

CV-11-422085  
Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN

MARC CHARETTE

Plaintiff

and

TRINITY CAPITAL CORPORATION,  
TRINITY WOOD CAPITAL CORPORATION,  
CAPITAL STRUCTURES LTD.,  
CAPITAL STRUCTURES 2002 LTD.,  
TC CAPITAL LIMITED, JAMES DOUGLAS BEATTY,  
JAMES GORDON ARNOLD,  
THE JOHN McKELLAR CHARITABLE FOUNDATION,  
FRASER MILNER CASGRAIN LLP, GRAHAM TURNER,  
BDO DUNWOODY LLP and RALPH THOMAS NEVILLE

Defendants

Proceedings 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 lawyers 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: March 11, 2011

Issued by: 

Registrar

Address of Court Office: *(Mr. Brenton)*

393 University Avenue

Toronto, ON M5G 1E6

TO:

TRINITY CAPITAL CORPORATION

55 University Avenue, Suite 500

Toronto, ON M5J 2H7

AND TO:

JAMES GORDON ARNOLD

32 Glenorchy Rd.

Don Mills, ON M3C 2P9

AND TO:

TRINITY WOOD CAPITAL  
CORPORATION

141 Adelaide Street West, Suite 701

Toronto, ON M5H 3L5

AND TO:

THE JOHN McKELLAR CHARITABLE  
FOUNDATION

130 King Street West, Suite 1500

Exchange Tower, P.O. Box 480

Toronto, ON M5X 1J5

AND TO:

CAPITAL STRUCTURES LTD.

55 University Avenue, Suite 1100

Toronto, ON M5J 2H7

AND TO:

FRASER MILNER CASGRAIN LLP

77 King Street West, Suite 400

Toronto-Dominion Centre

Toronto, ON M5K 0A1

AND TO:

CAPITAL STRUCTURES 2002 LTD.

55 University Avenue, Suite 1100

Toronto, ON M5J 2H7

AND TO:

GRAHAM TURNER

248 Riverview Blvd.

St. Catharines, ON L2T 3M8

AND TO:

TC CAPITAL LIMITED

141 Adelaide Street West, Suite 5AA

Toronto, ON M5H 3L5

AND TO:

BDO DUNWOODY LLP

36 Toronto Street, Suite 600

Toronto, ON M5C 2C5

AND TO:

JAMES DOUGLAS BEATTY

46 Teddington Park Avenue

Toronto, ON M4N 2C6

AND TO:

RALPH THOMAS NEVILLE

263 Ash Tree Way

Oakville, ON L6J 5J1

## DEFINED TERMS

1. The capitalized terms used throughout this statement of claim have the meanings indicated below:

- (a) “**Arnold**” means James Gordon Arnold;
- (b) “**BDO**” means BDO Dunwoody LLP;
- (c) “**BDO Opinion**” means the opinion, as amended from time-to-time, prepared by **BDO** and **Neville** opining on the relevant Canadian federal income tax consequences under the *ITA* in respect of transactions involving an individual resident in Canada making a cash donation in accordance with the terms of the **Program**;
- (d) “**Beatty**” means James Douglas Beatty;
- (e) “**Biggin Hill**” means Biggin Hill Holding Ltd.;
- (f) “**Capital**” means Capital Structures Ltd.;
- (g) “**Capital 2002**” means Capital Structures 2002 Ltd.;
- (h) “**CBCA**” means the *Canada Business Corporations Act*, R.S.C. 1985, c. C.44;
- (i) “**Charterbridge**” means Charterbridge Holdings International Ltd.;
- (j) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (k) “**Class**” and “**Class Members**” means all persons, other than **Excluded Persons**, who participated in the **Program** in at least one of the taxation years of 2001, 2002 or 2003;
- (l) “**Cornell**” means Cornell University;
- (m) “**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- (n) “**CRA**” means the Canada Revenue Agency;

