

Docket: 2021-1544(IT)G

BETWEEN:

CHRIS WALBY,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeal of
Joel De Las Alas (2021-1574(IT)G) on September 5 to 7, 2023,
at Winnipeg, Manitoba

Before: The Honourable Justice Ronald MacPhee

Appearances:

Counsel for the Appellant: Jeff Pniowsky
Matthew Dalloo

Counsel for the Respondent: David Silver
Allanah Smith
Erin Wolfe

AMENDED JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the Appellant's 2005, 2006, 2007, 2008, 2009, 2010 and 2011 taxation years are dismissed.

There shall be one set of costs payable by the Appellants to the Respondent. The parties shall have 30 days from the date of this Judgment to make submissions as to costs if they are unable to agree upon an amount.

This Amended Judgment is issued in substitution of the Judgment December 7, 2023 in order to include the years underscored in paragraph 1 hereof.

Signed at Ottawa, Canada, this 13th day of December 2023.

“R. MacPhee”

MacPhee J.

Docket: 2021-1574(IT)G

BETWEEN:

JOEL DE LAS ALAS,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeal of
Chris Walby (2021-1544(IT)G) on September 5 to 7, 2023,
at Winnipeg, Manitoba

Before: The Honourable Justice Ronald MacPhee

Appearances:

Counsel for the Appellant: Jeff Pniowsky
Matthew Dalloo

Counsel for the Respondent: David Silver
Allanah Smith
Erin Wolfe

JUDGMENT

The Appeal from a reassessment made under the *Income Tax Act* for the Appellant's 2006 taxation year is dismissed.

There shall be one set of costs payable by the Appellants to the Respondent. The parties shall have 30 days from the date of this Judgment to make submissions as to costs if they are unable to agree upon an amount.

Signed at Ottawa, Canada, this 7th day of December 2023.

“R. MacPhee”

MacPhee J.

Citation: 2023 TCC 164
Date: 20231207
Docket: 2021-1544(IT)G

BETWEEN:

CHRIS WALBY,
Appellant,
and
HIS MAJESTY THE KING,
Respondent;

Docket: 2021-1574(IT)G

AND BETWEEN:

JOEL DE LAS ALAS,
Appellant,
and
HIS MAJESTY THE KING,
Respondent.

AMENDED REASONS FOR JUDGMENT

MacPhee J.

OVERVIEW

[1] These matters were heard at the same time and under common evidence, save and except the testimony of the Appellants.

[2] Mr. Chris Walby and Mr. Joel De Las Alas (the “Appellants”) have appealed their reassessments from the Minister of National Revenue (the “Minister”) denying them charitable tax credits pursuant to s.118.1 of the *Income Tax Act* (the “Act”). For Mr. Walby, the years appealed are 2005 to 2011. For Mr. De Las Alas, the year appealed is 2006. For both Appellants, their appeals arise from their participation in the Global Learning Gifting Initiative program (the “GLGI Program”).

[3] As participants in the GLGI Program, both Appellants received two charitable receipts, one for the cash they contributed, and another for educational courseware licences (the “Licenses”), said to have been acquired through the GLGI Program from an offshore entity, Phoenix Learning Corporation. These licenses were claimed to have been gifted on their behalf to a registered charity.

[4] Pursuant to these appeals, the Appellants now claim only that the cash amounts advanced by them to the GLGI Program constitute valid charitable gifts under section 118.1 of the *Act* for which they should be entitled to charitable tax credits.

[5] The GLGI Program was at issue in the Tax Court of Canada’s 2015 decision *Mariano v. The Queen*.¹ In *Mariano*, both the cash receipt and the gift in kind receipt for the Licenses were denied as charitable tax credits by the Tax Court. In this matter, the Appellants’ counsel acknowledges that the gift in kind receipt was properly denied by the Minister, but states that his clients should be able to claim the cash contributions they made.

[6] A Partial Agreed Statement of Facts was filed in these matters and is included at Appendix “A” to this decision. As was agreed between the parties, the GLGI Program was designed to abuse Canada’s charitable donation receipt tax credit system. The GLGI Program operated in a manner to enrich the promoters and administrators of the program, as well as those who participated in the program, such as the Appellants.²

ISSUE

[7] The issue before the Court is whether the cash contributions made by the Appellants are a gift pursuant to section 118.1 of the *Act*. In deciding these Appeals, the parties have asked the Court to determine whether subsection 248(30) to (32) of the *Act* are applicable to these transactions, and if so, to apply these provisions.

[8] To answer this question, I will look at the following:

- (1) Whether there are two transactions in relation to the two charitable receipts the Appellants claimed on their tax returns or whether there is

¹ *Mariano v. The Queen*, 2015 TCC 244 [*Mariano*].

² Partial Agreed Statement of Facts at paras 64-65, 82-83, 161, 231-232, 255-256.

just one interconnected transaction that led to the creation of these receipts;

- (2) Whether sham documents having no actual effect that purport to provide a benefit to the donor can impact donative intent;
- (3) Whether a tax receipt prepared, pursuant to one of the steps in the GLGI arrangement, accurately representing the cash contribution made to a qualified charity is sufficient on its own to qualify for charitable donation tax credits;
- (4) Whether subsection 248(30) to (32) of the *Act* displaces the requirement for donative intent for a gift to be valid; and
- (5) If subsection 248(30) to (32) does apply, what was the amount of the advantage in respect of the cash donation?

FACTS

[9] The Appellant, Mr. Walby, participated in the GLGI Program in the 2005 to 2011 taxation years. He claimed charitable donation tax credits as a result of his participation as follows:

	2005	2006	2007	2008
Carry forward from previous years	\$0	\$0	\$0	\$15,080
Cash	\$15,000	\$15,000	\$15,000	\$15,000
Gift-in-kind	\$75,010	\$60,077	\$75,006	\$75,043
Other donations (not an issue)	\$25	\$20	\$80	\$0
Total charitable donations available	\$90,035	\$75,097	\$90,086	\$105,123
Total charitable donations available claimed	\$90,035	\$75,077	\$75,080	\$75,123
Amount available for transfer/carry forward	\$0	\$20	\$15,006	\$30,000

Carry forward from previous years	\$0	\$6,643	\$0
Cash	\$15,000	\$10,000	\$10,000
Gift-in-kind		\$50,021	\$50,000
Other donations (not an issue)	\$95	\$90	\$100

	2009	2010	2011
	2009	2010	2011
Amount available for transfer/carry forward	\$3,322	\$0	\$0

[10] The Appellant, Mr. De Las Alas, participated in the GLGI Program in the 2006 taxation year. In that year he made a cash contribution of \$13,600 to the GLGI Program. As a result of the various mechanisms of the program, described below, he claimed two donation amounts in his 2006 filing, a cash gift of \$13,600 and a gift of \$54,447 in relation to the donation of the Licenses.

[11] Both Appellants maintained that they were entitled to the entirety of their claimed charitable gifts (both for the cash contribution and the gift in kind) in their income tax filings and their filings at the objection stage.

[12] The fact that both parties contributed the cash amounts described above is not in dispute. Both parties received donation receipts from a registered Canadian charity as a result of their cash contributions.

[13] Mr. Walby and Mr. De Las Alas testified at trial. Both were honest in their testimony, providing what knowledge they had as to how the GLGI Program worked, in some instances admitting the various factual weaknesses in their case. Given the passage of time, and the fact that much of the GLGI Program was a sham, the parties struggled to describe various details, or to explain how the program was able to enrich them.

[14] The Appellants (mostly in cross examination) described participating in the program and signing the various documents provided through the GLGI Program. They also admitted that it was their expectation that they would receive back, as a result of their participation in the GLGI Program, more than their cash contribution. Both of the Appellants expected to be enriched as a result of their participation.

[15] In the cross examination of Mr. Walby the following was stated:

Q And you understood the investment or gifting arrangement was promoted on the basis that you would have losses, deductions, or credits equal to or greater than the net cost of the original investment, meaning you'd get more out than you put in.

A Yes

Q So you understood it was an investment?

A I understood what it was about. I don't -- I mean, I shouldn't say I understood what it was about, but I understood there was an investment, yes, to answer your question.

[16] And in the cross examination of Mr. De Las Alas:

MS. WOLFE: Okay, sorry, back, to the questions. So you've agreed that Jim told you could claim tax credits as a result of your participation in GLGI.

A Yes.

Q And you understood that those tax credits would be greater than your cash contribution?

A Yes.

Q So you were told you get more money back on your tax refund than the cash that you contributed?

A Yes, that's what he told me.

Q Okay. So you understood that you would profit from your participation.

A Yes.

[17] The Appellants' enrichment was to occur because their cash contribution would be one-third to one-sixth of the purported fair market value of the Licenses they would receive ownership of through the GLGI Program. Although the Appellants had very limited memory of this, based on the evidence at trial I find that they determined the total value of the property requested in the Application based on the Cash Ratio, with the assistance of the Promoter and its sales agents. The positive cash flow resulted from the difference between their cash outlay and the provincial and federal tax credits they would claim respecting both their monetary contribution and their purported gift-in-kind donation.

[18] Neither Mr. Walby, nor Mr. De Las Alas, had ever claimed a charitable donation anywhere near as large as their claimed donations to the GLGI Program. Their donation history from 1987 to 2022 (non inclusive) was put before the Court. Prior to participating in the GLGI Program, neither of the Appellants had ever donated more than \$700 in a year. Typically their annual donations were under \$100. After 2003, they also never made a donation anywhere near as large as their claimed donations in this matter.

[19] Both Appellants acknowledge receiving two receipts for each year they participated. One receipt was for their cash donation, and the second receipt was for software that was claimed to have been donated through the GLGI Program. Both receipts were claimed on their tax return for the various years before the Court.

[20] Presented at trial, mostly through submissions from the Appellants' counsel, as well as through the Partial Agreed Statement of Facts, is an acknowledgement that much of the GLGI Program was a sham, undertaken to create false receipts. Appellants' counsel describes the various components of the program, which led to the second receipt, as a "unicorn".

How the GLGI Program Worked

[21] I will not go into detail concerning the claimed mechanics of the GLGI Program. Attached at Exhibit "A" is a Partial Agreed Statement of Facts which goes in great detail in describing how the program worked. Any capitalized term not defined herein shall have the meaning given to it in the Partial Agreed Statement of Facts.

[22] A brief review of certain steps of the program is provided. This is included to show that the Appellants played an active role in the program in signing various documents required by the promoters in the GLGI Program. It also leads me to conclude that the Appellants' participation was part of one interconnected series of transactions (other reasons for this conclusion are set out later in this decision).

[23] Participants, including the Appellants, would review and sign various documents (the "Transactional Documents") that included the following:

- a) an "Information Sheet" containing information about the participant including their name, address, social insurance number, email address, the amount of the cash payment that would be made to one of the Charities, the value of courseware requested (generally three to five times the cash payment), prior donation history, and details of the sales agent;
- b) a "Deed of Gift" addressed to one of the Charities;
- c) a "Deed of Gift of Property" addressed to one of the Charities stating that the Appellants are the legal and beneficial owner in possession and control of the educational courseware purportedly specified in Schedule "A" (referred to as "Section A" in 2008 and subsequent years) to the deed;

- d) an “Application for Consideration as a Capital Beneficiary of the Global Learning Trust (2004)” (the “Application”) requesting that the participant be approved as a capital beneficiary of the Trust and, if so approved, that the participant receive a distribution of properties in the nature of educational courseware with a specified monetary value;
- e) “Direction One”, authorizing Escrowagent to deliver the Application to the trustee of the Trust, and also arrange for the delivery of the Deed of Gift of Property, to date or amend the date of certain documents and to arrange for the delivery of charitable donation receipts;
- f) “Direction Two”, authorizing Escrowagent to arrange for the delivery of the Deed of Gift of cash together with the cheque, to date or amend the date of certain documents and to arrange for the delivery of charitable donation receipts;
- g) a cheque to the Escrowagent;
- h) a cheque for a Charity, which was post-dated to four days after the date of
- i) their Application (“Cash Contribution”);
- j) a prior donation tax receipt; and
- k) for the years after 2007, a waiver as well as a donor acknowledgement.

