLGI, with the involvement of Cassels, Evans, and possibly Fasken, reassured them that the CRA was wrong and that the reassessments will ultimately be overturned. In November 2008, GLGI sent class members a draft Notice of Objection for them to fill out and submit in response to the Notices of Reassessment they had received. The covering email from GLGI stated:

... GLGI continues to believe that its program will be upheld and its program donors will be successful. ... Paying the Reassessment is not an admission of guilt (filing the Notice of Objection shows you disagree with the Reassessment). ... If the donors are successful and this payment is ultimately refunded, in whole or in part, the CRA will pay interest on the refund (the current rate is 6%). This interest rate is significantly higher than present bank rates on deposits.

[30] GLGI also sent class members a set of proposed answers to CRA's standard inquiry upon reassessment, along with a more fulsome explanation of GLGI's position in helping them challenge the reassessment. That explanation began:

In reassessing the Taxpayer, the Minister disallowed the claim for charitable donations and gifts for the Courseware Donation and the Cash Donation. For the reasons stated below, the Minister erred in disallowing the foregoing claim and the Taxpayer hereby respectfully requests that the Minister withdraw, vary or vacate the Notice of Reassessment forthwith.

[31] These communications continued to be sent to class members for all the years of the proposed class period. Of particular note is the correspondence from GLGI to class members dated August 15, 2008, where GLGI's position in response to CRA's view of the program stated emphatically that the CRA's position was a narrow technical one that would be soundly defeated:

The formation of the trust and the documentation relating to each of these transactions was prepared or carefully reviewed by the Bay Street law firm giving the tax opinion together with a number of other law firms. It is difficult to believe that these law firms could all have missed something so basic. Based on all the legal review and advice received over the history of the program GLGI has always been and remains highly confident that any court will quickly see through and dispose of these technical arguments by the CRA.

[32] These reassurances continued right up until the Tax Court's *Mariano* decision in November 2015. Plaintiff's counsel submit that it does not lie with the Moving Defendants to argue that the class members knew or ought to have known about the losses they suffered with the disallowance of the GLGI tax deduction, given that GLGI, with assistance from the Moving Defendants, was at all relevant times actively advising them that the CRA's reassessment would be reversed and that they will ultimately suffer no loss. The Divisional Court in *Western Life Assurance Company v. Penttila*, 2019 ONSC 14, at para. 35, has specifically noted that it "may delay the date on which a

claim was discovered...where the insured [or taxpayer] relies on the superior knowledge and expertise of the insurer [or promoter]”.

[33] Furthermore, Plaintiff’s counsel point to section 5(1)(a)(iv) of the *Limitations Act*, and submit that until 2015 an action was not the “appropriate means to seek a remedy”. As they put it in their factum, “The fact that the Gift Program was a sham, and that the trust structure failed for lack of certainty of objects were not facts that the Plaintiffs and the Class could have known before the *Mariano* decision was released.”

[34] In *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325, the plaintiff brought an action against its accounting firm who filed the plaintiff’s corporate tax returns late, resulting in CRA’s disallowance of tax credits. The Court of Appeal reasoned that the taxpayer initiating a legal action may be inappropriate where the professional defendant’s ameliorative efforts and the plaintiff’s reliance on such efforts to remedy its loss may render the proceeding premature. The Court also opined that “it is premature for a party to bring a court proceeding to seek a remedy if a statutory dispute resolution process offers an adequate alternative remedy and that process has not fully run its course or been exhausted”: *Ibid.*, at para. 29, citing *Volochay v. College of Massage Therapists of Ontario* (2012), 111 OR (3d) 561, at paras. 61-70 (CA).

[35] In an explanation of this principle that closely parallels the present case, the Court of Appeal in *Presidential MSH*, at para.38, referenced a previous decision in *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165, which was a tax case wherein CRA had also disallowed certain tax credits. The defendant in *Lipson* argued that the taxpayer’s receipt of the notice of the disallowance set the limitations clock running. However, like here, the disallowance was challenged by the taxpayer with a test case. Accordingly, the Court of Appeal opined:

...the plaintiff did not discover that a proceeding against the defendant was necessary or appropriate until the test cases were resolved in 2008. Before then, and particularly in 2004, the mere fact that the taxation authorities had resisted the plaintiff’s tax credits claim did not give the plaintiff knowledge that commencing a proceeding against the defendant in court would be necessary or an appropriate means to recover his losses.

[36] In *Lipson*, at para. 83, the Court of Appeal held that notices of disallowance are not a final disposition of the tax credit issue where tax litigation ensues. There, as here, a Cassels opinion advised that it was unlikely that the CRA could successfully deny the claimed tax credits; thus, the fact of a CRA challenge to the tax credits did not, in itself, mean the challenge would likely be successful or make the Cassels Brock opinion invalid. The Court went on to reason that even if receipt of the notices of disallowance prompted class members to obtain professional advice of their own, that did not demonstrate when class members knew, or ought reasonably to have known, that the test case litigation would not result in their favour.

[37] The Plaintiffs and the class members in the case at bar did not have actual or constructive knowledge of material facts from which they could infer that any of the Moving Defendants were liable to them for their losses until after the *Mariano* decision was rendered. For that matter, they did not know that they would suffer any losses at all until after the *Mariano* decision was rendered.

[38] Applying the Court of Appeal’s reasoning in *Presidential MSH* and *Lipton* here, it is clear that the litigation period only began to run for the class members with the release of the *Mariano* decision on November 23, 2015. Since the Statement of Claim herein was issued on September 28, 2017, the action was commenced prior to the expiry of the limitation period.