- (o) “**Excluded Persons**” means **Arnold, Beatty, Neville** and **Turner** and any members of their families and any entities in which any of them has or had an interest;
- (p) “**FMC**” means Fraser Milner Casgrain LLP;
- (q) “**FMC Opinion**” means the opinion, as amended from time-to-time, prepared by **FMC** and **Turner** opining on the Canadian federal income tax consequences to a resident of Canada who made a cash donation in accordance with the terms of the **Program**;
- (r) “**Foundation**” means the The John McKellar Charitable Foundation;
- (s) “**GAAR**” means the General Anti-Avoidance Rule in s. 245 of the *ITA*;
- (t) “*ITA*” means the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.), as amended;
- (u) “**LifeTech**” means LifeTech Corporation, now known as Iatra Life Sciences Corporation;
- (v) “**Mackenzie**” means The Mackenzie Institute for the Study of Terrorism, Revolution and Propaganda;
- (w) “**Marc**” means Marc Charette;
- (x) “**Neville**” means Ralph Thomas Neville;
- (y) “**Program**” means the Donation Program for Medical Science and Technology;
- (z) “**TC**” means TC Capital Limited;
- (aa) “**Trilon**” means Trilon Financial Corporation, now known as Brookfield Asset Management;
- (bb) “**Trinity**” means Trinity Capital Corporation;
- (cc) “**Trinity Wood**” means Trinity Wood Capital Corporation; and
- (dd) “**Turner**” means Graham Turner.

**RELIEF CLAIMED**

2. Marc claims on his behalf and on behalf of the other Class Members:
- (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing him as the representative plaintiff;
  - (b) general damages, special damages, plus, pursuant to s. 26(9) of the *CPA*, the costs of notice and of administering the plan of distribution of the recovery in this action plus applicable taxes, in the sum of \$300 million or such other sum as this court finds appropriate at the trial of the common issues or at a reference or references;
  - (c) punitive damages against Trinity, Trinity Wood, Beatty, Arnold, Capital, Capital 2002 and TC in the amount of \$5 million or such other sum as this court finds appropriate at the trial of the common issues;
  - (d) a declaration that all promissory notes executed by the Class Members for the purpose of the Program are void and unenforceable;
  - (e) an order directing a reference or giving such other directions as may be necessary to determine issues not determined in the trial of the common issues;
  - (f) prejudgment interest and postjudgment interest, compounded, or pursuant to ss. 128 and 129 of the *CPA*;
  - (g) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity; and
  - (h) such further and other relief as to this Honourable Court seems just.

**NATURE OF THE ACTION**

3. This action concerns the income tax consequences of leveraged charitable donations to support advancements in medical science and technology that were made by donors to the Foundation in accordance with the terms of the Program.

4. The Program was promoted as producing income tax credits of up to sixty-two point four percent (62.4%) depending on the donor's province of residence. A key selling point of the Program was that FMC "one of Canada's pre-eminent international law firms" and BDO "one of Canada's leading business advisory firms serving entrepreneurial clients" provided tax opinions that "address all the key tax implications of the Donation Program...".

5. Each donor participated in the Program by making a donation of at least \$100,000 to the Foundation. The donors were required to use their own funds for a portion of the donation and were provided with the option of financing for most of the donation.

6. The Foundation issued an official charitable donation income tax receipt to each donor to permit them to claim an income tax credit for an amount that included the financed portion of the donation.

7. In 2009, the Tax Court of Canada ruled, in a test case, that one of the donors was not entitled to the income tax credit he claimed as a result of participating in the Program. The Tax Court of Canada arrived at this conclusion because at common law, a donor cannot receive a benefit in return for a donation and the court determined that the financing for the donation was a benefit. Also, it found that the loans were not bona fide loans and GAAR applied to the transactions.

8. As a result of the Tax Court of Canada's ruling, all of the income tax credits claimed in respect of the Program were finally disallowed by CRA. Each donor has or will be required to pay, among other things, an amount on account of taxes owing, interest and penalties to CRA and other out-of-pocket expenses.

9. Had the donors known that they would not be entitled to income tax credits, they would not have participated in the Program.

#### **THE PARTIES AND OTHER PERSONS AND ENTITIES**

10. Marc resides in the City of Pickering. He participated in the Program in the taxation years of 2002 and 2003 by making leveraged donations in the amounts of \$1,000,000 and \$100,000 respectively. The particulars of Marc's donations are described below.

11. FMC is a limited liability partnership of lawyers with offices in Toronto, Ottawa, Montreal, Edmonton, Calgary and Vancouver. The donors paid at least part of their donation to FMC in trust.