[24] Any individual that completed the Transactional Documents and made the required Cash Contribution to the Escrowagent and the identified Charity would be guaranteed acceptance as a capital beneficiary of the Trust. The Trust would purportedly transfer software licences to a participant after they were accepted as a capital beneficiary. Once a participant’s Transactional Documents were processed, an email would be sent to the participant informing them that they had been accepted as a capital beneficiary of the Trust and inviting them to view a copy of their documents, including the Assignment of Licence at the website address for the GLGI Program.

[25] Direction One and Direction Two both purported to allow the participant to revoke their respective gift of courseware or Cash Contribution by providing notice within 48 or 72 hours, respectively, after having been notified that their Application had been approved and they would receive a distribution of property from the Trust.

[26] As a result, participants in the GLGI Program knew that no purported gift (either the Cash Contribution or the Licenses) would become effective until the participant's Application had been approved and the participant had been so notified.³ In *Mariano*, the Court found that the 72-hour period operated as a security to the participants to ensure that they received the benefit of the Licences prior to their cheques being cashed. I agree with this finding.

[27] Corporations that were involved with the GLGI Program would process the Transactional Documents on a batch basis for a group of participants, and would generate a number of documents by applying an algorithm to the information contained in a database created for that purpose, on a weekly basis. Those same corporations would create donation receipts on behalf of the Charities.

[28] Ultimately, once a participant made the decision to participate in the GLGI Program, all subsequent transactions followed a predetermined series. As long as a participant's Transactional Documents were complete, they would be able to participate in the GLGI Program and their Application would be approved as a capital beneficiary of the Trust.

ANALYSIS

(1) Participation in the GLGI Program constitutes one single interconnected arrangement

[29] The ultimate question before me is whether the Appellants made a gift pursuant to s. 118.1 of the *Act*. In this analysis, I will first determine whether there are two transactions in relation to the two charitable receipts the Appellants claimed on their tax returns, or whether there is just one interconnected transaction that led to the creation of these receipts.

[30] It is now well established that where there is only one interconnected arrangement, it is inappropriate for the Court to consider the transactions separately. The Tax Court in *Maréchaux*⁴ (upheld on appeal) considered whether the Appellant

³ *Mariano*, *supra* note 1 at paras 36-38.

⁴ *Maréchaux v. The Queen*, 2009 TCC 587 [*Maréchaux*].

in that case made a split gift. This finding has been summarized as follows by the Tax Court in *Herring*:⁵

124 Justice Woods went on to consider whether the appellant was entitled to a partial gift consisting of the taxpayer's "cash outlay" noting that "in some circumstances, it may be appropriate to separate a transaction into two parts, such that there is in part a gift, and in part something else" (para. 48).

125 However, she concluded "on the particular facts" of the appeal that it was "not appropriate to separate the transaction in this manner" because there was "just one interconnected arrangement" and "no part of it can be considered a gift that the appellant gave in expectation of no return" (para. 49).

[31] No part of such an interconnected arrangement will be considered a gift where it is given with the expectation of profit.

[32] The GLGI Program falls squarely within the holding in *Maréchaux*. Participation in the GLGI Program constitutes only one single interconnected arrangement. This is supported by the following facts set out in paragraphs 250 to 256 of the Partial Agreed Statement of Facts:

- a) all steps in the GLGI Program were predetermined;
- b) once a participant made the decision to participate in the GLGI Program, all subsequent transactions followed a predetermined series;
- c) although the Transactional Documents and promotional materials gave the appearance that a participant could retain the Licences to the courseware rather than donate them, such an option was so limited it was effectively non-existent because a CD ROM or other means of access through an online Portal was necessary in order to use the Licences;
- d) the Appellants could not use the educational courseware products as they were never provided with the necessary means of access nor with any instructions on how to gain such access;
- e) the only practical option the Appellants had was to donate the Licences as preordained by the GLGI Program;

⁵ *Herring v. The Queen*, 2022 TCC 41 at paras 124-125 [*Herring*].

- f) the Charities were merely conduits through which the cash generated by the GLGI Program was flowed in order to generate the donation tax credits and enrich the participants and the Promoter; and
- g) the GLGI Program, and all the transactions comprising it, were intended to deceive the Minister into allowing participants to realize donation tax credits greater than any amount they were actually out of pocket.

[33] The participants of the GLGI Program did not have any real alternative other than to follow through on the entirety of the steps that were involved when participating in the program. Any taxpayer that gave a cash donation, by direct consequence of that cash donation, was to receive courseware, distributed to the participant as a capital beneficiary of the Trust.

[34] The Court in *Mariano* came to the same conclusion wherein it found:

[I]t is clear they participated in a leveraged donation scheme that was interconnected and all part of the same transaction or series of transactions, the same program if you will, that was clearly marketed to them for the purpose of offering to them and from which they expected to receive, in return for their cash donation, a number of Licences having an expected value of 3 to 8 times the cash donation to donate to another charity [...]⁶

[35] No member of the public who was not involved in the GLGI Program would have known of the option of becoming a capital beneficiary of the Trust without making a cash donation.⁷ As stated in *Mariano*, “[a] cash donation was always mentioned and integrated into any calculations of net cash advantage or total contributions.”⁸ This illustrates how the cash donation was part of a *quid pro quo* to receive a distribution of courseware licenses from the Trust which would ultimately result in an inflated charitable tax receipt relating to the in kind donation by consequence of the Transactional Documents.

[36] In the absence of the cash donations, license transfers from the Trust would not have been possible. The Court summarized this in *Mariano* as follows:

⁶ *Mariano*, *supra* note 1 at para 48.

⁷ *Ibid* at para 41.

⁸ *Ibid* at para 41.

It is clear that neither the Promoter nor any of the administrators involved, either hired and paid for by the Promoter, the Charities or the Escrow Agent, such as IDI and JDS, could be paid under the program if there was no cash donation. It is clear the Promoter received its compensation only in cash, pursuant to agreements with Millenium and CCA, both at the stage they were made by the participants to Millenium, and again at the stage Millenium redonated 80% of such cash received to CCA who paid the Promoter, from its cash received, a further amount equal to 20% of both the value of such cash redonated as well as the value of Licences donated by the participants to CCA based on the EMC valuation. IDI was paid in cash via the direction of the Promoter to Millenium, to pay from amounts owing to it, funds to IDI based also on a percentage of cash donations. If there was no cash, there was no method of payment to the Promoter and those down the chain and so there was no business to be carried on by the Promoter or others. Common sense and the business model clearly identified for the Program support the need for a cash contribution to make the program work. [...] ⁹

[37] Therefore, I conclude that participation in the GLGI Program constituted an interconnected series of transactions. I must consider the transactions together and cannot consider whether any transaction qualifies for charitable donation tax credits independent of the others. No part of such an interconnected arrangement will be considered a gift where it is given with the expectation of profit.

(2) Sham documents having no effect still impact a person's donative intent

[38] The Appellants' counsel argues that since the pretence documents that were intended to give rise to a valid in-kind donation were sham documents that had no actual effect and provided no actual benefit, then they should have no impact on the donative intent of the Appellants with respect to the cash donation.

[39] The Appellants' argument in this regard has been considered by the Federal Court of Appeal in *Berg*,¹⁰ which dealt with a similar set of facts. In *Berg*, pretence documents, which made promises of the substantial transfer of assets to the participants' ownership (then to be gifted to a charity), were in fact a sham. The FCA concluded that the pretence documents "had value when they were delivered" to the taxpayer such that the case was "indistinguishable from *Maréchaux*".¹¹ The Court added in obiter that the taxpayer did not have "the requisite donative intent" because

⁹ *Ibid* at para 45.

¹⁰ *Berg v. R*, 2014 FCA 25 [*Berg*].

¹¹ *Ibid* at para 28.

“he intended to enrich himself by making use of falsely inflated charitable gift receipts to profit from inflated tax credit claims.”¹²

[40] Donative intent should be assessed at the time at which the taxpayer makes the donation. The Court in *Herring* stated “the operative time to calculate the amount of any benefit is at the time the alleged donations were made.”¹³ In *Crane*, the Court articulated that “expectation of [...] financial benefits vitiated any donative intent at the time of his alleged gift.”¹⁴

[41] Based on the above, in assessing donative intent by the Appellants, I do take into consideration the various sham documents that the Appellants believed to be legitimate at the time of their cash contribution. Although the Appellants clearly did not understand all the claimed mechanism’s of the GLGI Program, they did understand that ultimately they would receive ownership of educational licenses, which would be gifted on their behalf. The overall effect of this arrangement would be their ultimate enrichment.

[42] Donative intent is often assessed using the principle of “*animus donandi* or liberal intent, meaning the donor must be willing to grow poorer for the benefit of the donee without receiving any compensation.”¹⁵ In assessing donative intent, the court will “look for objective manifestation of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances.”¹⁶

[43] In the present case, the taxpayer had clear intent to profit when making their donations. The taxpayer intended to make the cash donation which would cause seemingly valuable courseware licenses to be transferred to them which would subsequently be donated for valuable tax credits that exceeded the amount of the initial cash donation. It doesn’t matter that after the fact it was discovered that the intended profit does not arise. All that matters is that profit was the intention at the time the taxpayer made the cash donation. The Appellants utilized documents which had the purported and intended effect of creating a positive return for them which they executed and attempted to derive benefit from.

¹² *Ibid* at para 29.

¹³ *Herring*, *supra* note 5 at para 234.

¹⁴ *Crane v. The King*, 2022 TCC 115 at para 39 [*Crane*].

¹⁵ *Herring*, *supra* note 5 at para 117 considering *Mariano*, *supra* note 1 at para 18.

¹⁶ *Symes v. The Queen*, [1993] 4 SCR 695 at para 74.

[44] This leads me to my finding that neither Appellant had donative intent at the time they made their cash contribution to the GLGI Program. The cash contributions they made cannot be isolated and were part of an interconnected series of transactions meant for their enrichment. Therefore, no gift was made by either Appellant as a result of their participation in the GLGI Program. The appeals are dismissed on that basis. Although this is my ultimate conclusion in this matter, I will consider each of the additional arguments presented by the Appellants.

(3) The law of gifts applies to determine whether a transfer of property qualifies for charitable donation tax credits.

[45] The Appellants also argue that a properly completed tax receipt accurately representing a cash donation to a qualified charity is all that the Appellants must prove existed to be successful in claiming the cash donation. It is argued that the sham documents relating to the in-kind donation cannot undo the real transaction which involved the transfer of cash and which was represented in an accurate tax receipt.

[46] To agree to this argument would be to ignore the interconnection of the cash gift with the rest of the steps in the GLGI Program.

[47] The law of gifts applies such that a cash donation must form a valid gift to qualify for charitable donation tax credits. As previously set out, donative intent has been held to be a necessary element for there to be a valid gift, which includes an intent to impoverish oneself.¹⁷

[48] As concluded above, there was no donative intent with respect to the cash donation. The cash donations were part of a series of transactions which the Appellants participated in, which would lead to their enrichment. Therefore the cash donation was not a gift and cannot qualify for charitable donation tax credits under section 118.1 of the *Act*.

(4) Whether subsection 248(30)-(32) of the Act displaces the requirement for donative intent for a gift to be valid?

¹⁷ *Herring, supra* note 5 at para 117.

[49] The *Act* was amended in 2013 to include subsection 248(30).¹⁸ Subsection 248(30) was brought in with an effective date of December 21, 2002.¹⁹

[50] Subsection 248(30) reads as follows:

Intention to give

(30) The existence of an amount of an advantage in respect of a transfer of property does not in and by itself disqualify the transfer from being a gift to a qualified donee if

(a) the amount of the advantage does not exceed 80% of the fair market value of the transferred property; or

(b) the transferor of the property establishes to the satisfaction of the Minister that the transfer was made with the intention to make a gift.

[51] Subsections 248(30) to (41) are interrelated and provide a framework for dealing with gifts with an advantage.

[52] The Appellants argue that subsection 248(30) applies to permit split gifts where the amount of the advantage is less than 80%. Consequently, donative intent should not be required for a valid gift provided the advantage is below the 80% threshold. At trial, the Appellant did not argue this issue further and considered it evident that subsection 248(30) applied in this way.

[53] The Respondent argues that subsection 248(30) only applies to valid gifts where donative intent is present. Subsection 248(30) provides no relief for invalid gifts where donative intent is lacking. The Respondent explains that the purpose of subsection 248(30) is to reconcile the common law and Quebec civil law concept of what constitutes a gift. Under both the common law and the civil law, donative intent is required. However, under the common law, any advantage vitiates a gift. Under the civil law, a gift less the amount of an advantage remains valid provided donative intent is present. Subsection 248(30) therefore operates to permit the net amount of an otherwise valid gift to be claimed similar to civil law. This alters the common law view that any advantage vitiates a gift rather than displacing the requirement of donative intent altogether.