IV. Negligence and duty of care

[39] The Plaintiffs’ claims against Cassels, Fasken, and Evans are pleaded separately and must be analyzed separately on their discreet fact. But all three claims are framed in negligence, and all three pertain to the provision of services that are alleged to have been faulty and to have caused economic loss. For each of the three Moving Defendants, the Plaintiffs state that it was reasonably foreseeable that the class members would sustain loss as a result of the professional services they provided.

[40] Under what is generally known as the *Anns/Cooper* test, reasonable foreseeability of harm is not a sufficient footing on which to rest liability; rather, for a claimant the key is to establish that there is a duty of care owing to them by the defendant: *Cooper v Hobart*, 2001 SCC 79; *Anns v Merton London Borough Council*, [1978] AC 728 (HL). That, in turn, depends on “whether the parties were at the time of the loss in a sufficiently proximate relationship”: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, [2020] 3 SCR 504, at para. 22.

[41] Generally speaking, “a solicitor acting for a client generally owes no duty to persons other than that client”: *Baypark Investments Inc. v. Royal Bank of Canada* (2002), 57 O.R. (3d) 528, at para. 23 (SCJ), citing *White and another v. Jones and others*, [1995] 2 AC 207 (HL). As the British Columbia Court of Appeal put it, “there could not exist, as between this respondent and the appellant lawyers, the relationship of ‘proximity’ or neighbourhood on which, as Lord Atkin said [in *Donoghue v. Stevenson*, [1932] AC 562 (HL)], the creation under our law of the duty on one person in tort to care for the interests of another is founded”: *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.*, 1989 CanLII 242, at p. 11 (BC CA).

[42] It is only “under ‘narrow’, ‘exceptional’, ‘very limited’ and ‘well defined’ circumstances that a lawyer can be held to owe a duty to a non-client third party to protect his, her or its economic interests”: *2116656 Ontario Inc. v. Grant and LLF Lawyers LLP*, 2019 ONSC 114, at para. 32, citing *Chand Morningside Plaza et al. v. Badhawar et al.*, 2015 ONSC 293, at para. 6. For lawyers to be held to owe expanded duties beyond their own clients, several important conditions must be met under the circumstances:

- (i) The solicitor must know – from placing himself or herself in a position of sufficient proximity with the non-client third party -- that the particular non-client third party is relying on his or her skill. Actual knowledge is a prerequisite for a finding of care.
- (ii) The non-client third party must in fact rely on the solicitor’s guidance and skill. Reliance is the essence of the proposition.
- (iii) The reliance must be reasonable.

Grant and LLF Lawyers, at para. 36, citing *Dutton v. Bognor Regis Urban District Council*, [1972] 1 QB 373 (C.A.), at 394-395.

[43] The same can be said for accountants, appraisers and valuation experts in the provision of their professional services. In *Deloitte & Touche v. Livent Inc.*, [2017] 2 SCR 8, the Supreme Court of Canada found proximity of defendant to plaintiff to be a necessary ingredient to liability in negligence and/or negligent misrepresentation, and that the factors crucial to the proximity analysis are the defendant's undertaking and the plaintiff's reliance. Thus, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so...": *Ibid.*, at para. 30.

[44] In *Barkley v. Tier 1 Capital Management Inc.*, 2018 ONSC 1956, aff'd 2019 ONCA 54, investors in a failed syndicated mortgage issued a proposed class action commenced against the promoter and appraiser of the project. The promoter had retained the appraiser to provide professional services in justifying the value of the secured property. The evidence showed that the appraiser had no relationship with the investors and undertook no responsibility to them. There was no contractual relationship or communication between the investors and the appraisers: *Ibid.*, at para. 19. In a straightforward application of the Supreme Court's ruling in *Livent*, Justice Perrel held that the appraiser's duty was solely to the client for who retained it, and, barring an extraordinary and express extension of that duty, it ended there.

[45] Whether the pleading sounds in negligence or negligent misrepresentation, and whether the defendant is a lawyer, appraiser, or any other provider of service or advice, the critical factor in the analysis of a claim of economic loss is the same. "The issue of whether [the service provider] owes the [claiming party] a duty of care turns on whether they are in a special relationship of proximity": *Mahendran v. 9660143 Canada Inc.*, 2022 ONCA 676, at para. 10. The *Livent* formula is therefore to be applied to each of the Moving Defendants' situations:

In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care.

Raponi v. Olympia Trust Company, 2022 ONSC 4481, at para.209, citing *Livent*, paras. 30-31.

[46] As a final illustration of the point, in *Trillium Motor World Ltd. v General Motors of Canada Limited*, 2015 ONSC 3824 – another economic loss case claimed against Cassels – McEwan J. found that General Motors franchisees who retained Cassels for advice with respect to the franchisor's proposed termination of them were, as clients, owed a duty of care by Cassels as a matter of course; on the other hand, General Motors franchisees who were aware of Cassel's views and who had listened to Cassels on an open conference call but who had not retained Cassels as their law firm, were owed no duty of care.

[47] As Justice McEwan put it, “In effect, Trillium is asking the court to extend the duty of care Cassels owed to its clients to non-clients who chose not to retain Cassels. Trillium did not point to a single Canadian legal decision that has recognized a duty of care owed by a lawyer to a non-client in analogous circumstances”: *Ibid.*, at para. 373.