12. Turner resides in the City of St. Catharines. At all material times, Turner was a partner of FMC.

13. Turner, together with FMC, authored the FMC Opinion.

14. At all material times, FMC and Turner were in a solicitor-client relationship with Trinity, Arnold and Capital.

15. BDO is a limited liability partnership of accountants registered in Ontario.

16. Neville resides in the City of Oakville. At all material times, Neville was a partner of BDO.

17. Neville, together with BDO, authored the BDO Opinion.

18. Trinity was a corporation incorporated on July 23, 1982 pursuant to the laws of Canada with its registered head office located in the City of Toronto. Trinity described itself as an independent Merchant Bank focusing on providing growth capital to small and medium sized companies in Southern Ontario.

19. Trinity, at the direction of Arnold and Beatty, managed, marketed and promoted the Program to the donors in 2001, 2002 and 2003.

20. On or before January 12, 2008, Trinity was dissolved for failing to comply with the provisions of the *CBCA*.



21. Beatty resides in the City of Toronto. He was the founder of Trinity, its president, sole director and manager. At all material times, Beatty was the president, chief executive officer and sole director of Capital and an officer and a director of Capital 2002. At all material times, Beatty was a shareholder and director of LifeTech.

22. Arnold resides in the City of Toronto. Arnold was the founder, an officer and a director of TC. At all material times, Arnold was a shareholder, officer and the managing director of LifeTech.

23. Beatty and Arnold designed and implemented the Program with the assistance of the persons and entities described herein.

24. Trinity Wood is a corporation incorporated pursuant to the laws of Ontario and has its registered head office in the City of Toronto. Trinity Wood itself managed the Program in at least 2003.

25. Capital was a corporation incorporated on October 12, 2001 pursuant to the laws of Ontario and had its registered head office in the City of Toronto.

26. In 2001, Capital provided the donors with the financing for the loan component of the donation to the Program.

27. On or about November 24, 2008, Capital was cancelled.
28. Capital 2002 was a corporation incorporated on October 22, 2002 pursuant to the laws of Canada with its registered head office in the City of Toronto.
29. In 2002, Capital 2002 provided the donors with the financing for the loan component of the donation to the Program.
30. On or about February 9, 2006, Capital 2002 was dissolved for failing to comply with the provisions of the *CBCA*.
31. TC was a corporation incorporated on January 27, 2003 pursuant to the laws of Canada with its registered head office in the City of Toronto.
32. In 2003, TC provided the donors with the financing for the loan component of the donation to the Program.
33. On or about November 17, 2009, TC was dissolved for failing to comply with the *CBCA*.
34. Charterbridge was a corporation incorporated pursuant to the laws of the British Virgin Islands. As described below, in 2001, Charterbridge received \$4,426,920

of the donors' donations. Thereafter, Charterbridge paid a substantial portion of the \$4,426,920 to Arnold.

35. On or about November 2, 2009, Charterbridge was dissolved.

36. Biggin Hill was a corporation incorporated pursuant to the laws of the British Virgin Islands. As described below, Biggin Hill received a substantial portion of the donors' donations in 2003. Thereafter, Biggin Hill paid a substantial portion of the funds it received to Arnold.

37. On or about November 1, 2009, Biggin Hill was dissolved.

38. The Foundation is a Canadian registered charity which was registered in 1987. The Foundation was the initial charitable recipient of the donors' donations.

39. Cornell is a New York based University. In 2001, Cornell received \$5,543,000 in donations from the Foundation.

40. At all material times, Mackenzie was a Canadian registered charity. In 2001, 2002 and 2003 Mackenzie received some of the donations from the Foundation.

41. LifeTech is a corporation incorporated pursuant to the laws of Canada and is involved in the business of biotechnology.

42. Trilon is a global asset manager focused on property, renewable power and infrastructure assets with over \$100 billion of assets under management.

#### **THE STRUCTURE OF THE PROGRAM**

43. To participate in the Program, each donor had to make a donation of at least \$100,000 to the Foundation. The donors were not required to fund the entire donation, rather, they had the option to leverage their donation by funding up to thirty-two percent (32%) of the donation using their own funds. The leveraged portion of the donation was financed by Capital, Capital 2002 or TC in 2001, 2002 and 2003, respectively.