¹⁸ *Van Der Steen v. The Queen*, 2019 TCC 23 at para 55 [*Van Der Steen*].

¹⁹ *Ibid* at para 55.

[54] The Respondent argues this by stating as follows in their written submissions: “If Parliament intended to do away with the requirement of donative intent, it would have stated so explicitly. [...] This conclusion is supported by the object, spirit, and purpose of this provision, which was to modify the law with respect to [c]ontributions with an [a]dvantage. In effect, gifts that might otherwise be completely vitiated under the common law because of the existence of a benefit, despite the intention to make a gift for the amount of the contribution that exceeds the benefit, would no longer be vitiated.” [...] “This relieves the taxpayer of the common law prohibition on receiving any advantage for a charitable donation.”

[55] In this analysis, I am entirely in agreement with the submissions put forth by the Respondent.

[56] The correct interpretation of subsection 248(30) is that an advantage does not necessarily disqualify a gift provided that donative intent is still present. Therefore I conclude that, where there is no donative intent, there is no gift. In such a case, the provisions of subsections 248(30) to (32) do not apply.

(5) If subsection 248(30) does apply, what was the amount of the advantage in respect of the cash donation?

[57] If I am wrong in finding that subsection 248(30) does not apply to the present case, I will consider in the alternative how it would apply. If subsections 248(30) to (32) do apply, pursuant to the legislation the eligible amount of the gift is reduced by the amount of the advantage as a result of subsection 248(31). Therefore, I will consider in the alternative what would be the amount of the advantage that applies for the purpose of subsection 248(31).

Position of the Parties

[58] On this issue, the Appellants argue that as established in the case law, an inflated donation tax receipt cannot be considered a benefit. An inflated receipt has no fair market value (citing *Castro v R*, 2015 FCA 225).

[59] The Appellants further argue that subsection 248(30) should not apply to what is “intended” or “attempted” and only real consideration should be considered an advantage. The Court should consider what actually happened rather than what the Appellants intended would happen (i.e. the Appellants received no actual benefit from receiving courseware or related tax receipts).

[60] By consequence, the Appellants are arguing that the advantage is zero and the cash donation should not be reduced at all under subsection 248(31).

[61] The Respondent argues in their written submissions that “the inflated donation tax credit receipts and [a]ssignments of Licences the Appellants received ought to be valued at the value of the inflated donation tax credits the [A]ppellants would have expected to derive from the inflated donation tax receipts. Therefore, the value of the advantage received by the [A]ppellants through the [GLGI] Program can be quantified by determining the total non-refundable provincial and federal tax credits attributable to the purported gift-in-kind contribution in any respective taxation year, assuming all tax credits could be claimed in the year of the purported donation.” An inflated tax credit used to induce a donation is a benefit or consideration not contemplated by the *Act*. “A clear difference exists between taxpayers who make Cash Contributions for the purpose of obtaining donation tax receipts containing false information in order to claim tax credits for amounts greatly in excess of their Cash Contribution, and taxpayers who receive donation tax receipts that accurately reflect the fair market value of their gift.” An inflated tax receipt should therefore constitute an advantage under subsection 248(32).

[62] In the alternative, the Respondent argues the inflated tax receipts and assignment of licenses ought to be assigned a value equal to the amount of the cash donation because this is the amount the Appellants were willing to pay to acquire the inflated tax receipts.

[63] In the further alternative, the Respondent argues the expected value of the courseware is the amount of the advantage. This would be three to five times larger than the cash contribution.

[64] The Respondent supports these positions by stating in their written submissions that “[t]he “amount of an advantage” is defined very broadly in subsection 248(32) of the Act and includes the value of any benefit the transferor “has received, obtained or enjoyed” or to which the transferor is “entitled, either immediately or in the future and either absolutely or contingently, to receive, obtain or enjoy”: i. that is consideration for the gift; ii. that is in gratitude for the gift; or iii. that is in any other way related to the gift.”

[65] Consequently, the Respondent submits that regardless of the valuation method used, the amount of the advantage would exceed 80% and therefore the cash donation is not saved by paragraph 248(30)(a). The cash donation would not be

saved by paragraph 248(30)(b) either since the Appellants failed to prove to the Minister's satisfaction that they had donative intent in making the cash donation.

If subsection 248(30) applies, how do we apply it?

[66] To apply subsection 248(30), the first step is to consider what the advantage to the transferor is.

[67] In *Herring*, the Tax Court considered the entire amount of a limited-recourse loan to be the amount of the advantage which exceeded the 80% threshold.²⁰ It did not matter that the loan proceeds were never actually advanced to the charity as the intended recipient of the funds.²¹

[68] The time at which the amount of a benefit is to be considered is at the time at which the purported donation occurs.²²

[69] It is important to recognize that the "amount" of the advantage is what must not exceed 80% rather than the "fair market value" of the advantage. The "amount" of the advantage is an unclear concept.²³

[70] Some benefits that have been considered an advantage by the courts have included loans with no interest or below market interest rates,²⁴ an embedded put option,²⁵ funds deposited to the taxpayer's investment portfolio,²⁶ and the services of a discretionary portfolio manager.²⁷

[71] As to whether pretence documents can constitute an advantage where they have no actual effect, the Federal Court of Appeal in *Castro* considered the value of

²⁰ *Herring*, *supra* note 5 at para 229.

²¹ *Ibid* at para 233.

²² *Ibid* at para 234.

²³ *Cassan v. The Queen*, 2017 TCC 174 at para 332.

²⁴ *Ibid* at paras 316-317; *Maréchaux*, *supra* note 4 at para 9; *Markou v. The Queen*, 2018 TCC 66, *aff'd* 2019 FCA 299 at para 77.

²⁵ *Maréchaux*, *supra* note 4 at para 11.

²⁶ *Crane*, *supra* note 14 at para 30.

²⁷ *Ibid* at para 30.

pretence documents by applying the *Berg* Federal Court of Appeal decision, stating as follows:

42 The judge of the Tax Court concluded that the pretence documents received by Mr. Berg were of no value since they were false and they could therefore not constitute a benefit. On appeal, this Court overturned that conclusion. The pretence documents had value since they were used by Mr. Berg to claim greater tax credits than those he was actually entitled to receive. Furthermore, this Court determined that on the facts of that case, it was not open to the judge to conclude that Mr. Berg had the requisite donative intent. Mr. Berg never intended to impoverish himself by transferring the timeshare units to the registered charity; on the contrary, he wanted to enrich himself by making use of falsely inflated charitable gift tax receipts. In sum, Mr. Berg did not have the requisite donative intent for the purposes of subsection 118.1 of the *Act*.²⁸

[72] The benefit associated with a purported gift can come from an interconnected agreement and can also come from a third party rather than from the recipient of the donation.²⁹

If subsection 248(30) applies: courseware as the advantage

[73] In this analysis one clear advantage to both Appellants is the expected dollar amount of the Licenses that they expected to receive.

[74] The amount of the advantage of the courseware is the value that the Appellants expected the courseware to have (and not the fair market value it actually had). Since the courseware had an expected value far greater than the cash donation made by the Appellants, then paragraph 248(30)(a) would not save the gift from being disqualified as the advantage far exceeds the entirety of the cash donation. Thus the application of subsections 248(30)-(32) would once again lead to the dismissal of the Appeals.

If subsection 248(30) applies: tax credit as the advantage

[75] Another possible advantage is the tax credit received by the Appellants in exchange for the purported in-kind donation.

²⁸ *Castro v. R*, 2015 FCA 225 at para 42.

²⁹ *Jensen v. The Queen*, 2018 TCC 60 at para 48.

[76] Although a tax benefit from a donation typically is not considered an advantage that would invalidate a gift or void its donative intent,³⁰ in an arrangement such as in the GLGI Program, the inflated tax credit created through the various sham transactions are an advantage for the purposes of subsection 248(30).³¹

[77] Since the advantage from the tax credits derived from the in-kind donation exceeds the cash donations, the charitable gift would once again not be saved by subsection 248(30).

If subsection 248(30) applies: the pretence documents as the advantage

[78] In other cases, the pretence documents themselves have been found to have value to the taxpayer at the time they were acquired and used based on their expected result.³²

[79] I would also make such a finding in this case. In a very simplistic manner, I would value the pretence documents as being equal to the cash donation amount, that amount being the value that the Appellants were willing to pay for them. Once again the charitable gift would not be saved by subsection 248(30).

CONCLUSION

[80] Subsections 248(30) to (32) do not displace the common law requirement of donative intent to make a valid gift. These provisions only save otherwise valid gifts where there is a technical advantage that would defeat a gift where donative intent is otherwise present.

[81] Since neither Appellant had donative intent in making their cash contributions, but instead were participating in a series of interconnected transactions meant to lead to their enrichment, the Appeals are dismissed.

[82] Costs are payable by the Appellants.

³⁰ *Markou v. The Queen*, 2019 FCA 299 at para 60.

³¹ *Crane*, *supra* note 14 at paras 24-25, 30, 44; *Berg*, *supra* note 10 at paras 28-29.

³² *Berg*, *supra* note 10 at para 28.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated December 7, 2023 in order to include the word underscored in paragraph 80 hereof.

Signed at Ottawa, Canada, this 13th day of December 2023.

“R. MacPhee”

MacPhee J.

Appendix A

	2021-2120(IT)G	
	TAX COURT OF CANADA	
BETWEEN		
	DONNA COLLINS	
		Appellant
	and	
	HIS MAJESTY THE KING	
		Respondent
<hr/> Section Break (Continuous)		
	2021-1574(IT)G	
	TAX COURT OF CANADA	
BETWEEN		
	JOEL DE LAS ALAS	
		Appellant
	and	
	HIS MAJESTY THE KING	
		Respondent
<hr/> Section Break (Continuous)		
	2021-1544(IT)G	
	TAX COURT OF CANADA	
BETWEEN		
	CHRIS WALBY	
		Appellant
	and	
	HIS MAJESTY THE KING	
		Respondent
	<u>PARTIAL AGREED STATEMENT OF FACTS</u>	

The parties, through their respective counsel, agree on and admit the following facts for the purpose of these appeals, and the parties further agree that unless otherwise stated, this agreement and admission does not mean that the appellants had knowledge of all admitted facts at the time they made their decision to participate in the Global Learning Gifting Initiative (the "Program").

Further, with respect to the facts in paragraph 11 and all facts thereafter, the Appellants do not admit to the relevance and admissibility of them. Moreover, this agreement is "partial" in that the parties may file additional evidence and this agreement is not necessarily intended to be a roadmap of the facts of the appellants' case.

1. → the Appellant, Chris Walby ("Walby"), participated in the Program in the 2005, 2006, 2007, 2008, 2009, 2010, and 2011 taxation years;
2. → Walby claimed the following amounts of charitable donations arising from his participation in the Program:

	2005	2006	2007	2008	2009	2010	2011
Carry-forward from previous year	\$0	\$0	\$0	\$15,080	\$0	\$6,643	\$0
Cash	\$15,000	\$15,000	\$15,000	\$15,000	\$15,000	\$10,000	\$10,000
Gift-in-kind	\$75,010	\$60,077	\$75,006	\$75,043	\$60,010	\$50,021	\$50,000
Other donations (not at issue)	\$25	\$20	\$80	\$0	\$95	\$90	\$100
Total charitable donations available	\$90,035	\$75,097	\$90,086	\$105,123	\$75,105	\$66,754	\$60,100
Total charitable donations available claimed	\$90,035	\$75,077	\$75,080	\$75,123	\$71,783	\$66,754	\$60,100
Amount available for transfer/carry-forward	\$0	\$20	\$15,006	\$30,000	\$3,322	\$0	\$0

3. → The cash payments were made by the Appellant by cheques in the respective amounts, payable to the respective charities, which charities at the time of payment were registered charities under the *Income Tax Act*.