[48] The non-clients’ awareness of the service provider, and even the service provider’s communication in a forum containing an audience of non-clients, does not suffice as a sufficiently proximate relationship on which to found a duty of care by the service provider to the non-client. Absent a contractual relationship or a specific undertaking made to the non-clients, the non-clients remain what Justice McEwan dubbed “on-lookers”: *Ibid.*, at para. 374. Lawyers and other service providers owe them no duty and assume no liability toward them.

V. The claim against Cassels

[49] Cassels’ participation in this entire matter was limited to tax advice. Specifically, Cassels provided the tax opinion on which GLGI build its tax sheltered gift program. As discussed above, that program was ultimately labeled a “sham” by the Tax Court of Canada and was declared invalid. The taxpayers who had contributed to the plan had their taxes reassessed, creating an economic loss for each of them in the form of an unanticipated tax burden.

[50] There is also evidence that Cassels had some input – again, presumably in the form of tax law advice – into the model answers to CRA’s inquiries that GLGI and its principal provided to each class member and encouraged them to use. As with the tax opinion, the advice with respect to responding to CRA was provided by Cassels to GLGI. The class members, in turn, received guidance from GLGI. That guidance, which was apparently based on input from Cassels, was not successful; it was rejected by the CRA and was ineffective in lessening the class members’ losses.

[51] In assessing the scope of Cassels’ undertaking in rendering its legal advice, the specific context of that advice must be taken into account. The Court of Appeal has instructed that undertakings by service providers should not be understood as having been given “at large”. Rather, “[a] court must consider whether the undertaking is made *to the plaintiff* and for what purpose” [emphasis added]: *Charlesfort Developments Limited v Ottawa (City)*, 2021 ONCA 410 at paras. 37, 47.

[52] The uncontested evidence of Cassels partner, Christopher Norton, is that none of the class members had retained Cassels or were in a solicitor-client relationship with Cassels. Furthermore, Cassels gave its tax opinion and any other advice directly to GLGI and not to class members, and never made any statement that showed that it was undertaking any responsibility toward any class member.

[53] In fact, not only did Cassels refrain from expressing any undertaking to advise class members, but it expressly limited the scope of its undertaking to its client, GLGI. The tax opinion on its face states that Cassels is only providing the opinion to allow GLGI to structure the gift program, and not to solicit donations – either through use of its name in a marketing campaign or in any other way.

[54] What the record in this case does not contain, of course, is any other correspondence, memoranda, or record of any other communication between Cassels and GLGI which might

quality, clarify, embellish upon, or contextualize the Cassels tax opinion and advice. All of that material falls under the rubric of solicitor-client privilege and cannot be produced absent GLGI's consent. Accordingly, the scope of Cassels's undertaking must be gleaned from the express language of the tax opinion itself and the transactional context in which it was given.

[55] An explicit disclaimer of responsibility, or an explicit limitation of the undertaking by a professional service provider, eliminates any inference of a duty of care and effectively limits the scope of the service provider's liability: *Hedley Byrne & Co v Heller & Partners Ltd*, [1964] AC 465 (HL); *Carman Construction Ltd. v Canadian Pacific Railway Co.*, [1982] 1 SCR 958. Accordingly, where a professional sets out the scope of its undertaking by limiting reliance on their work product to its client alone, third parties can claim no duty of care: *Barkley*, at para. 97. Any reliance by them on that work product without the professional's specific authorization would be unreasonable and would generate no liability: *The Pas (Town of) v. Porky Packers Ltd.*, [1977] 1 SCR 51, at 66-68.

[56] There is nothing in the evidentiary record that runs counter to this conclusion. Even the three representative Plaintiffs in their affidavits and cross-examinations confirm that there was no undertaking to the class by Cassels, and no reliance by class members on Cassels.

[57] Unlike in other cases where lawyers and others have been held to have a duty to non-clients, here Cassels provided no 'comfort letters' to class members, did not appear in GLGI's promotional materials or promote the gift program in any way, was not known to class members when they made their donation to the gift program, and did not allow the Cassels name or that of its individual lawyers to be used to bolster the credibility and authority of the GLGI program: see *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, at para 64.

[58] The express limitations on Cassels' undertaking, which limits its proximity to GLGI alone, effectively negates any prospect of a duty of care owing by Cassels to the class members. The elimination of a duty of care in this way then negates any potential liability in negligence or negligent misrepresentation: *Schneider v Royal Crown Gold Reserve Inc*, 2016 SKQB 380 at paras 95, 113.

[59] Given the extent of the evidentiary record at this point, and the ongoing application of solicitor-client privilege which will continue to prevent any further evidence regarding the scope of Cassels' undertaking and the parameters of its liability, the Court is in as good a position to fairly adjudicate the claim against Cassels as it will be if the matter goes to trial. The present motion has provided "a process that allows the judge to make the necessary findings of fact [and] apply the law to those facts": *Hryniak v. Mauldin*, [2014] 1 SCR 87, at para. 4. There is no prospect of liability against Cassels, and there is therefore no need to go to trial.

VI. The claim against Fasken

[60] Like Cassels, the Fasken parties submit that none of the Plaintiffs or class members were parties to a solicitor-client relationship with Fasken and that Fasken owed them no duty of care. As corporate counsel to GLGI, Fasken submits that its only legal duty was to that now defunct entity.

[61] Moreover, Fasken argues that the Plaintiffs' claims in negligence and negligent misrepresentation take aim at the tax law failure of the GLGI program and the economic losses caused by that failure, whereas Fasken provided no tax law advice or services to GLGI. From Fasken's point of view, the claim against them resembles a claim by purchasers of a house against the contractor who built the structure when the purchasers' complaint is that the municipality would not, for reasons unrelated to structure, re-zone the house for non-residential use. Fasken contends that not only did it have no solicitor-client relationship with the class members, but the class members' losses had nothing to do with Fasken's work for GLGI and so Fasken did not cause any loss to the Plaintiffs or class members.