44. The Program commenced in the 2001 taxation year. In that year, 118 donors made donations totaling approximately \$18.3 million, including the financed portion.

45. The Program continued to operate in the 2002 and 2003 taxation years when the donors made donations, including the financed portions, totaling approximately \$106 million and approximately \$94 million, respectively, for a total of approximately \$218 million.

46. The structure of the Program was generally the same in each of the three years of operation.

47. In each year donors were provided with two options for participating in the Program.

48. The first option required donors to pay for the full amount of the donation using their own funds. If the donor elected to participate in the Program in this manner, he/she/it was required to deliver a certified cheque for the full amount of the donation payable to FMC in trust.

49. The second option required the donors to contribute up to thirty-two percent (32%) of the total donation using their own funds and to borrow the balance. If the donor elected to participate in the Program in this manner, the donor:

- (a) completed a pledge form, loan application, agreement, power of attorney and promissory note;
- (b) delivered a certified cheque of up to thirty-two percent (32%) of the total donation payable to FMC in trust;
- (c) paid a security deposit to either Capital in 2001, Capital 2002 in 2002 or TC in 2003 of up to twelve percent (12%) of the loan;
- (d) paid a loan fee and insurance premium to either Capital in 2001, Capital 2002 in 2002 or TC in 2003 of up to five percent (5%) of the loan;
- (e) was provided with an insurance policy after closing of each donation transaction that purportedly insured the donor against the risk that the security deposit would not increase in value to equal the loan amount on the due date of the loan; and
- (f) had the option to execute a quit claim and assignment, the effect of which was to assign the insurance policy and the security deposit to Capital in 2001, Capital 2002 in 2002 or TC in 2003 in full satisfaction of the outstanding loan.

50. In each year donors who participated in the Program by way of the second option were issued an official charitable donation income tax receipt by the Foundation in the amount of the total donation, including the financed portion.

#### **THE UNDERLYING TRANSACTIONS IN 2001**

51. In 2001, 118 donors participated in the Program and made donations totaling approximately \$18,305,000. The donors contributed approximately \$3,661,000 of their own money and paid \$1,830,500 to Capital on account of security deposits, loan fees and insurance premiums.

52. Capital loaned the donors \$14,644,000 on account of the financed portion of the donation. In order to do so, Capital borrowed \$14,052,000 from Trilon and \$592,000 from Trinity.

53. On or about December 31, 2001, FMC and Turner, on instructions from Capital and Trinity, transferred \$18,305,000 to the Foundation.

54. On or about December 31, 2001, the Foundation directed \$5,643,000 to Cornell, \$12,479,024 to Mackenzie and retained \$182,976. Thereafter, Cornell, Mackenzie and other persons and entities engaged in a series of commercial transactions, the particulars of which are described below.

55. On or about December 31, 2001, Cornell entered into two agreements to acquire laboratories and certain intellectual property from Charterbridge and paid Charterbridge \$5,643,000 as consideration for the acquisition of the property. Charterbridge had acquired the laboratories and intellectual property (and other assets) that it sold to Cornell from LifeTech for \$600,000.

56. On or about December 31, 2001, Mackenzie entered into an agreement to purchase from Charterbridge a five percent (5%) interest in the commercial exploitation of certain intellectual property for \$65,000,000. Pursuant to the agreement, Mackenzie directed \$11,628,887 of the funds it received from the Foundation to Charterbridge for point nine percent (0.9%) interest in the commercial exploitation of the intellectual property.

57. On or about December 31, 2001, Mackenzie also directed \$725,274 of the funds it received from the Foundation to Charterbridge. Thereafter, on Mackenzie's instructions, Charterbridge directed \$748,741 to Trinity in satisfaction of a fundraising agreement entered into by Mackenzie and Trinity.

58. Of the \$12,429,024 Mackenzie received from the Foundation, it retained \$124,863 for its own purposes.

59. On or about December 31, 2001, Charterbridge and Capital entered into an agreement whereby Charterbridge directed \$14,052,000 of the \$17,997,161 it

received from Mackenzie and Cornell to Capital and Capital assigned most of the donors' security deposits and insurance policies to Charterbridge. Thereafter, Capital directed \$14,052,000 to Trilon in satisfaction of the loan referred to in paragraph 52 above.