4. → in the 2008 taxation year, ~~Wally~~ erroneously claimed a carry-forward of \$15,080 from the 2007 taxation year. The amount that would be available for carry forward, if the amounts claimed are determined to be charitable donations, from the 2007 taxation year was \$15,006, as referenced in the chart in paragraph 2.¶

5. → the Appellant, Donna Collins ("Collins"), participated in the Program in the 2005, 2006, 2007, and 2008 taxation years.¶

6. → Collins claimed the following amounts of charitable donations arising from her participation in the Program.¶

	2005	2006	2007	2008
Carry-forward from previous years	-	-	42,356	\$4,936
Cash	\$20,000	\$15,000	-	-
Gift-in-kind	\$100,046	\$75,100	-	-
Other donations (not at issue)	\$410	-	-	\$3,153
Total charitable donations available	\$120,456	\$90,100	\$42,356	\$8,089
Total charitable donations available claimed	\$120,456	\$47,744	\$37,420	\$8,089
Amount available for transfer/carry-forward	-	\$42,356	4,936	-

7. → The ~~cash payments were made by the Appellant by cheques~~ in the respective amounts, payable to the respective charities, which charities at the time of payment were registered charities under the *Income Tax Act*.¶

8. → the Appellant, Joel De Las Alas ("De Las Alas"), participated in the Program in 2006.¶ Section Break (Next Page).....

9. → De Las Alas claimed the following amounts of charitable donations arising from his participation in the Program:¶

	2006
Cash	\$13,600
Gift-in-kind	\$54,447
Other donations (not at issue)	\$23
Total charitable donations claimed	\$68,070

10. → The cash payment was made by the Appellant by cheque in the above amount, payable to the respective charity, which charity at the time of payment was a registered charity under the *Income Tax Act*.¶

Global Learning Group Inc. ¶

11. → Robert Lewis is the sole shareholder and director of Global Learning Group Inc. (“GLG Inc.” or the “Promoter”);¶

The Global Learning Gifting Initiative (2004) program ¶

12. → the Program was formed on October 18, 2004, and registered as a tax shelter for the stated purpose of raising funds for the benefit of two then registered Canadian charities: the Canadian Charity Association (“CCA”), which later changed its name to the International Charity Association Network (“ICAN”) and the Millennium Charitable Foundation (“Millennium”);¶

13. → the Program was promoted by, among others, the Promoter;¶

14. → throughout the material period, the Program was promoted to Canadian taxpayers on the basis that they would receive tax credits far in excess of any cash amounts actually paid based on donation receipts received from specified charities, which would result in a positive return to participants, ranging from 56% to 112%, depending on the tax rates in effect in the taxpayers’ province of residence, and the year of participation;¶..... Section Break (Next Page).....

15. → the Program operated from 2004 through 2014, the details of which are summarized in the following chart.¶

Year	Number of Participants	Purported cash donations	Purported value of in-kind donations	Total purported Donations	Average ratio of purported cash to in-kind donations
2004	2,180	\$9,603,304	\$31,213,414	\$40,816,718	1/3
2005	12,177	50,665,207	246,986,504	297,651,711	1/5
2006	22,674	88,807,306	464,065,759	552,873,065	1/5
2007	14,455	56,038,363	325,970,847	382,009,210	1/6
2008	4,292	19,192,750	99,947,893	119,140,643	1/5
2009	3,478	16,800,838	88,564,244	105,365,082	1/5
2010	2,902	14,934,241	79,895,074	94,829,315	1/5
2011	3,028	16,625,591	95,345,974	111,971,565	1/6
Totals	\$65,186	\$272,667,600	\$1,431,989,709	\$1,704,657,309	1/5

Canadian International Technology Training Inc. ¶

16. → Canadian International Technology Training Inc. ("CITTI") is the management entity of the Promoter.¶

17. → Robert Lewis was at all material times the principal of CITTI.¶

IDI Strategies Inc. ¶

18. → IDI Strategies Inc. ("IDI") acted as the consultant for the Promoter tasked with assisting with the operation of the Program.¶

19. → the principals and indirect owners of IDI are Richard Glatt, James Penturn and Jack Kaslasy, pursuant to the following ownership structure.¶

a. → IDI is owned 45% by Amber Financial, 45% by Jodrick Investments and 10% by 1444610 Ontario Ltd.;¶

i. → Amber Financial is owned 100% by CS Skyld Holdings whose shareholder is John Penturn and Son Ltd., and Edith Penturn owns 100% of John Penturn and Son Ltd.¶

ii. → Jodrick Investments is 100% owned by Richard Glatt, and¶

iii. → 1444610 Ontario Ltd. is 100% owned by Jack Keslasy ("Mr. Keslasy") who is the president of IDI,¶

20. → GI,GI Inc. and IDI entered into an agreement whereby IDI would provide general administrative, record-keeping and support services in connection with the processing of applications from participants in the Program as detailed below at paragraph 64,¶

21. → IDI was involved in the Program until April 2011,¶

JDS Corporation Inc. ¶

22. → JDS Corporation ("JDS") was the service provider for the Program from its inception in 2004 until May 9, 2011,¶

23. → Denis Jobin was JDS' sole shareholder, officer, director and employee throughout the material period,¶

24. → JDS created a database that was used in the Program, to keep track of participants' information, including their names, addresses, social insurance numbers, phone numbers, e-mail addresses and other information,¶

25. → the database created by JDS facilitated the Promoter's control and operation of the Program,¶

Phoenix Learning Corporation ¶

26. → Phoenix Learning Corporation ("Phoenix"), is an entity registered in the Bahamas,¶

27. → Michael Morris, a Bahamian resident during the material period, is the president of Phoenix, ¶

Global Learning Trust

- 28. → the Global Learning Trust (2004) (the "Trust") was purportedly settled in Ontario by Michael Morris by Deed of Settlement dated November 19, 2004,
- 29. → the Trust was settled with \$100 US dollars in cash,
- 30. → the Trust was settled to facilitate the Program,

Global Learning Trust Services Inc.

- 31. → an Ontario corporation, Global Learning Trust Services Inc., acted as the trustee of the Trust (the "Trustee") throughout the material period,
- 32. → Ronald Knechtel, an Ontario resident, was the sole shareholder of the Trustee,
- 33. → Ronald Knechtel passed away on January 6, 2014,

Beneficiaries of the Trust

- 34. → CCA was the only income beneficiary of the Trust,
- 35. → the capital beneficiaries of the Trust were defined as any sui-juris individuals who:
 - a. → made one or more charitable donations to one or more registered charities in the calendar year in which the individual made an application for consideration for inclusion as a Capital Beneficiary or in the immediately preceding calendar year,
 - b. → received from each of those charities a receipt in the form prescribed by the *Income Tax Act*,
 - c. → made written application to the Trustee for consideration for inclusion as a Capital Beneficiary; and

d. → whose application for consideration was approved by the Trustee;¶

Escrowagent¶

36. → Escrowagent Inc. ("Escrowagent") was incorporated in the Province of Ontario on November 4, 2004;¶

37. → Allen Beach, at that time a lawyer at Fasken Martineau, was the sole director of Escrowagent from November 4, 2004, until April 1, 2011;¶

38. → Graham Turner, a lawyer, was appointed as the sole director, president and secretary of Escrowagent on April 1, 2011;¶

39. → Escrowagent's stated role in the Program was to deliver documents from participants to the specified registered charities, to date or amend the date of certain documents, to deliver donation receipts from the charities to participants, and to deal with situations where a participant may wish to cancel their involvement in the Program;¶

40. → despite its stated role, many of Escrowagent's activities were carried out by IDI or other persons involved in the Program until early 2011;¶

41. → in 2011, Escrowagent, then under the control of Graham Turner, took over many of the functions previously performed by IDI and JDS;¶

42. → Escrowagent received a fee, inclusive of GST, from each Program participant in the following amounts:¶

a. → \$10.70 in 2004, 2005, and 2006;¶

b. → \$10.60 to 10.70 in 2007;¶

c. → \$25.50 in 2008;¶

d. → \$40.50 in 2009; and¶.....

g. → \$41.30 in 2010 and 2011.¶

InfoSource, Inc.¶

43. → InfoSource, Inc. ("InfoSource") is a Floridian corporation, that owns or otherwise has all rights to licence certain computer-based learning and testing courseware products ("Educational Courseware Products").¶

The Evolution of the Program from a previous tax shelter arrangement¶

44. → the Program evolved from a previous tax shelter arrangement called Global Learning Systems ("GLS").¶

45. → in 2002 and 2003, Robert Lewis and CITTI promoted the GLS program which involved a cash purchase of in-kind property and the subsequent donation of that property to a registered Canadian charity at an inflated value.¶

46. → the GLS program allowed participants to purchase InfoSource's Educational Courseware Products for donation to a number of charities, including CCA.¶

47. → CITTI obtained the Educational Courseware Products that participants donated as part of the GLS program pursuant to a licence agreement with InfoSource.¶

48. → in late 2003, amendments to the *Income Tax Act* were announced that would have severely restricted the program by limiting the eligible amount of the participants' charitable donation claim with respect to the gift in-kind to its cost, thereby rendering the GLS donation program far less marketable and less profitable to the Promoter.¶

49. → as a result of the proposed amendments, CITTI gave notice to cancel its licence agreement with InfoSource, and the GLS program was discontinued.¶

50. → in 2004, GLG Inc. and Robert Lewis created the Program, which was similar to the GLS program but included the use of a trust to avoid the application of the proposed amendments to the *Income Tax Act*.¶

The Charities: 2004 to 2011

51. → CCA and Millennium were the original charities involved in the Program;

52. → in addition to Millennium and CCA, a number of other charitable organizations participated in the Program between 2004 and 2011, as summarized in the following table:

	2004	2005	2006	2007	2008	2009	2010	2011	Role in the Program
Millennium	X	X	X	X					Received purported cash gifts and issued receipts.
CCA/ICAN	X	X	X	X					Received purported gifts of property and issued receipts.
York Region Education-Industry-Foundation and Career-Centre ("Career Foundation")				X					Received purported gifts of cash and property, and issued receipts.
Glooscap Heritage Society ("Glooscap")					X	X	X	X	Received purported gifts of cash and property, and issued receipts.
Malvern Rouge Valley Youth Services ("Malvern")					X	X	X		Received purported gifts of cash and property, and issued receipts.
Judaic-Proselyte Church of Christ ("Judaic")						X			Received purported gifts of cash and property, and issued receipts.
ResQ Youth International (ResQ)						X			Received purported gifts of cash and property, and issued receipts.
Eskasoni First Nation ("Eskasoni")							X		Received purported gifts of cash and property, and issued receipts.
Trinity Global Support Foundation ("Trinity")								X	Received purported gifts of cash and property, and issued receipts.

(collectively, the "Charities")¶

- 53. → Millennium was a registered Canadian charity until its status was revoked on August 9, 2008;¶
- 54. → CCA/ICAN was a registered Canadian charity until its status was revoked on January 10, 2009;¶
- 55. → Career Foundation became a registered Canadian charity on August 31, 1988;¶
- 56. → Malvern became a registered charitable foundation on February 26, 2007, until its status was revoked on November 12, 2011;¶
- 57. → ~~Glooscap~~ became a registered Canadian charity on May 12, 2005, until its status was revoked on October 20, 2011;¶
- 58. → Judaic was a registered Canadian charity until its status was revoked on October 22, 2011;¶
- 59. → ~~ResQ~~ Youth International became a registered Canadian charity on August 1, 2003;¶
- 60. → ~~Eksaoni~~ is a First Nations community, and is defined as a municipality, per sections 81 and 83 of the *Indian Act*, and was registered by the Minister as a "qualified ~~donee~~" within the meaning of subsection 149.1(1) of the *Income Tax Act*;¶
- 61. → Trinity was a registered Canadian charity until its status was revoked on May 4, 2013; The formation of the Program in late 2004¶
- 62. → on October 18, 2004, ~~GJ, G~~Inc, applied for registration of the Program as a tax shelter;¶..... Section Break (Next Page)



63. → before assuming their roles in the Program, the two original charities, Millennium and CCA, were each required to enter into the following fundraising agreements with GLGInc.¶

a. → on October 19, 2004, GLGInc. entered into a fundraising agreement with Millennium whereby:¶

i. → Millennium was to pay GLGInc. a fundraising fee equal to 20% of the gross amount of cash donations raised by GLGInc.¶

ii. → Millennium was to pay IDI \$100,000 from the first cash donations plus a variable fee equal to 7.2% of the first \$5,000,000 raised and 15.7% of the balance; and¶

iii. → Millennium was authorized to pay IDI's fee out of the amounts otherwise payable to GLGInc.¶

b. → on November 19, 2004, CCA entered into an agreement with GLGInc. whereby CCA was to pay a fundraising fee equal to approximately 18% of the gross amount of both the cash donations raised and the fair market value of the in-kind donations delivered to CCA; and¶

c. → in an undated amendment to their November 19, 2004, agreement, CCA agreed to pay GLGInc. a fundraising fee equal to approximately 17.78% of the gross amount of both the cash donations raised and the fair market value of the in-kind donations delivered to CCA with the proviso that in no case would the fee exceed 88% of the cash received into the Program.¶

64. → on October 28, 2004, GLGInc. and IDI entered into an agreement whereby IDI would provide general administrative, record-keeping and support services in connection with the processing of applications by prospective participants in the Program, as well as develop and maintain an electronic database to keep the records of the Program and other communications;¶..... Section Break (Next Page).....