[62] It is necessary to emphasize that the record contains very little information about the actual work done by Fasken on behalf of GLGI. Most if not all of it falls under the umbrella of solicitor-client privilege which Fasken cannot waive without the consent of its client, GLGI. Accordingly, the extent of Fasken's undertaking to GLGI, and the reasonableness of any reliance by parties other than GLGI – including, of course, class members – must be analyzed only by reference to the externally visible evidence and transactional context in which Fasken's work took place.

[63] The evidentiary record is for the most part uncontested on the facts relevant to the duty of care issue. Allan Beach, a (now retired) Fasken partner named as an individual Defendant, was a corporate/commercial solicitor, not a tax lawyer. The record establishes that, consistent with Fasken firm policy of not advising on tax shelters, neither Beach nor Fasken more generally agreed to provide – indeed, were not asked to provide – any tax law advice or tax law opinions.

[64] Fasken likewise did not design or endorse the impugned GLGI program and did not permit GLGI or anyone else to suggest that it did. Allan Beach deposed, and the record contains nothing to the contrary, that Fasken made no representations to participants in the GLGI program, including about the program's tax efficacy or the likelihood that tax credits claimed under the GLGI program would be allowed.

[65] The scope of Fasken's retainer was to provide certain corporate/commercial legal services to GLGI, on the understanding that the necessary tax opinion would come from a different law firm – i.e. Cassels. Fasken neither requested nor approved the Cassels opinion. In addition, the taxpayers participating in the GLGI program were required to sign a disclaimer of any reliance on GLGI's professional advisors, which included Fasken. None of the Plaintiffs testified that they had relied on Fasken's legal advice or legal work or were even aware of Fasken's existence in this matter.

[66] The GLGI application forms that each participating taxpayer signed are in the record as exhibits to Allan Beach's affidavit. In those forms, each GLGI program participant specifically acknowledged:

- (a) GLGI would establish a "legal defence fund" that it would use to "pay legal fees in the event of a reassessment by the Canada Revenue Agency";
- (b) GLGI participants had been urged to obtain their own legal and financial advice before participating in the GLGI program;
- (c) the lawyers for GLGI did not represent the participants; and

(d) the lawyers for GLGI were not providing the participants any advice, including about the tax treatment of any donations that may be made under the GLGI program

[67] It is also uncontroverted in the record that Fasken had no contact with participants in the GLGI program, nor did Fasken have any contact fundraisers involved in the marketing of the program to taxpayers. The record contains no evidence of Beach's or Fasken's name ever being disclosed to class members; and, indeed, the Plaintiffs' own evidence confirms that none of them knew about Fasken's involvement as solicitors for GLGI during the relevant period.

[68] The Plaintiffs have also named Escrowagent Inc. ("Escrowagent"), an Ontario corporation of which Allan Beach was director, as a Defendant. For present purposes, Escrowagent has been defined as part of the Fasken group of Defendants, and that company's position will be considered as part of the claim against Fasken.

[69] As the Cassels tax opinion describes it, that company was tasked with the function of "assist[ing] [GLGI contributors] with the paper flow if, after receiving any distribution of Licenses from the Trust, [contributors] elect to make a gift to the Charity and/or the foundation." This essentially mechanical function was also set out in the Directions signed by participants and addressed directly to Escrowagent.

[70] As Allan Beach describes it in his affidavit and cross-examination, Escrowagent's role was to administer the 48-hour and 72-hour "cooling-off" periods in conformance with the tax opinion. It exercised no discretion and had no decision-making function. Rather, it held funds and documents in custody during the cooling-off periods (without depositing any contributors' funds in any Escrowagent bank account), and monitored the donations to keep track of any revocation applications during those short periods. Subject to any revocations, Escrowagent then "assist[ed]...with the paper flow" – i.e. arranged for the release from escrow and delivery to GLGI of the participants' cheques and documentation.

[71] The Cassels tax opinion indicated that the entity acting as escrow agent for the GLGI program was to be independent of GLGI in order to objectively and accurately monitor the revocation applications and ensure that the cooling off periods were properly observed before funds and documents were turned over to GLGI. The Plaintiffs submit, accurately, that the fact that Allan Beach, a Fasken partner, was director of Escrowagent Inc., and that Fasken was corporate counsel to GLGI, breached this requirement of independence. The tax opinion envisioned an arm's length escrow agent, not one under GLGI's own lawyers' control.

[72] That said, in *Wintercorn v. Global Learning Group Inc.*, 2022 ONSC 4576, at para. 26, an earlier motion dealing with refusals at discovery, Justice Glustein provided a benign description of this non-arm's length relationship:

[26] Beach's evidence is that all his activity with respect to Escrowagent was part of his solicitor-client relationship with GLGI. Beach, as corporate/commercial solicitor to GLGI, prepared certain commercial documents and monitored the mechanical functions performed by Escrowagent to maintain consistency with the Opinion on behalf of his client, GLGI.

[73] While it is the case that Beach, a Fasken partner, was Escrowagent's sole director and officer, the fact is that class members/contributors to GLGI's program were unaware of Fasken's role with either GLGI or Escrowagent. Beach deposed that he personally ensured that Escrowagent performed its limited and mechanical activities independently, without influence by anyone connected to GLGI. This included the task of ensuring the integrity of the program's revocation periods.