60. After the transactions described above were completed, \$4,426,920 of the donors' contributions in 2001 remained off-shore in the possession of Charterbridge.

61. On February 1, 2002, Charterbridge and Arnold entered into a non-competition agreement whereby Arnold agreed not to compete with Charterbridge for five years and Charterbridge agreed to pay Arnold \$1,000,000 per year for five years.

62. On or after February 1, 2002, Arnold agreed to and did pay Beatty a portion of the funds he received or was to receive from Charterbridge.

#### **THE UNDERLYING TRANSACTIONS IN 2002 AND 2003**

63. The full particulars, including the names of some of the charities and the amounts transferred, of the underlying transactions in 2002 and 2003 are not known to Marc but are known to the defendants.

64. However, the transactions generally followed the same pattern as in 2001.



65. In 2002, donors participating in the Program made donations totaling approximately \$106 million. The donors contributed approximately \$33,920,000 of their own money and paid \$18,020,000 to Capital 2002 on account of security deposits, loan fees and insurance premiums.

66. Capital 2002 loaned the donors \$72,080,000 on account of the financed portion of the donation. In order to do so, Capital 2002 borrowed funds from a commercial lender, the identity of which is unknown to Marc, but is known to the defendants.

67. On or about December 31, 2002, FMC and Turner, on instructions from Capital 2002 and Trinity, transferred \$106 million to the Foundation.

68. On or about December 31, 2002, the Foundation transferred substantially all of the \$106 million to Mackenzie and another charity or charities, the identities of which are not known to Marc, but are known to the defendants. Thereafter, Mackenzie, the unidentified charity or charities and other persons and entities engaged in a series of commercial transactions the particulars of which are not known to Marc, but are known to the defendants.

69. After the commercial transactions referred to above were completed:

- (a) each of the Foundation, Mackenzie and the unidentified charity or charities retained a portion of the funds for their own purposes;
- (b) Capital 2002 assigned most of the donors' security deposits and insurance policies from 2002 to an off-shore entity;

- (c) Capital 2002 directed \$72,080,000 to the commercial lender in satisfaction of the loan referenced in paragraph 66 above;
- (d) a substantial portion of the donors' contributions in 2002 remained in the possession of the off-shore entity;
- (e) the off-shore entity entered in to an agreement with Arnold whereby Arnold was paid substantial amounts of money; and
- (f) thereafter, Arnold agreed to and paid Beatty a portion of the funds he received from the off-shore entity.

70. In 2003, donors participating in the Program made donations totaling approximately \$94 million. The donors contributed approximately \$30,080,000 of their own money and paid \$15,880,000 to TC on account of security deposits, loan fees and insurance premiums.

71. TC loaned the donors \$63,920,000 on account of the financed portion of the donation. In order to do so, TC borrowed funds from a commercial lender, the identity of which is unknown to Marc, but is known to the defendants.

72. On or about December 31, 2003, FMC and Turner, on instructions from TC and Trinity, transferred \$94 million to the Foundation.

73. On or about December 31, 2003, the Foundation transferred substantially all of the \$94 million to Mackenzie and another charity or charities, the identities of which are not known to Marc, but are known to the defendants. Thereafter, Mackenzie, the unidentified charity or charities and other persons and entities engaged in a series of

commercial transactions the particulars of which are not known to Marc, but are known to the defendants.

74. After the commercial transactions referred to above were completed:
- (a) each of the Foundation, Mackenzie and the unidentified charity or charities retained a portion of the funds for their own purposes;
  - (b) TC assigned most of the donors' security deposits and insurance policies from 2003 to Biggin Hill;
  - (c) TC directed \$72,080,000 to the commercial lender in satisfaction of the loan referenced in paragraph 71 above;
  - (d) a substantial portion of the donors' contributions in 2003 remained off-shore in the possession of the Biggin Hill;
  - (e) Biggin Hill entered in to an agreement with Arnold whereby Arnold was paid substantial amounts of money; and
  - (f) thereafter, Arnold agreed to and paid Beatty a portion of the funds he received from Biggin Hill.