- ¶
65. → according to their agreement, for its services to GLG Inc., IDI was to be paid a lump sum fee of \$100,000 and a variable fee equal to 7.2% of the first \$5,000,000 raised by the Program and equal to 15.7% of the balance of all cash payments made by participants, ¶
- ¶
66. → on November 10, 2004, the law firm Cassels Brock & Blackwell LLP provided a legal opinion, paid for by GLG Inc., regarding the Program, ¶
- ¶
67. → in late November 2004, InfoSource and Phoenix signed a licence agreement entered into as of October 20, 2004 (the "First Master Licence Agreement"), whereby InfoSource granted Phoenix a maximum of 250,000 single user perpetual royalty free licences in each of the six Education Courseware Products described in the agreement, for a total of ¶
1.5 million licences, for a fee of \$400,000 USD, ¶
- ¶
68. → there were six Educational Courseware Products licenced under the First Master Licence Agreement: "Office 2000 Seminar-on-a-Disk", "How-to-Master Office XP", "How-to-Master Office 2003", "IC3", "A+2003" and "MCSE 2000", ¶
- ¶
69. → the First Master Licence Agreement provided that for each licence, Phoenix was authorized to make one CD-ROM copy of each of the Educational Courseware Products, ¶
- ¶
70. → the \$400,000 USD fee under the First Master Licence Agreement was a negotiated price that represented the fair market value of the licences granted under that agreement, ¶
- ¶
71. → the source of the funds Phoenix used to pay the \$400,000 USD fee to InfoSource originated from GLG Inc.; the funds came from the cash amounts paid by GLS participants in the 2003 taxation year and the remainder came from cash raised from the Program in 2004 and 2005, ¶
- ¶
72. → on November 19, 2004, the Trust was settled by Michael Morris as described above at paragraph 28, ¶

73. → also on November 19, 2004, Phoenix gifted the Trust with 200,000 single user perpetual royalty free licences for each of the six Educational Courseware Products (the "Sublicence Agreement"), for a total of 1.2 million of the maximum 1.5 million licences under the First Master Licence Agreement;

74. → the Sublicence Agreement provided that each licence shall be assigned a licence serial number ("Licence Serial Number") in the range of 100,000,001 to 100,200,000;

75. → the Licence Serial Numbers were devised by Mr. John, of JDS, and were merely sequential numbers with no intrinsic meaning;

76. → the Licence Serial Numbers had no meaning to InfoSource;

77. → on November 19, 2004, EMC Partners provided an appraisal of the licences gifted to the Trust (the "EMC Opinion") at the Promoter's behest;

78. → the EMC Opinion valued the licences based on the purported retail prices charged by InfoSource for purchasers of individual user licences on CD-ROM format, which resulted in a total value of \$184,598,000-USD for the 1.2 million licences transferred under the Sublicence Agreement;

79. → on December 27, 2004, Wise, Blackman LLP prepared a report reviewing and confirming the EMC Opinion at the Promoter's behest;

80. → the EMC Opinion inflated the value of the individual licences;

81. → the true fair market value of an individual licence transferred under the Sublicence Agreement was nominal;

Becoming a participant in the Donation Program

82. → GLG Inc. and IDI (up to 2011) actively marketed the Program to prospective participants, including the Appellants, either directly or through the use of agents and sub-agents;..... Section Break (Next Page).....

83. → agents and sub-agents were paid a commission based on a percentage of the cash collected from Program participants;

The Transactional Documents

84. → once the Appellants decided to participate in the Program, they would complete a document package (the "Transactional Documents") that included the following:

a. → an Information Sheet that contained information about the participant including name, address, SIN, email address; the amount of the cash payment that would be made to one of the participating charities; the value of courseware requested (generally 3 to 5 times the cash payment); prior donation history; and details of the sales agent;

b. → a "Deed of Gift" addressed to one of the Promoter approved Charities, along with a cheque for the stipulated amount;

c. → a "Deed of Gift of Property" addressed to one of the Promoter approved Charities stating that the Appellants are the legal and beneficial owners in possession and control of the educational courseware specified in Schedule "A" (referred to as "Section A" in 2008 and subsequent years) to the deed;

d. → an "Application for Consideration as a Capital Beneficiary of the Global Learning Trust (2004)" (the "Application") requesting that the participant be approved as a capital beneficiary of the Trust and, if so approved, receive a distribution of properties in the nature of educational courseware with a specified monetary value;

e. → "Direction One", authorizing Escrowagent to deliver the Application to the trustee of the Trust, and also arrange for the delivery of the Deed of Gift of Property, to date or amend the date of certain documents and arrange for the delivery of charitable donation receipts;

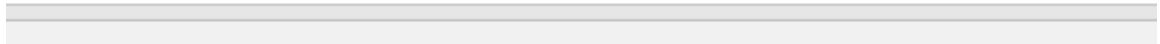
f. → "Direction Two", authorizing Escrowagent to arrange for the delivery of the Deed of Gift of cash together with the cheque, to date or amend the date of certain documents and arrange for the delivery of charitable donation receipts;

g. → a cheque to Escrowagent; Section Break (Next Page)

h. → a prior donation receipt; and¶

i. → ~~in~~ some instances, a Waiver as well as a Donor Acknowledgement ¶

- 85. → in order to participate in the Program, it was expected that the participant's cash donation would be one-third to one-sixth of the purported fair market value of the property they would receive as a capital beneficiary of the Trust (the "Cash Ratio"), as summarized in the chart above at paragraph 15.¶
- 86. → participants were instructed to post-date their ~~cheque~~ to four days after the date of their Application.¶
- 87. → the participants did not possess or control, nor have any legal or beneficial interest in any Educational Courseware Products, ~~licenses~~ to such products or other similar property at the time they executed the Deed of Gift of Property.¶
- 88. → although the Deed of Gift of Property referred to the "educational courseware specified in "Schedule A (or "Section A" in some years of operation of the program) to this Deed", no documents titled "Schedule A" or "Section A" were ever created specifically for an individual participant.¶
- 89. → the participant, and not the Trustee, determined the total value of the property requested in the Application based on the Cash Ratio, with the assistance of the Promoter and its sales agents.¶
- 90. → Direction One and Direction Two both purported to allow the participant to revoke the respective gift of property or cash by providing notice within 48 or 72 hours after having been notified that their Application had been approved and they would receive a distribution of property from the Trust.¶
- 91. → as a result of the revocation options in Direction One and Direction Two, participants would receive notification that their Application had been approved before the time for them to revoke their cash gift had expired.¶ ::::::::::::::



- 92. → no purported gifts would ever become effective until after the Application had been approved and the participant had been so notified,¶
- 93. → as long as a participant's Transactional Documents were complete, they would be able to participate in the Program and their Application would be approved,¶

The administration of the Program¶

- 94. → IDI and JDS assisted the Promoter with the administration and operation of the Program from its inception in 2004 until early 2011,¶
- 95. → JDS kept the database of the Program, which tracked the information from the participant's Transactional Documents,¶
- 96. → JDS also developed and utilized software that allocated the number of licences to be distributed to each participant based on an algorithm that matched the appropriate number of licences to the various Educational Courseware Products with established values to approximate the value of licences requested by each participant in their Application,¶
- 97. → at weekly closings JDS would process the Transactional Documents on a batch basis for a group of participants, and would generate the following documents by applying the algorithm to the information contained in the database.¶
 - a. → Schedule "A" containing a listing of all the participants included in that particular closing, and the Licence Serial Numbers assigned to those individuals,¶
 - b. → a "Resolution of the Sole Trustee of the Global Learning Trust (2004)" purporting to approve the individuals set out in Schedule "A" as capital beneficiaries of the Trust and assign to them the licences identified in that schedule as satisfaction of that individual's capital interest in the Trust; and¶

Section Break (Next Page).....

- c. → a "Notice of Transfer of Licences" addressed to Phoenix giving notice that the Trust had purportedly assigned and transferred to the beneficiaries all the rights, title and interest in the licences identified in Schedule "A";¶
98. → JDS created the Resolution and Notice of Transfer of Licences using either an undated, pre-signed template that contained Mr. Knechtel's signature, or affixing an electronic copy of Mr. Knechtel signature to a document created by JDS.¶
99. → JDS also created the following documents for each participant that was included in a closing:¶
- a. → an "Assignment of licence" addressed to the participant indicating that the Trust had assigned and transferred single-user courseware licences to the Educational Courseware Products bearing the Licence Serial Numbers in Exhibit "A", each licence being the form of licence annexed as Exhibit "B"; and¶
 - b. → Exhibit "A", which was a listing of the Educational Courseware Products and Licence Serial Numbers of the licences purportedly assigned to the participant.¶
100. → the Exhibit "B" document referenced in the "Assignment of licence", which purported to be a copy of the Sublicence Agreement between Phoenix and the Trust, was not attached or provided to the participant.¶
101. → JDS created the Assignment of licence from a template, using a copy of Mr. Knechtel's signature.¶
102. → neither Mr. Knechtel nor the Trustee had any involvement in the closing process, the approval of beneficiaries, the assignment of licences to participants, or the creation of the Resolution, the Notice of Transfer of Licences or Assignment of licence.¶
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¶
103. → after a closing, an e-mail would be sent to each participant informing them that they had been accepted as a capital beneficiary of the Trust, and were invited to view a copy of their documents, including the Assignment of Licence and Exhibit "A", at the website address of the Donation Program,¶

¶
104. → the e-mail was sent by Mr. Jobin of JDS on behalf of Escrow Agent,¶

¶
105. → the approval of a participant as a beneficiary of the Trust, and assignment of Licence Serial Numbers was an automatic step in the operation of the Program,¶

¶
106. → no cheques were cashed before a participant was notified of their acceptance as a capital beneficiary by the Trust,¶

¶
107. → participants in the Program knew that their cheques for the cash contribution would not be cashed until they were notified that they were accepted as capital beneficiaries of the Trust and would be receiving the benefit of purported licence distributions for further gifting,¶

¶
108. → participants were never notified about the process of converting licences for their own use nor the actual cost of converting the licences to CD-ROM format for their own use,¶

109. → JDS also created the donation receipts on behalf of the Charities; Changes to the

¶
Program after its formation¶

¶
110. → between 2004 and 2011 the administration, structure and promotion of the Program remained as described above with the exception that new charities were brought in to receive the purported gifts, and additional licences were required to facilitate the purported in-kind gift,¶

¶
111. → the material developments of the Program, after 2004, are summarized in the following paragraphs,¶:.....