[74] Having a partner at Fasken – a law firm retained by GLGI – be the director of the entity acting as escrow agent for GLGI's program was an improper and, frankly, careless arrangement given the requirement of independence. But as it turns out, it was also a harmless one. The Plaintiffs complain about the lack of independence as part of their overall dissatisfaction with GLGI, but they do not allege, and have led no evidence to suggest, that Escrowagent ever neglected its functions or performed them in a faulty or harmful way.

[75] During the entire period relevant to Beach's involvement with Escrowagent, it never failed to give effect to a revocation or mishandled any escrowed funds or documents or neglected to arrange for the release from escrow and delivery of any escrowed material. The economic loss claimed by the Plaintiffs and class relates to the overall concept and tax law viability of the GLGI program – i.e. that the CRA has reassessed the class members and denied their GLGI-related deductions, and that the Tax Court of Canada found the program to be a sham from a tax law point of view. The losses are not related to, and are not claimed in respect of, the mechanics of the program's administration or any act or omission attributable to Escrowagent.

[76] Despite the lack of any evidence impugning Escrowagent's management of its limited tasks, I do not exactly blame the Plaintiffs for naming Allan Beach and Escrowagent as Defendants. They appear to have taken a cue from *dicta* in the Tax Court's reasons for decision in *Mariano*. There, at paras. 85-86, the Court commented:

[856] It is clear that the Promoter [of GLGI], either directly or through its subcontractors or agents, undertook the duties of both the Trustee and the Escrow Agent, above discussed, so that any participant in the Program was deceived into thinking these parties were active and independent when they were not.

[86] Since the evidence shows that Alan [*sic*] Beach, the solicitor who prepared the precedents for the Transaction Documents, was also the principal of the Escrow Agent, whom he acknowledged played no active role in correspondence with the CRA, then it is clear that even solicitors for the Promoter were aware of the deceit intended to be perpetrated upon any applicants and the public at large.

[77] This description by the Tax Court is more than a little confusing, likely because, unlike in the case before me, the court had no evidence from Allan Beach or anyone else to describe how Escrowagent went about the tasks it was assigned to do. Beach himself was not a party to the *Mariano* action and no party called him as a witness; counsel for Fasken points out that Beach was absent enough from the *Mariano* case that his name was misspelled in the decision.

[78] Operating in an evidentiary void regarding Fasken and Escrowagent, the court came to the conclusion that Escrowagent "played no active role" and deferred all of its duties to the promoter

of GLGI. That may have been the *Mariano* plaintiff's perception, but it was uninformed and therefore speculative. By contrast, in the record before me, which includes an affidavit and thorough cross-examination of Allan Beach, the uncontradicted evidence is that Escrowagent discharged its mechanical and very narrow escrow function in accordance with its mandate under the Cassels tax opinion.

[79] The record shows that it was indeed Escrowagent, not GLGI, who handled the funds and documentation held in escrow during the cooling-off periods and who attended to any retraction applications submitted by contributors during those periods. Moreover, the fact that Allan Beach "played no active role in correspondence with the CRA", as narrated in *Mariano*, does not impugn his conduct; rather it confirms the limited and mechanical nature of Escrowagent's role in the GLGI program. It also demonstrates that, although Beach's position as both Fasken partner and Escrowagent director was non-arm's length and improper, it was not meaningful as the cause of any class member's loss.

[80] Since the *Mariano* case was heard without participation by, or evidence from, Allan Beach and/or Escrowagent Inc., I do not take the Tax Court's comments with respect to them as findings of facts; they are certainly not findings that are in any way binding on me, since I have direct evidence on point from Allan Beach himself. As already mentioned, despite their pleading that those two parties were at fault, nothing in the record – including evidence explored with Allan Beach in cross-examination – supports the description given by the Tax Court that Escrowagent Inc., driven by Allan Beach, abdicated its responsibilities. The evidence points entirely to Allan Beach fulfilling for Escrowagent Inc. its mandated responsibilities, but that those responsibilities were always designed to be non-discretionary and minimal.

[81] In short, given Fasken's role as corporate solicitors for GLGI, Allan Beach should not have played a role as Escrowagent Inc. principal and sole director. An entity controlled by persons at arm's length from GLGI and any law firm retained by it should have been chosen to perform the escrow functions required by the tax opinion on which the GLGI program was based. But this lack of arm's length independence was not what caused any loss to the Plaintiffs or class members.

[82] Fasken's role as solicitor for certain corporate matters was unknown and irrelevant to the class members, while Escrowagent Inc.'s and Allan Beach's functions were carried out mechanically and without causing harm to the class members. Notwithstanding the Tax Court's negative statements about Fasken's, Escrowagent Inc.'s, and Allan Beach's conduct, there is no basis in the evidentiary record before me to support a claim against any of those Defendants.

[83] In short, Fasken owed the Plaintiffs and class members no duty, and the Plaintiffs and class members did not know of or rely on Fasken. Further, Escrowagent Inc. and Allan Beach, though improperly positioned as non-arm's length from Fasken and GLGI, did nothing to cause the class members economic loss.

[84] There is by now an ample evidentiary record on which to base these conclusions, and, given the continued application of privilege to all communications between Fasken and its client, GLGI, there is little prospect that any further evidence will appear at a trial to shed light on Fasken's undertaking and scope of liability. The Court is at this stage able to make a fair determination that

the claim against Fasken will not succeed; there is therefore no genuine issue requiring a trial of that claim: *Hryniak*, at para. 49.