#### THE TAX OPINIONS

75. FMC and Turner prepared the FMC Opinion.

76. The FMC Opinion expressly stated that it was intended to be relied upon by Trinity and prospective participants in the Program. Specifically, the FMC Opinion stated:

The opinions expressed in this letter may only be relied upon by the addressee and by a Donor who is provided a copy of this letter by the addressee or its authorized agent. Each Donor should review this letter and their particular circumstances with their professional tax advisor. [emphasis added]

77. The FMC Opinion stated that the transactions contemplated in the Program should constitute a gift by an individual to a registered charity and would entitle the donor to a tax credit equal to the top combined federal/provincial tax rate in the province in which the individual is resident.

78. BDO and Neville prepared the BDO Opinion.

79. The BDO Opinion stated that the transactions contemplated in the Program should be treated for income tax purposes as a donation by an individual to a registered charity which will entitle the donor to a tax credit.

80. The FMC Opinion and the BDO Opinion were necessary prerequisites to the creation and promotion of the Program in 2001, 2002 and 2003. The Program could not have been created and promoted without the FMC Opinion and the BDO Opinion.

81. Arnold, Beatty, Trinity and Trinity Wood prepared and distributed a marketing package to the donors in 2001, 2002 and 2003 that described the Program. The FMC Opinion and the BDO Opinion formed part of the marketing package in each year.

82. FMC and Turner consented to the FMC Opinion being included in the marketing package.

83. BDO and Neville consented to the BDO Opinion being included in the marketing package.

84. FMC and Turner knew and intended that the donors would rely upon the existence of the FMC Opinion in making their decision to participate in the Program.

85. BDO and Neville knew and intended that the donors would rely upon the existence of the BDO Opinion in making their decision to participate in the Program.

86. All donors were either provided a copy of the FMC Opinion and the BDO Opinion, or were made aware of their existence, before they decided to participate in the Program.

#### **MARC'S DONATIONS**

87. Marc participated in the Program in 2002 and 2003.

88. Before agreeing to participate in the Program, Marc read the FMC Opinion and the BDO Opinion. Marc would not have participated in the Program but for the existence of the FMC Opinion and the BDO Opinion.

89. On November 12, 2002, Marc executed a pledge, loan application, promissory note, agreement and power of attorney that provided that Marc:

- (a) pledged a donation of \$1,000,000 to the Foundation;
- (b) delivered \$320,000 of his own funds to FMC on account of his contribution to the donation;
- (c) borrowed \$680,000 from Capital 2002; and
- (d) delivered \$170,000 of his own funds to FMC on account of an expense deposit, of which \$120,000 was a security deposit and \$50,000 was a loan fee and premium for the issuance of an insurance policy in favour of Marc.

90. On November 19, 2002, the Foundation issued Marc an official charitable donation income tax receipt in the amount of \$1,000,000.

91. On November 22, 2002, British Indemnity Limited, an insurance company incorporated in Bermuda, issued an insurance policy that purportedly insured Marc against the risk that his security deposit did not increase in value to equal the outstanding loan upon the due date.

92. On March 18, 2004, Marc executed:

- (a) an assignment, the effect of which was to assign the insurance policy to Capital 2002; and
- (b) a quit claim, the effect of which was to release any interest Marc had in the security deposit.

93. As a result of executing the assignment and the quit claim, Marc did not have an obligation to repay the outstanding loan to Capital 2002.

94. On February 14, 2003, Marc executed a pledge, loan application, promissory note, agreement and power of attorney that provided that Marc:

- (a) pledged a donation of \$100,000 to the Foundation;
- (b) delivered \$8,000 of his own funds to FMC on account of his contribution to the donation;
- (c) borrowed \$109,000 from TC of which: (i) \$92,000 was used to fulfill the remainder of the donation; and (ii) \$17,000 was allocated as an expense amount of which \$12,000 was a security deposit and \$5,000 was a donation structuring fee payable to TC and a premium for the issuance of an insurance policy in favour of Marc;
- (d) agreed to repay \$12,000 of the loan on June 30, 2003;
- (e) agreed to repay \$12,000 of the loan on December 31, 2003; and
- (f) agreed to repay the balance of the loan, being \$85,000, on December 31, 2028.

95. On March 3, 2003, British Indemnity Limited issued an insurance policy that purportedly insured Marc against the risk that his security deposit did not increase in value to equal the outstanding loan upon the due date.