Developments in 2005

- 112. → a significant number of licences from the Sublicence Agreement were purportedly distributed to participants in 2004 and early 2005, which necessitated that the inventory of licences be replenished to facilitate the continuing operation of the Program;
- 113. → on September 14, 2005, InfoSource attached "Exhibit B" to the First Master Licence Agreement, which granted Phoenix the right to duplicate a further 250,000 CD-ROMs of each of the six Educational Courseware Products specified in the agreement, at its own expense, for a fee of \$200,000 USD;
- 114. → on December 22, 2005, Phoenix gifted the Trust with a maximum of 200,000 single user perpetual royalty free licences to use the six Educational Courseware Products specified in the agreement, for a possible total of 1.2 million licences; however, based on the Licence Serial Numbers in the 2005 Sublicence Agreement, the number of licences actually assigned was only 510,000;
- 115. → in 2005, the Trust purportedly distributed 1,326,993 licences to Educational Courseware Products, of which 858,105 were acquired on November 19, 2004, and 297,267 were acquired on December 22, 2005;

Developments in 2006

- 116. → by licence agreement entered into as of April 12, 2006, InfoSource granted Phoenix a maximum of 250,000 single user perpetual royalty free licences in each of the seven Education Courseware Products specified in the agreement (the "2006 Master Licence Agreement"), for a total of 1.75 million licences, for a fee of \$550,000 USD;
- 117. → the seven Education Courseware Products specified in the 2006 Master Licence Agreement included: "Microsoft Office 2000 Seminar on a Disk", "How-to-Master Office XP", "How-to-Master Office 2003", "IC 2005 Training", "A+ 2003 Training", "Lotus Notes 5.0 Training", and "Soft Skills Training Library";

- ¶
118. → on April 18, 2006, Phoenix gifted the Trust with a total of 800,000 single user perpetual royalty free licences to use four specified Educational Courseware Products,¶
- ¶
119. → on September 26, 2006, Phoenix gifted the Trust with a total of 470,000 single user perpetual royalty free licences to use two specified Educational Courseware Products,¶
- ¶
120. → on October 2, 2006, Phoenix gifted the Trust with a total of 1.24 million single user perpetual royalty free licences to use four specified Educational Courseware Products,¶
- ¶
121. → on November 7, 2006, InfoSource attached "Schedule B" to the 2006 Master Licence Agreement which extended the expiration of that agreement until March 31, 2007, and also gave Phoenix the right to grant a further 250,000 licences to each of the nine Educational Courseware Products specified in Schedule B, for a total of 2.25 million additional licences, for a fee of \$200,000 USD,¶
- ¶
122. → the nine Educational Courseware Products specific in Schedule B which was attached to the 2006 Master Licence Agreement on November 7, 2006 included: "Microsoft Office 2000 Seminar on a Disk", "How-to-Master Office XP", "How-to-Master Office 2003", "IC 2005 Training", "A+ 2003 Training", "Lotus Notes 5.0 Training", "Soft Skills Training Library", "Integrating Technology in the Classroom" (online delivery only), "Office 2007" and "Windows Vista" web-based training (as soon as available),¶
- ¶
123. → on December 27, 2006, Phoenix gifted the Trust with a total of 250,000 single user perpetual royalty free licences to use five specified Educational Courseware Products,¶
- ¶
124. → in 2006, the Trust purportedly distributed 2,893,909 licences to Educational Courseware Products, of which 212,733 were acquired on December 22, 2005, and 800,000 were acquired on April 18, 2006, and 470,000 were acquired on September 26, 2006, and 1,240,000 were acquired on October 2, 2006, and 171,176 were acquired on December 27, 2006,¶
- Section Break (Next Page)

Developments in 2007

125. → on March 14, 2007, Phoenix gifted the Trust with a total of 250,000 single-user perpetual royalty-free licences to use five specified Educational Courseware Products;
126. → by licence agreement entered into as of April 1, 2007, InfoSource granted Phoenix a maximum of 500,000 single-user perpetual royalty-free licences in each of the ten Education Courseware Products specified in the agreement (the "2007 Master Licence Agreement"), for a total of 5 million licences, for a fee of \$750,000 USD;
127. → the ten Educational Courseware Products specific in the 2007 Master Licence Agreement included:
"Microsoft Office 2000", "Microsoft Office XP", "Microsoft Office 2003", "Microsoft Office 2007",
"Microsoft Windows Vista", "TC 2005 Training", "A+ 2003 Training", "Lotus Notes 5.0 Training", "Soft Skills Training Library" and "Integrating Technology in the Classroom";
128. → although the 2007 Master Licence Agreement provided that for each licence, Phoenix was authorized to make one CD-ROM copy of each of the Educational Courseware Products, Exhibit A to the agreement provided that the specified Education Courseware Products may be fulfilled via internet-based delivery using a hosted Learning Management System ("LMS") supplied by InfoSource;
129. → five of the Educational Courseware Products specified in Exhibit A to the 2007 Master Licence Agreement were available only through internet delivery;
130. → on April 23, 2007, Phoenix gifted the Trust with a total of 250,000 single-user perpetual royalty-free licences to use five specified Educational Courseware Products;
131. → on June 8, 2007, Phoenix gifted the Trust with a total of 250,000 single-user perpetual royalty-free licences to use five specified Educational Courseware Products;.....Section Break (Next Page).....

- 132. → on June 18, 2007, Phoenix gifted the Trust with a total of 2,000,000 single user perpetual royalty free licences to use 10 specified Educational Courseware Products,¶
- ¶
- 133. → on July 6, 2007, Phoenix gifted the Trust with a total of 500,000 single user perpetual royalty free licences to use the five specified Educational Courseware Products,¶
- ¶
- 134. → on October 8, 2007, Phoenix gifted the Trust with a total of 4,250,000 single user perpetual royalty free licences to use 170 specified Educational Courseware Products,¶
- ¶
- 135. → in late 2007, Career Foundation became a participating charity in the Program, and received purported gifts of cash and property, and issued donation receipts in respect of those purported gifts,¶
- ¶
- 136. → on December 17, 2007, Career Foundation and the Promoter entered into a fundraising agreement whereby the Promoter would be entitled to receive a base fundraising fee of 16.62% (plus GST) of the gross fair market value of cash donations and in-kind donations raised and delivered by the Promoter to Career Foundation, with the proviso that in no case would the fee exceed 8% (including GST) of the cash donations received by the Promoter and accordingly Career Foundation would keep 12% of the cash donations,¶
- ¶
- 137. → on December 21, 2007, Career Foundation gave a 30-day notice to the Promoter for termination of the December 17, 2007 agreement,¶
- ¶
- 138. → in 2007, the Trust purportedly distributed 1,854,485 licences to Educational Courseware Products, of which 78,824 were acquired on December 27, 2006, and 250,000 were acquired on March 14, 2007, and 250,000 were acquired on April 23, 2007, and 878,749 were acquired on June 18, 2007, and 396,912 were acquired on July 6, 2007,¶.....

Developments in 2008 Additional Licence

Agreements

- 139. → by licence agreement entered into as of January 31, 2008, InfoSource granted Phoenix the right to grant to persons, ordinarily resident in Canada, single-user royalty free licences to 13 of the Educational Courseware Products specified in the agreement (the "2008 Master Licence Agreement"), for a fee of \$100,000 USD;
- 140. → the 13 Educational Courseware Products specific in the 2008 Master Licence Agreement included: "Microsoft Office 2000, 2002 (XP), 2003, 2007", "Microsoft Windows 98, 2000, XP, Vista", "IC 2005", "Soft Skills for Education Administrators", "A+ 2003 Training", "Lotus Notes 5.0 Training", and "Integrating Technology in the Classroom";
- 141. → unlike the previous Master Licence Agreements that allowed Phoenix to grant perpetual licences, the 2008 Master Licence Agreement provided that any licence granted was time limited and would expire 12 months following the issue of the licence to an end-user;
- 142. → unlike the previous Master Licence Agreements that contemplated that each licence would be delivered by CD-ROM, the 2008 Master Licence Agreement required any licence granted by Phoenix that required registration via a charitable entity to be registered and administered through a new separately branded LMS maintained by InfoSource;
- 143. → accordingly, any licence granted under the 2008 Master Licence Agreement required online delivery through an InfoSource LMS; **Section Break (Next Page)**

144. → the 2008 Master Licence Agreement did not specify the number of single user licences granted, but instead provided that the number was to be agreed upon, and also provided for additional fees once the number of end-user licences had been granted under the following formula:¶

0 – 50,000 End-Users:⊘	US\$ 200,000⊘	⊘
50,001 – 250,000 End-Users:⊘	US\$ 400,000⊘	⊘
250,001 – 500,000 End-Users:⊘	US\$ 750,000⊘	⊘
500,001 – 1,000,000 End-Users:⊘	US\$ 900,000⊘	⊘

145. → no additional fees were paid by Phoenix to InfoSource under the above formula;¶

Changes to the participating Charities:¶

146. → Career Foundation issued a small number of donation receipts in 2008 as a result of the carry-over of their participation in the Program from 2007;¶

147. → in 2008, Malvern and Gloscap became participating charities in the Program;¶

148. → in 2008, both Malvern and Gloscap received purported gifts of cash, and issued donation receipts in respect of those purported gifts of cash;¶

149. → in 2008, Malvern also received purported gifts of property, and issued donation receipts in respect of those purported gifts;¶

150. → on April 2, 2008, the Promoter and Malvern entered into a fundraising agreement whereby Malvern would pay the Promoter a base fundraising fee of 16.62% plus GST of the gross fair market value of cash and in-kind donations raised and delivered by the Promoter, with the proviso that in no case would the fee exceed 88% plus GST of cash received through or by efforts of the Promoter;¶

151. → the Promoter and Malvern entered into a subsequent agreement on December 1, 2008, which provided that the Promoter shall receive a fundraising fee of 19.5% (plus 5% GST) of the gross amount of the donations raised by the Promoter;¶
Section Break (Next Page).....

152. → pursuant to the agreement between the Promoter and Malvern entered into on December 1, 2008, Malvern was irrevocably authorized and directed to pay 13.7% of all cash donations to the IDS;

153. → on April 2, 2008, the Promoter and Glosscap entered into a fundraising agreement whereby Glosscap would pay the Promoter a fundraising fee of 19.5% (plus 5% GST) of the gross amount of donations raised by the Promoter;

154. → through the agreement between the Promoter and Glosscap entered into on April 2, 2008, Glosscap was irrevocably authorized and directed to pay the following amounts to IDS:

a. → a fixed amount of \$200,000 from the first charitable cash donations in any calendar year; and

b. → a variable fee equal to 7.2% of the aggregate of \$5,000,000 and 13.75% of the balance of all cash donations during each year;

155. → although no express agreement existed between Malvern and Glosscap, Mr. Keslasy of IDI directed Glosscap to allocate and transfer monies to Malvern;

156. → Glosscap withdrew from the Program on November 5, 2008;

157. → Glosscap withdrew from the Program after receiving advice from its counsel regarding the payments to Malvern;

Online Portal

158. → in 2008, InfoSource began to provide its Educational Courseware Products for the Program through a dedicated portal website (a "Portal") and LMS, which authorized, managed and tracked access to certain Educational Courseware Products used by end-users at charities participating in the Program;

159. → the end-user was provided with a user-ID and password to access the Portal;¶
160. → in 2008, the Portal provided access to over 170 Educational Courseware Products;¶
161. → InfoSource required that each participating charity enter into an agreement to obtain access (a "Portal Agreement"), which provided that the charity would pay an annual fee (a "Portal Fee") to gain access to the Portal;¶
162. → the Portal Agreements were necessary for a participating charity to gain access to InfoSource's Educational Courseware Products via a LMS, and use the licences purportedly donated by participants in the Program;¶
163. → there was no connection between the licences purportedly distributed to participants (evidenced by Licence Serial Numbers) and the courseware available on the Portal;¶
164. → Licence Serial Numbers in respect of the licences purportedly donated to the Charities were not allocated to individuals that accessed the Educational Courseware Products on the online portal;¶
165. → effective December 3, 2008, and terminating on March 31, 2009, InfoSource and Career Foundation entered into an agreement which allowed Career Foundation to access the LMS Portal for fees totalling \$232,000 CDN;¶
- Additional Licence Agreements as a result of the Portal*¶
166. → the 2008 Master Licence Agreement was replaced by licence agreement entered into as of September 19, 2008 (the "Second 2008 Master Licence Agreement");¶
167. → pursuant to the Second 2008 Master Licence Agreement, InfoSource granted Phoenix the right to grant to persons, ordinarily resident in Canada, 25,000 single-user royalty¶ Section Break (Next Page)
-

free licences in each of the 69 the Educational Courseware Products specified in the agreement for a fee of \$1 USD;

168. → the 69 Educational Courseware Products specific in the Second 2008 Master Licence Agreement included: "Microsoft Office 2000, 2002 (XP), 2003, 2007", "Microsoft Windows 98, 2000, XP, Vista", "IC 2005", "Soft Skills for Education Administrators", "A+ 2003 Training", "Lotus Notes 5.0 Training", and "Integrating Technology in the Classroom";

169. → the nominal cost in the Second 2008 Master Licence Agreement relates to InfoSource's decision to enter into Portal Agreements and charge Portal Fees to participating charities;

170. → October 8, 2008, Phoenix gifted the Trust with 25,000 single user perpetual royalty free licences to use 171 specified Educational Courseware Products;