VII. The claim against Evans

[85] The third moving Defendant to be considered here is Evans, a financial advisory and valuation firm that was retained by GLGI in early 2008. As described by Evans' counsel in the first paragraph of their factum, it produced "a comprehensive valuation report for courseware licenses which were being donated to charities through a Tax Shelter program run by GLGI." The report was delivered to GLGI on December 15, 2008 (the "Evans Report").

[86] A valuation report is a representation of value, and, like here, claims of professional negligence against valuers are generally framed in negligent misrepresentation or negligent performance of a service causing economic loss. In this respect, the legal framework in which their professional liability for claims of economic loss are essentially the same as the legal framework for analyzing the claims against law firms discussed in the two sections above.

[87] In *Deloitte & Touche v. Livent Inc.*, [2017] 2 SCR 8, the Supreme Court held that proximity of defendant to plaintiff is a necessary ingredient to liability in such cases, and that two factors are crucial to the proximity analysis: the defendant's undertaking and the plaintiff's reliance. As the Court described it, at para. 30, there is a reciprocity between the rights and obligations flowing between the parties:

[30] In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so. [citations omitted]

[88] As with the claims against Cassels and Fasken, the first question to be addressed with respect to Evans is the scope of its undertaking. A claimant who alleges reliance on an audit or a property/business valuation, but who lies outside of those parameters would be asserting an unreasonable, and therefore inactionable, reliance. "[T]he plaintiff's reliance must be within the scope of the defendant's undertaking -- that is, the purpose for which the representation was made or the service was undertaken": *Lavender v. Miller Bernstein LLP*, 2018 ONCA 729, at para. 36.

[89] In *Barkley v. Tier 1 Capital Management Inc.*, 2018 ONSC 1956, an investors' class action in respect of syndicated mortgages, the valuation firm that appraised the mortgaged property was found to have had a contractual relationship only with the syndicator and not to have had any dealings or communication with the investors. As with lawyers, the general rule flowing from *Livent* is that the retainer must be analyzed in all its circumstances to determine whether the valuator's undertaking extends beyond the client that retained it to the clients or customers

[90] The one significant difference between a financial consultant/valuator and a lawyer, of course, is that the correspondence, advice, and retainer between valuator and client are not privileged. Accordingly, there is a substantial amount of important documentation between Evans

and GLGI that is in the record, while a similar quantity of correspondence and other documentation is not available for Cassels and Fasken.

[91] Under the circumstances, the proximity analysis must take into account Evans' undertaking as stated in its retainer agreement. Further, it must consider the context of the Evans Report having been produced and its intended use as a measure of whether class members could reasonably rely on it. In *Barkley*, at para. 97, Justice Perell concluded that "the Appraiser Defendants made no undertaking and undertook no service to the Class Members. The Appraiser Defendants did not make an invitation to the investors to rely on the appraisal..." Both sides of the coin – the undertaking by Evans and whether there was reasonable reliance on the Evans Report as a result of an "invitation" to the class members to do so – inform the proximity analysis.

[92] The combination of Evans' and the Plaintiffs' documentary productions, along with those of the Defendant Graham Turner, have created a record showing that while Evans was anxious to characterize its work as being undertaken for GLGI alone, the reality is that the Evans Report was meant to be shared with, and relied upon by, outside parties. When Evans was retained in 2008, CRA was actively reassessing the GLGI program participants on the basis that the value of the licenses donated by the participants was significantly overstated. The Evans Report was obtained by GLGI in order to support the reassessment applications by participants in the GLGI program by supplying the CRA with an expert opinion with respect to the fair market value of the licenses the participants acquired through GLGI.

[93] Richard Evans, the author of the Evans Report, deposed that it was his understanding that the report was to be delivered by GLGI to CRA in support of the then ongoing reassessments. The Evans Report itself states that CRA may review the report as part of its analysis of the value of the GLGI courseware licenses. As explained in the *Mariano* decision, at paras. 23-24, the allegation made by CRA against the GLGI program was that, taking into account the real value of the licenses acquired through GLGI and donated to charitable recipients, the participants in the program received "inflated tax receipts [which] is a benefit that vitiates the gift". Based on the information available to it and a number of assumptions set out in the Evans Report, Evans opined that the value of the courseware licenses was equal to the list/retail pricing of those licenses.

[94] Counsel for Evans submits that there is no evidence that the Evans Report was ever provided to any class members. This forms the basis for Evans' position that the class members did not rely on Evans' valuation or anything else contained in the Evans Report.

[95] With respect, whether any individual class member personally received a copy of the Evans Report is a red herring. In the first place, email correspondence produced by the Plaintiff, Alex Kepic, indicates that "participants [in the GLGI program] were provided if requested [Evans and other] reports". More importantly, Alex Kepic deposes that participants were advised by GLGI of the Evans Report, and understood that it was being submitted to CRA by GLGI on their behalf and that they could rely on it in their reassessment applications. In fact, there was no other reason for GLGI to have commissioned the Evans Report and delivered it to CRA; GLGI was not itself a participant in its own program, and so GLGI's own taxes were not the subject of CRA's analysis.

[96] Alex Kepic attests to the fact that on September 15, 2010, he completed a Notice of Objection for the 2007 and 2008 tax years. He states that the typed text on the Notice of Objection

was provided to him by GLGI and that he filled out the balance of the Notice by hand. In the typed portion, paragraph 7 of the Notice of Objection states:

The Licensed Courseware was independently appraised by a qualified valuator, Richard Evans, and another qualified appraiser, Richard M. Wise of Blackman, Chartered Accountants (“Wise”) independently reviewed and confirmed the foregoing appraisal (the “Appraised Value”).