96. On May 5, 2003, the Foundation issued Marc an official charitable donation income tax receipt in the amount of \$100,000.

97. On both June 30, 2003 and December 31, 2003, Marc repaid TC \$12,000.

98. On February 28, 2005, Marc executed:

- (a) an assignment, the effect of which was to assign the insurance policy to TC; and

- (b) a quit claim, the effect of which was to release any interest Marc had in the security deposit.

99. As a result of executing the assignment and the quit claim, Marc did not have an obligation to repay \$85,000 to TC.

100. On June 30, 2006, Marc received a Notice of Reassessment disallowing the entire donation tax credit he claimed pursuant to the Program in 2002 because:

- (a) the gift was not a valid gift pursuant to s. 118.1 of the *ITA*;
- (b) the 25 year interest-free loan was not a bona fide loan; and
- (c) GAAR applied to the series of transactions.

101. As a result of the Notice of Reassessment, Marc was required to pay additional taxes of \$464,096 and interest of \$115,225.41.

102. On August 2, 2007, Marc received a Notice of Reassessment disallowing the entire donation income tax credit he claimed pursuant to the Program in 2003. As a result of the Notice of Reassessment, Marc was required to pay taxes of \$47,759.90 and interest of \$12,255.80.

#### **NEGLIGENCE**

103. Each of the defendants owed a duty of care to the donors because it was reasonably foreseeable to each of them that their acts and omissions would cause



damage to the donors. They breached the standard of care expected in the circumstances. Their acts and omissions did cause damage to the donors.

104. FMC and Turner breached the required standard of care in that, among other things

- (a) they assisted in the design of the Program when they knew or ought to have known that it would not meet the requirements of the *ITA*;
- (b) they issued the FMC Opinion knowing that it would be used for the purpose of promoting the Program;
- (c) they failed to properly investigate and consider the income tax consequences to the donors of participating in the Program;
- (d) they knew or ought to have known that the interest free loans to the donors would constitute an economic benefit to the donors;
- (e) they knew or ought to have known that the option to assign the insurance policy in full satisfaction of the loan constituted an economic benefit to the donors and would prevent the donors from obtaining a tax credit under section 118.1 of the *ITA*;
- (f) they knew or ought to have known that the General Anti-Avoidance Rule in section 245 of the *ITA* did apply to the donors' donations;
- (g) they knew or ought to have known that the donations would not constitute a gift to a registered charity and would not entitle the donors to a tax credit under section 118.1 of the *ITA*;
- (h) they knew or ought to have known that the FMC Opinion was not accurate or reliable following the issuance by the CRA of factsheets in November and December 2003;
- (i) they looked only to the technical wording of various income tax rules and guidelines without asking or considering whether the overall structure of the Program was in compliance with the *ITA*;
- (j) they permitted the FMC Opinion to be included in the marketing package that was disseminated to the donors to encourage them to elect to participate in the Program;

- (k) they permitted the donors to derive unwarranted confidence from the existence of the FMC Opinion;
- (l) they knew or ought to have known that GAAR applied to the series of transactions in the Program;
- (m) they failed to ensure that the FMC Opinion provided accurate legal advice in accordance with the recognized standards of a competent lawyer in comparable circumstances;
- (n) they failed to ensure the accuracy and reliability of the content of the FMC Opinion; and
- (o) they knew that the promoters of the Program relied upon and used the FMC Opinion to launch, promote and sell the Program.

105. BDO and Neville breached the required standard of care in that, among other things:

- (a) they issued the BDO Opinion knowing that it would be used for the purpose of promoting the Program;
- (b) they failed to properly investigate and consider the income tax consequences to the donors of participating in the Program;
- (c) they knew or ought to have known that the interest free loans to the donors would constitute an economic benefit to the donors;
- (d) they knew or ought to have known that the General Anti-Avoidance Rule in section 245 of the *ITA* did apply to the donors' donations;
- (e) they knew or ought to have known that the donations would not constitute a gift to a registered charity and would not entitle the donors to a tax credit under section 118.1 of the *ITA*;
- (f) they knew or ought to have known that the option to assign the insurance policy in full satisfaction of the loan constituted an economic benefit to the donors and would prevent the donors from obtaining a tax credit under section 118.1 of the *ITA*;
- (g) they knew or ought to have known that the BDO Opinion was not accurate or reliable following the issuance by the CRA of factsheets in November and December 2003;