171. → the October 8, 2008, gift provided that the licences were to be delivered by CD-ROM but may, if required, be fulfilled via web based delivery using an InfoSource LMS subject to the availability of the Educational Courseware Products;

172. → in 2008, the Trust purportedly distributed 665,898 licences to Educational Courseware Products;

173. → all of the 665,898 licences to Educational Courseware Products purportedly distributed to the Trust in 2008 were acquired on October 8, 2008;

Developments in 2009

174. → in 2009, Malvern continued its participation in the Program;

175. → in an agreement dated February 1, 2009, Malvern and the Promoter entered into a fundraising agreement whereby Malvern would pay the Promoter a base fundraising fee; Section Break (Next Page)

¶
of 13.75% (including GST) of the gross fair market value of cash and in-kind donations raised and delivered by the Promoter, with the proviso that in no case would the fee exceed 89.5% of cash received through or by efforts of the Promoter.¶

¶ 176. → in 2009, ReoQ and Judaic became participating charities in the Program, and received purported gifts of cash and property, and issued donation receipts in respect of those purported gifts.¶

¶ 177. → in an agreement dated August 24, 2009, ReoQ and the Promoter entered into a fundraising agreement whereby ReoQ would pay the Promoter a base fundraising fee of 13.75% (including GST) of the gross fair market value of cash and in-kind donations raised and delivered by the Promoter with the proviso that in no case would the fee exceed 89.5% of cash received through or by efforts of the Promoter.¶

¶ 178. → on August 27, 2009, InfoSource and Malvern entered into a Portal Agreement for a term of 1-year with a Portal Fee of \$300,000 USD.¶

¶ 179. → in late 2009, Glooscap renegotiated its participation in the Program and received purported gifts of cash and property, and issued donation receipts in respect of those purported gifts.¶

¶ 180. → in an agreement dated October 5, 2009, Glooscap and the Promoter entered into a fundraising agreement whereby Glooscap would pay the Promoter a base fundraising fee of 15% (including GST) of the gross fair market value of cash and in-kind donations raised and delivered by the Promoter, with the proviso that in no case would the fee exceed 89.5% of cash received through or by efforts of the Promoter.¶

¶ 181. → in an agreement dated October 7, 2009, Judaic and the Promoter entered into a fundraising agreement whereby Judaic would pay the Promoter a base fundraising fee of 15% (including GST) of the gross fair market value of cash and in-kind donations raised and delivered by the Promoter, with the proviso that in no case would the fee exceed 89.5% of cash received through or by efforts of the Promoter.¶..... Section Break (Next Page).....

182. → in 2009, the Trust purportedly distributed 2,052,050 licences to Educational Courseware Products;

183. → of the licences distributed in 2009, 2,951 were acquired on July 6, 2007 and 2,049,099 were acquired on October 8, 2009;

Developments in 2010 Participating

charities in 2010

184. → in 2010, Malvern and Gloscap continued their participation in the Program;

185. → in 2010, Eskasoni became a participating qualified donee in the Program, and received purported gifts of cash and property, and issued donation receipts in respect of those purported gifts;

186. → in an agreement dated October 20, 2009, Eskasoni and the Promoter entered into a fundraising agreement whereby Eskasoni would pay the Promoter a base fundraising fee of 15% (including GST) of the gross fair market value of cash and in-kind donations raised and delivered by the Promoter, with the proviso that in no case would the fee exceed 89.5% of cash received through or by efforts of the Promoter;

187. → despite signing the fundraising agreement in late 2009, Eskasoni delayed its participation in the Program to obtain a legal opinion;

188. → Malvern, Gloscap and Eskasoni were all required to enter into Portal Agreements with InfoSource;

189. → on March 15, 2010, InfoSource and Gloscap entered into a Portal Agreement for a term of 1-year with a Portal Fee of \$300,000 USD;

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190. → on August 27, 2010, InfoSource and Malvern entered into a Portal Agreement for a term of 1-year with a Portal Fee of \$60,000 USD;

191. → despite assurances from the Promoter that it would reimburse the First Nation for any Portal Fees, Eskasoni refused to sign the InfoSource Portal agreement or pay the associated \$150,000 USD Portal Fee;

192. → the Promoter agreed to compensate InfoSource by:

a. → increasing Glooscap's Portal Fee by \$50,000 USD; and

b. → entering into a consulting agreement with InfoSource and paying \$100,000 USD;

193. → on December 20, 2010, InfoSource and Glooscap amended the March 15, 2010, Portal Agreement to increase the Portal Fee to \$350,000 USD;

194. → no consulting services were provided by InfoSource to the Promoter in the agreement described above at paragraph ["HYPERLINK \'1\' _bookmark0"](#);

195. → the Promoter reimbursed Malvern and Glooscap for the Portal Fees they paid to InfoSource;

Additional Licence Agreements

196. → by licence agreement entered into as of November 1, 2010, InfoSource granted Phoenix the right to grant to persons, ordinarily resident in Canada, 45,000 single-user royalty-free licences to 78 of the Educational Courseware Products specified in the agreement (the "2010 Master Licence Agreement"), for consideration of \$1 USD;

197. → the 2010 Master Licence Agreement provided that Phoenix must elect to activate all of the licences to any Educational Courseware Product through a Portal maintained by InfoSource; **Section Break (Next Page)**;

198. → on December 1, 2010, Phoenix gifted the Trust with a total of 45,000 single user perpetual royalty free licences to use 78 specified Educational Courseware Products;

199. → in 2010, the Trust purportedly distributed 1,557,491 licences to Educational Courseware Products;

200. → of the licences purportedly distributed in 2010, 901,553 were acquired on October 8, 2008, and 655,960 were acquired on December 1, 2010;

Developments in 2011

201. → by licence agreement entered into as of March 31, 2011, InfoSource granted Phoenix the right to grant 25,000 single use royalty free licences to a product called "A Learning Community Network" ("ALCN") (sometimes known as "Aboriginal Learning Community Network") (the "2011 Master Licence Agreement"), for a consideration of \$1 USD;

202. → the ALCN product was an interactive web-based community platform which included access to 212 Educational Courseware Product titles specified in a schedule to agreement;

203. → all of the licences granted under the 2011 Master Licence Agreement required the end-user to activate all of the licences through a LMS maintained by InfoSource, and that the Charities contract directly with InfoSource and pay the appropriate fee;

204. → the 2011 Master Licence Agreement provided that any licence granted to was time limited and would expire 12 months following the issue of the licence to an end-user;

205. → the 2011 Master Licence Agreement provided that licences granted under the agreement would expire by December 31, 2014;

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206. → on April 1, 2011, Phoenix gifted the Trust with single-user ALCN licences (as defined with reference to the 2011 Master Licence Agreement) but did not specify the number of individual licences that were granted;

207. → the April 1, 2011 gift purported to grant perpetual licences despite the fact that the licences granted to Phoenix pursuant to the 2011 Master Licence Agreement were time limited;

208. → the purported value of each ALCN licence was \$4,500 USD;

209. → the purported value of each ALCN licence was inflated;

210. → an ALCN licence had no economic value without a LMS;

Changes to the administration of the Program

211. → the roles previously performed by IDI and JDS, were assumed by Escrowagent in 2011;

212. → Escrowagent, in turn, delegated many of those tasks to the Promoter, including:

a. → maintenance of the databases on behalf of the Trust and Escrowagent;

b. → delivering the documents from participants to the Charities;

c. → transferring cash payments from the participants to the Charities;

d. → dating or amending the date of certain documents;

e. → facilitating the purported transfer of licences from the Trust to capital beneficiaries of the Trust; and

f. → arranging for the delivery of donation receipts to participants;..... Section Break (Next Page)

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- 213. → Lars Kensit, an IT person affiliated with GLG Inc., was responsible for producing the Schedule "A" documents as part of the closing procedure setting out the purported distributions of properties to the capital beneficiaries of the Trust;¶
- 214. → in 2011, the Promoter instructed Mr. Kensit to fraction each ALCN licence into 30 sub-units (an "ALCN Sub-unit") each with a purported value of \$150 USD;¶
- 215. → each ALCN Sub-unit was assigned with a number (an "ALCN Number") similar to a Licence Serial Number;¶
- 216. → Mr. Kensit used an algorithm to assign a number ALCN Sub-units, represented by ALCN Numbers, to capital beneficiaries to equal the value requested in the participant's Application;¶
- 217. → the ALCN Sub-units and ALCN Numbers had no relationship to the 2011 Master Licence Agreement;¶
- 218. → InfoSource did not provide any authority to divide or fraction an ALCN licence into ALCN Sub-units;¶
- 219. → the ALCN Sub-units had no economic value;¶
- 220. → the ALCN Sub-units and ALCN Numbers had no relationship or correlation to the 25,000 passwords subsequently assigned by the participating charities that received access to the ALCN product;¶:.....

Participating charities in 2011

- 221. → in 2011, ~~Glooscap~~ continued its participation in the Program;
 - 222. → in 2011, Trinity became a participating charity in the Program, and received purported gifts of cash and property, and issued donation receipts in respect of those purported gifts;
 - 223. → ~~Glooscap~~ and ~~InfoSource~~ entered into a Portal Agreement dated March 15, 2011 for a fee of \$375,000 USD;
 - 224. → the Promoter reimbursed ~~Glooscap~~ for the Portal Fee, by allowing ~~Glooscap~~ to withhold \$324,439 CDN from its 2011 fundraising fees;
 - 225. → ~~gg~~ October 19, 2011, Trinity and ~~GLG Inc.~~ entered into an agreement whereby Trinity agreed to pay a fundraising fee based on the total amount of cash and the purported fair market value of the annual ALCN ~~licences~~ it received from its participation in the Program;
 - 226. → the fundraising fee was not to exceed 79.203% of the total cash contributions, plus GST/HST;
 - 227. → Trinity also entered into an administration and maintenance contract with ~~InfoSource~~ with respect to access to the Portal;
 - 228. → Trinity and ~~InfoSource~~ entered into a Portal Agreement effective March 21, 2012, and terminating on March 21, 2013, for a fee of \$500,000 USD, which allowed no more than 30,000 distinct users to access ~~InfoSource's~~ Portal website;
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Cash Flow

229. → the amounts of the cash donations made by participants to the Charities, the fundraising fees paid by the Charities and the cash amounts retained by the Charities are set out in Schedules A to H to this Agreed Statement of Facts;
230. → the Program was predicated on a preordained circular flow of funds with the intended result that none of the Charities ever had the unfettered use of the cash donations made by the participants in the Program;
231. → on average, more than 90% of the cash funds ended up in the hands of the Promoter;
232. → on average, of the total purported donations, the Charities retained less than 10% of the total purported cash donations from the Program;

Some insiders were not required to make the cash payment

233. → in each of the years the Program operated, some individuals ("Non-cash Participants") only made purported donations of property, and did not make a donation of cash as contemplated by the Program;
234. → Non-cash Participants included the Promoter, employees or subagents of the Promoter, or other insiders of the Program with whom the Promoter wished to benefit by allowing them to receive distributions of property from the Trust without requiring them to make the cash payment;
235. → all Non-cash Participants had some affiliation with the Program and the Promoter which allowed them to participate without making the contemplated cash payment;

Trust deficiencies

The trust objects are uncertain

236. → the capital beneficiaries of the Trust were not ascertainable at the time the Trust Deed of Settlement was executed; ...