[97] Graham Turner is a lawyer (not a member of either Cassels or Fasken) who was independently retained by GLGI to, among other things, assist it in navigating the CRA reassessments of the GLGI program participants. He testified that he was mandated by the director of GLGI to “take care of his clients”. In pursuit of this mandate, he drafted the Notice of Objection for the participants to use with CRA in challenging the reassessments, and he provided this Notice to them by posting it on the GLGI website. In this way, he describes his job as an agent of GLGI as involving “two aspects of the program. One at the corporate level, and one at what they call their donor. Like, sometimes they call them their clients.”

[98] A document entitled “Information on Filling Out the Notice of Objection” was also sent to the class members by Graham Turner on behalf of GLGI. That document explained how to electronically file the Notice of Objection, the date by which it had to be filed, instructions for drafting a cover letter to CRA to accompany the Notice, a step by step guide to the draft Notice he had sent explaining each matter that needed to be filled in by the individual participant in the GLGI program, and a reminder to sign and date the document at the end.

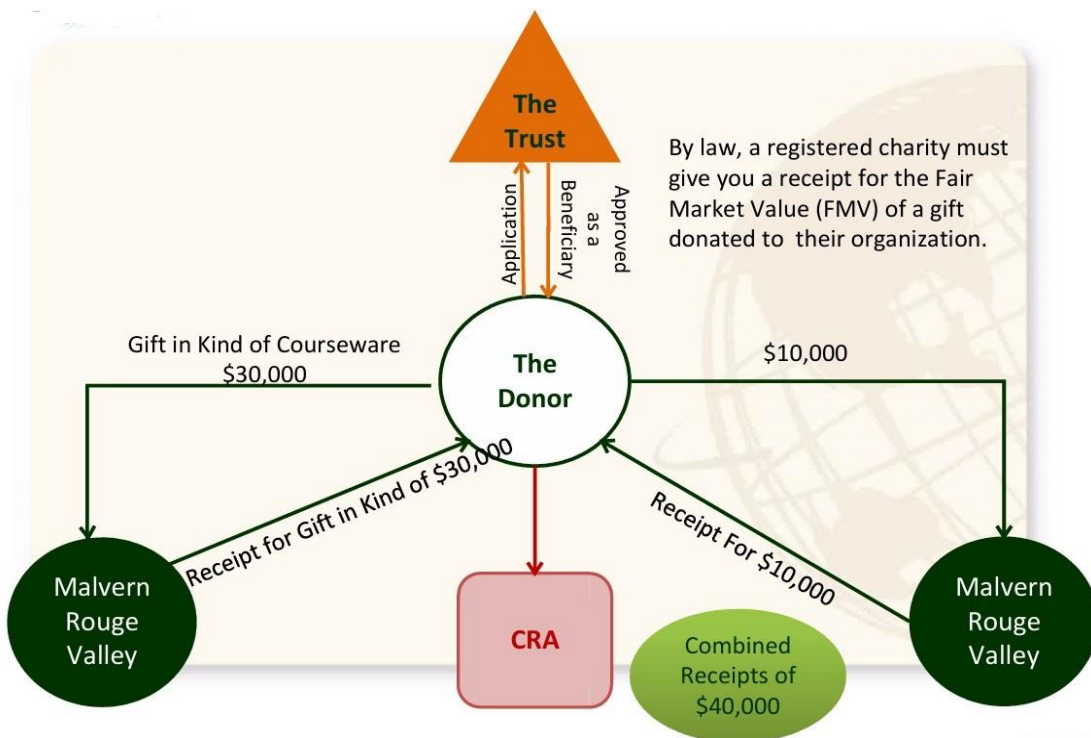
[99] It is as clear as could be that the class members filing the Notice with CRA were meant to rely on the model Notice that GLGI was sending to them. It is likewise beyond debate that the model Notice itself announced its reliance on the Evans Report which GLGI had already forwarded to CRA.

[100] Moreover, a power point presentation produced by GLGI as a marketing tool for its tax program makes specific reference to Evans as having provided an authoritative and reliable valuation report. It indicates that Evans has credibility with CRA as the firm chosen to support another valuation by Wise Blackman, the CRA’s own previous expert valuator.

[101] The following frames are extracted from the GLGI marketing presentation geared toward recruiting new participants and reassuring existing ones. As can be seen, Evans was not just a prominent expert touted by GLGI and relied on by class members in their dealings with CRA; its role was to support the crucially important fair market value attributed to the participant’s donations. This use of the Evans Report by class members in support of their submissions to CRA, despite any verbiage to the contrary in its retainer agreement, appears to have been squarely within the parameters of Evans’ undertaking. Likewise, the class members’ use of and reliance on the Evans Report was not only foreseeable, but in the circumstances appears to have been one of the reasons, if not the only reason, for the report.

Fair Market Value (FMV)

- The following steps have been taken to address the concern of FMV
 - A yearly appraisal by emc partners establishes that the FMV is accurate. emc partners is a professional valuator who have performed hundreds of appraisals for a wide range of companies
 - A review by Wise Blackman was completed to confirm the appraisal by emc partners. Richard Wise has been engaged previously by Revenue Canada when they had wanted to challenge FMV in tax court.
 - A second full evaluation has also been provided by a Vancouver based valuator, Evans & Evans. They have also confirmed the accuracy of the FMV.
 - Finally, millions of licenses are sold online everyday around the world by Info Source to governments and educational institutions.