- (h) they looked only to the technical wording of various income tax rules and guidelines without asking or considering whether the overall structure of the Program was in compliance with the *ITA*;
- (i) they permitted the BDO Opinion to be included in the marketing package that was disseminated to the donors to encourage them to elect to participate in the Program;
- (j) they permitted the donors to derive unwarranted confidence from the existence of the BDO Opinion;
- (k) they knew or ought to have known that GAAR applied to the series of transactions in the Program;
- (l) they failed to ensure that the BDO Opinion provided accurate accounting advice in accordance with the recognized standards of a competent accountant in comparable circumstances;
- (m) they failed to ensure the accuracy and reliability of the content of the BDO Opinion; and
- (n) they knew that the promoters of the Program relied upon and used the BDO Opinion to launch, promote and sell the Program.

106. Trinity Wood, Beatty, Arnold, Capital, Capital 2002, TC and Trinity breached the required standard of care required in the circumstances because, among other things:

- (a) they designed, developed and promoted the Program when they knew or ought to have known that it would not meet the requirements of the *ITA* for charitable donations;
- (b) they knew or ought to have known that the CRA would not recognize the charitable donation income tax receipts issued by the Foundation;
- (c) they failed to disclose to BDO and Neville the particulars of the underlying transactions as pleaded herein;
- (d) they failed to disclose to the donors that very little of the donations would remain with the charities;

- (e) they failed to disclose to the donors that Arnold would be paid millions of dollars from the donors' donations;
- (f) they failed to disclose to the donors that Arnold and Beatty had a commercial interest in LifeTech;
- (g) they failed to obtain a second legal opinion regarding whether the Program was in compliance with the *ITA*; and
- (h) they failed to obtain a second accounting opinion regarding whether the Program was in compliance with the *ITA*.

107. The Foundation breached the required standard of care because, among other things:

- (a) it issued charitable donation income tax receipts for the donations when it knew or ought to have known that CRA would not recognize them;
- (b) it failed to do any due diligence regarding the underlying transactions as pleaded herein;
- (c) it relied upon the assurances of the other defendants and Trinity Capital, Capital 2002, TC and Trilon that the Program was in compliance with the provisions of the *ITA* with respect to charitable donations; and
- (d) it failed to obtain independent legal advice or independent accounting advice regarding whether the Program was in compliance with the provisions of the *ITA* in respect of charitable donations.

#### **DAMAGES**

108. As a result of the conduct of the defendants as pleaded, Marc and the donors have suffered the following damages and losses including:

- (a) they paid, or will be required to pay, increased amounts on account of taxes as a result of CRA's reassessments;

- (b) they paid, or will be required, to pay to the CRA interest and penalties as a result of the CRA's reassessments;
- (c) they incurred special damages, including but not limited to fees paid to consultants, lawyers and/or accountants in connection with the CRA's reassessment(s); and
- (d) they lost the opportunity of the return on investment of the funds they personally advanced to the Program.

109. Marc and the other donors are also entitled to recover, as damages or costs in accordance with the *CPA*, the costs of administering the plan to distribute the recovery in this action.

#### **PUNITIVE DAMAGES**

110. Trinity, Trinity Wood, Beatty, Arnold, Capital, Capital 2002 and TC structured and operated the Program knowing that very little of the donations would be used for charitable causes.

111. Marc pleads that the conduct of Trinity, Trinity Wood, Beatty, Arnold, Capital, Capital 2002 and TC in developing, promoting and continuing to promote the Program was intentional, deliberate, callous, extreme in nature, motivated by economic considerations and is deserving of condemnation and punishment and as such renders them liable to pay punitive damages.

**RELEVANT LEGISLATION**

112. Marc pleads and relies on the *CJA*, the *CPA*, the *ITA*, the *Negligence Act*, R.S.O. 1990, c. N.1 and all relevant amendments thereto.

**PLACE OF TRIAL**

113. Marc proposes that this action be tried in the City of Toronto, in the Province of Ontario.

March 11, 2011

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CV-11-422085

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PROCEEDINGS COMMENCED AT TORONTO

STATEMENT OF CLAIM

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