237. → any individual who completed the Transactional Documents and made the required cash payments to Escrowagent and one of the promoter approved Charities, would automatically become a capital beneficiary of the Trust;

238. → the Trustee did not know who was in or out of the class of capital beneficiaries at any time;

239. → the Appellants' Applications were certain to be accepted as part of their participation in the Program;

The trust property is uncertain

240. → at no time did the Trustee have ownership, possession or control of any licences pertaining to the Educational Courseware Products that allegedly formed part of the Trust property;

241. → the Appellants did not acquire any interests under the licence or own the Educational Courseware Products purportedly gifted;

242. → the Appellants did not take possession of any licence or the Educational Courseware Products;

243. → none of the licences granted to the Trust were converted into CD-ROMs;

244. → neither the licences nor any Educational Courseware Products formed part of the capital of the Trust;

Trustee did not perform the required duties

245. → it was the Trustee's responsibility to determine who would be a capital beneficiary of the Trust;

246. → the Trustee did not exercise its responsibility of determining who would be a capital beneficiary of the Trust and performed no selection process to establish which applicants would become capital beneficiaries of the Trust,¶

247. → no one, other than the Trustee, was authorized to assume any of the responsibilities of the Trustee, including determining who the Trust's capital beneficiaries would be,¶

248. → it was always understood by the Appellants that their Applications would be accepted by the Trust in order to implement their participation in the Program,¶

The Trust was illusory¶

249. → purportedly formed for the purpose of fundraising for the benefit of Millennium and CCA, the Trust was actually a vehicle used to raise funds for the Promoter and to entice Canadian taxpayers to make minimal investments and receive generous tax receipts in return,¶

The Program Structure is a Sham¶

250. → all steps in the Program were predetermined,¶

251. → once a participant made the decision to participate in the Program, all subsequent transactions followed a predetermined series,¶

252. → although the Transactional Documents and promotional materials gave the appearance that a participant could retain the ~~licences~~ to the Educational Courseware Products rather than donate them, such an option was so limited it was effectively non-existent because a CD-ROM or other means of access through an online Portal was necessary in order to use the ~~licences~~.¶

253. → the Appellants could not use the Educational Courseware Products as they were never provided with the necessary means of access nor with any instructions on how to gain such access;¶..... Section Break (Next Page)

- 254. → the only practical option the Appellants had was to donate the ~~licences~~ as preordained by the Program;¶
 - 255. → the Charities were merely conduits through which the cash generated by the Program was flowed in order to generate the donation tax credits and enrich the participants and the Promoter;¶
 - 256. → the Program, and all the transactions comprising it, were intended to deceive the Minister into allowing participants to realize donation tax credits greater than any amount they were actually out of pocket;¶
 - 257. → to facilitate the Program, the Promoter obtained valuation reports that inflated the purported value of the in-kind portion of the donations;¶
 - 258. → collectively, InfoSource received approximately \$3.89 million USD in payments between 2004 and 2011 from Phoenix (\$2.1 million USD), the Charities (\$1.69 million USD) and ~~GLG Inc.~~ (\$100,000 USD);¶
 - 259. → InfoSource's intention in entering into a relationship with the Program was profit motivated and not for reasons of philanthropy;¶
- Fair market value of the Licences;¶
- 260. → the Trustee valued the ~~licences~~ at \$nil;¶
 - 261. → unless converted into a CD-ROM or provided access through a LMS, the ~~licences~~ are useless;¶.....

262. → the fair market value of each individual licence (or ALCN Sub-unit in 2011) purportedly distributed was no greater than:¶

2004	\$0.30	×
2005	\$0.32	×
2006	\$0.30	×
2007	\$0.16	×
2008	nominal	×
2009	nominal	×
2010	nominal	×
2011	nominal	×

263. → collectively, the transactions which the Promoter claimed would give rise to a total charitable contribution in excess of the cash donation, were a sham (perpetrated by the Promoter, employees or subagents of the Promoter, or other insiders of the Program directly against the Respondent and indirectly against the Appellants) or were otherwise legally ineffective, such that the purported in-kind donations had no value.¶

DATED at the City of Winnipeg, Manitoba, this _____ day of _____, 2022.¶



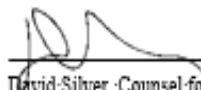
Jeff Pniowsky, Counsel for the Appellants¶

[27th]

[October]

Section Break (Continuous).....

DATED at the City of Winnipeg, Manitoba, this 28th day of _____, 2022.¶



David Silver, Counsel for the Respondent¶

Column Break.....

[October]

Schedule "A"

Cash amounts retained by Charities and the Promoter - 2004

	Participants	Charities			% of total cash
		Millennium	Canadian Charity Association (ICAN)	Total Received by Charities	
Donations by Participants	-\$ 9,604,034	\$ 9,604,034		\$ 9,604,034	
Transfers from Millennium to ICAN		-\$ 7,489,146	\$ 7,489,146		
	-\$ 9,604,034	\$ 2,114,888	\$ 7,489,146	\$ 9,604,034	100%
Fundraising fees					
to GLGI		-\$ 833,137	-\$ 6,775,016	-\$ 7,608,153	-79%
to IDI		-\$ 1,273,372	\$ -	-\$ 1,273,372	-13%
Total Fundraising Fees		-\$ 2,106,509	-\$ 6,775,016	-\$ 8,881,525	-92%
Amount retained by Charities		\$ 8,379	\$ 714,130	\$ 722,509	8%
Distribution of fundraising fees					
	GLGI	IDI Strategies Inc.	Total	% of total cash	
Total Cash Donations (per "A" above)			\$ 9,604,034	100%	
Fundraising Fees paid by participating charities (per "B" and "C" above)	\$ 7,608,153	\$ 1,273,372	\$ 8,881,525	92%	
Transfers to IDI	-\$ 797,692	\$ 797,692	\$ -		
Net Amounts received by GLGI and IDI	\$ 6,810,461	\$ 2,071,064	\$ 8,881,525		
			\$ -		

Section Break (Next Page)

Schedule "C"

Cash amounts retained by Charities and the Promoter – 2006

	Participants	Charities			
		Millennium	Canadian Charity Association (ICAN)	Total Received by Charities	% of total cash
Donations by Participants	-\$ 88,807,306	\$ → 88,807,306		\$ → 88,807,306	
Transfers from Millennium to ICAN		-\$ 70,053,429	\$ → 70,053,429	\$ → -	
	-\$ 88,807,306	\$ → 18,753,877	\$ → 70,053,429	\$ → 88,807,306	100%
Fundraising fees				\$ → -	
to GLGI		-\$ 18,894,844	-\$ 61,625,536	-\$ 80,520,380	-91%
to IDI				\$ → -	0%
Total Fundraising Fees		-\$ 18,894,844	-\$ 61,625,536	-\$ 80,520,380	-91%
Amount retained by Charities		-\$ 140,967	\$ → 8,427,893	\$ → 8,286,926	9%
Distribution of fundraising Fees					
	GLGI	IDI-Strategies Inc.	Total	% of total cash	
Total Cash Donations (per "A" above)			\$ → 88,807,306	100%	
Fundraising Fees paid by participating charities (per "B")	\$ → 80,520,380		\$ → 80,520,380	91%	
Transfers to IDI	-\$ 12,811,176	\$ → 12,811,176	\$ → -		
Net Amounts received by GLGI and IDI	\$ → 67,709,204	\$ → 12,811,176	\$ → 80,520,380		

Section Break (Next Page)

Schedule "D"

Cash amounts retained by Charities and the Promoter – 2007

	Participants	Charities				% of total-cash
		Millennium	Canadian Charity Association (ICAN)	York-Region Education Industry Foundations	Total Received by Charities	
Donations by Participants	-\$56,038,363	\$56,038,363			\$56,038,363	
Transfers from Millennium		-\$44,909,961	\$33,949,577	\$10,960,384	\$ → -	
	-\$56,038,363	\$11,128,402	\$33,949,577	\$10,960,384	\$56,038,363	100%
Fundraising fees					\$ → -	
to-GLGI		-\$10,390,890	-\$29,843,955	-\$9,645,138	-\$49,879,983	-89%
to-IDI					\$ → -	0%
Total Fundraising Fees		-\$10,390,890	-\$29,843,955	-\$9,645,138	-\$49,879,983	-89%
Amount retained by Charities		\$ → 737,512	\$4,105,622	\$1,315,246	\$6,158,380	11%
Distribution of fundraising fees						
	GLGI	IDI Strategies Inc.	Total	% of total cash		
Total Cash Donations (per "A" above)			\$56,038,363	100%		
Fundraising Fees paid by participating charities (per "B")	\$49,879,983		\$49,879,983	89%		
Transfers to IDI	-\$7,668,658	\$7,668,658	\$ → -			
Net Amounts received by GLGI and IDI	\$42,211,325	\$7,668,658	\$49,879,983			
			\$ → -			

Schedule "F"

Cash amounts retained by Charities and the Promoter – 2009

	Participants	Charities				Total Received by Charities	% of total cash
		Glooscap	Malvern	Judaica	ResOr		
Donations by Participants	-\$16,800,838	\$1,842,457	\$14,431,501	\$139,700	\$387,180	\$16,800,838	100%
<u>Fundraising fees</u>							
to GLGI		-\$1,628,011	-\$11,686,778	-\$118,814	-\$320,365	-\$13,753,968	-82%
Total Fundraising Fees		-\$1,628,011	-\$11,686,778	-\$118,814	-\$320,365	-\$13,753,968	-82%
Amount retained by Charities		\$214,446	\$2,744,723	\$20,886	\$66,815	\$3,046,870	18%
Distribution of fundraising fees							
		IDI Strategies					
	GLGI	Inc.	Total	% of total cash			
Total Cash Donations (per "A" above)			\$16,800,838	100%			
Fundraising Fees paid by participating charities (per "B" above)	-\$13,753,968		-\$13,753,968	82%			
Transfers to IDI	-\$1,691,597	\$1,691,597	\$ -				
Net Amounts received by GLGI and IDI	-\$12,062,371	\$1,691,597	-\$13,753,968				
			\$ -				

Section Break (Next Page)

Schedule "C"

Cash amounts retained by Charities and the Promoter – 2010

	Participants	Charities				Total Received by Charities	% of total cash
		Glooscap	Malvern	Eskasoni			
Donations by Participants	-\$14,871,806	\$5,843,911	\$ 97,500	\$8,930,395	\$14,871,806	A	100%
Fundraising fees							
to GLGI		-\$ 5,192,265	-\$ 87,262	-\$ 7,852,147	-\$13,131,674	B	-88%
Total Fundraising Fees		-\$ 5,192,265	-\$ 87,262	-\$ 7,852,147	-\$13,131,674	C	-88%
				\$ -	\$ -		
Amount retained by Charities		\$ 651,646	\$ 10,238	\$1,078,248	\$1,740,132	D	12%
		Distribution of fundraising Fees					
		GLGI	IDI Strategies Inc.	Total	% of total cash		
Total Cash Donations (per "A" above)				\$14,871,806	100%		
Fundraising Fees paid by participating charities (per "B" above)	-\$13,131,674			-\$13,131,674	88%		
Transfers to IDI	-\$ 2,073,266	-\$ 2,073,266	\$ -				
Net Amounts received by GLGI and IDI	-\$11,058,408	-\$ 2,073,266		-\$13,131,674			
				\$ -			

Schedule "H"

Cash amounts retained by Charities and the Promoter – 2011

	Participants	Charities		Total Received by Charities	% of total cash
		Glooscap	Trinity-Global Support Foundation		
Donations by Participants	\$-16,577,703	\$-8,291,512	\$-8,286,191	\$-16,577,703	100%
Fundraising fees					
to GLGI		-\$ 7,420,893	-\$ 7,430,177	-\$14,851,070	-90%
Total Fundraising Fees		-\$ 7,420,893	-\$ 7,430,177	-\$14,851,070	-90%
				\$ → -	
Amount retained by Charities		\$ → 870,619	\$ → 856,014	\$-1,726,633	10%
	Distribution of fundraising Fees				
	GLGI	IDI Strategies Inc.	Total	% of total cash	
Total Cash Donations (per "A" above)			\$-16,577,703	100%	
Fundraising Fees paid by participating charities (per "B" above)	-\$14,851,070		-\$14,851,070	90%	
Transfers to IDI	-\$ 872,194	\$ → 872,194	\$ → -		
Net Amounts received by GLGI and IDI	-\$13,978,876	\$ → 872,194	-\$14,851,070		

CITATION: 2023 TCC 164

COURT FILE NO.: 2021-1574(IT)G
2021-1544(IT)G

STYLE OF CAUSE: JOEL DE LAS ALAS v. HIS MAJESTY
THE KING

CHRIS WALBY v. HIS MAJESTY THE
KING

AMENDED JUDGMENT AND
AMENDED REASONS FOR
JUDGMENT BY: The Honourable Justice Ronald MacPhee

DATE OF AMENDED
JUDGMENT AND AMENDED
REASONS FOR JUDGMENT: December 13, 2023

PARTICIPANTS:

Counsel for the Appellant: Jeff Pniowsky
Matthew Dalloo

Counsel for the Respondent: David Silver
Allanah Smith
Erin Wolfe

COUNSEL OF RECORD:

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For the Respondent: Shalene Curtis-Micallef
Deputy Attorney General of Canada

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Ottawa, Canada