[102] In May 2010, Jennifer Lucas, a partner at Evans, was contacted by Mike Ozerkevich, the principal of emc Partners Inc. (“emc”), another valuation firm who had worked on assessing the value of the GLGI licenses. In that communication, emc advised Evans that it was withdrawing its valuation report due to the unreliability of some of the information on which emc had relied. It is apparent from Evans’ internal communications that it understood that its own role was critical in supporting the class members’ position respecting the GLGI program. Following the emc withdrawal, Jennifer Lucas emailed Michael Evans advising him of this development and commenting, “I think it is bad. Michael did his own valuation which he said he withdrew, which might mean our valuation is the only one standing.”

[103] On May 20, 2010, following this internal conversation, Jennifer Lucas wrote to GLGI on Evans letterhead, and advised them that Soft Skills, one of the courseware titles contained in the GLGI program, was no longer being offered on the same terms as had been in place when valued by Evans. The letter went on to state: “Hence, all Evans & Evans reports which offer a calculation, estimate or opinion as to the value or price of the Soft Skills courseware titles are hereby withdrawn immediately.”

[104] It is unclear in the evidence why this letter limited Evans’ withdrawal to the Soft Skills courseware rather than applying it across the entire GLGI program as had emc Partners, Inc. in its comprehensive withdrawal. Michael Evans deposed that, in fact, he thought that Evans had entirely withdrawn its report and that the Lucas letter misstated the matter.

[105] In any case, Richard Glatt of IDI Strategies Inc., indicated in his examination for discovery that he cannot recall the withdrawal of the Evans Report – whether it was a partial or a complete withdrawal – being communicated to the class members. Indeed, there is no correspondence or other documentation in the record evidencing any communication about Evans’ withdrawal to class members.

[106] For his part, class member Alex Kepic has deposed that he is certain that he was never advised that the Evans Report had been withdrawn either in part or in whole. There is no indication in the record that any of the class members had revised or amended their Notice of Objection to CRA which, as indicated above, had explicitly relied on the Evans Report to support the value of the courseware licenses and to justify the tax deductions they had taken.

[107] Notwithstanding the efforts by Evans to limit their liability in their engagement agreement with GLGI, or to define their undertaking as aimed strictly at GLGI and not to GLGI’s participants, it is obvious that the entire purpose of the Evans Report was to reassure the class members that the tax appeals would succeed, and to be provided to CRA in the tax appeals. Based on that reassurance, some number of class members – that number is still to be determined at a later stage of the case – continued to challenge the reassessments and did not pay the reassessed taxes. This resulted in those class members incurring increased interest expenses when their reassessments were ultimately confirmed.

[108] Counsel for Evans makes a policy argument that imposing liability on Evans in this context will somehow result in “indeterminate liability”. However, it is difficult to understand why liability

would be indeterminate. It was reasonably foreseeable – indeed, patently obvious - to Evans and everyone else involved that the participants in the GLGI program would rely on its report in back-stopping the CRA challenges. The class is neither vast nor unknown. As Plaintiffs’ counsel describe it, it is comprised of specific “capital beneficiaries,” participating in a closed tax shelter program. Evans was not only aware of the gift program’s structure, but expressly identified these donors within its own report. Liability is therefore confined to a foreseeable and closed loop of participants. Evans’ “floodgates” argument is, with respect, misplaced.

[109] The Federal Court of Appeal has emphasized that professionals – including, and in particular, those who provide opinions of value – have “a duty of care to warn against investment in an improvident or suspect tax shelter”: *Canada v. Scheuer*, 2016 FCA 7, at para. 44. Contrary to Evans’ position, public policy considerations point to not allowing valuers and similarly placed professionals to absolve themselves of liability to taxpayers who will rely on their advice as a seal of approval. Again, as the Federal Court of Appeal put it: “The issuers of such opinions, who benefited financially from the provision of their professional advice, are better placed to indemnify the plaintiffs in the event of negligence in the exercise of their professional responsibilities”: *Ibid.*

[110] Evans’s policy arguments are also contradicted by their own acknowledged outreach to external parties. As already indicated above, Evans’ undertaking to GLGI was accompanied by their stated understanding that the Evans Report would be used by the CRA and “outside parties” This conscious exit from the private “internal consulting” bubble by authorizing their report to be submitted in tax proceedings engaged in by participants in the GLGI program expanded the undertaking to include class members and underscored the foreseeability of the class members’ reliance on the report.

[111] Having authorized external reliance, all of the hallmarks of owing a duty of care toward class members are present. There is certainly a strong triable issue with respect to Evans’ liability to the Plaintiffs and class which cannot be dismissed at this point without going to trial. At trial, the Court will be in a better position to achieve a full appreciation of the evidence to make a determination on the scope of Evans’ undertaking, the class members’ reliance, and the liability, if any, that accompanies those findings: *Hryniak*, at para. 56.

VIII. Disposition

[112] The motions by Cassels and Fasken are granted. The action is dismissed as against Cassels and Fasken.

[113] The motion by Evans is denied. The action will proceed to trial as against Evans.

IX. Costs

[114] The parties may make written submissions as to costs.

[115] I would ask counsel for the Cassels and Fasken to email brief submissions to my assistant within two weeks of today, and counsel for the Plaintiffs to respond with submissions emailed to my assistant within two weeks thereafter. I would also ask counsel for the Plaintiffs to email brief submissions relating to the motion by Evans to my assistant within two weeks of today, and

counsel for Evans to respond with submissions emailed to my assistant within two weeks thereafter.

Morgan J.

Date: July 3, 2026