

Court File No.: CV-17-583573-00CP
Commercial List File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

LYNN WINTERCORN, PETER NEWMAN, EMILY FLAMMINI and ALEX KEPIC

Plaintiffs

- and -

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

Defendants

PROCEEDING COMMENCED UNDER THE *CLASS PROCEEDINGS ACT, 1992*

NOTICE OF MOTION

The Plaintiffs will make a motion to a Judge on Thursday, October 12, 2017 at 10:00 a.m. or as soon after that time as the motion can be heard at the court house, 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- in writing under subrule 37.12.1(1) because it is;
- in writing as an opposed motion under subrule 37.12.1(4);

[X] orally.

THE MOTION IS FOR:

- (a) an order abridging the time for service and validating service of this notice of motion and motion record, if necessary, so that the motion is properly returnable on the date indicated above;
- (b) an order, in the form attached as Schedule "A" (the "Order"), appointing A. Farber & Partners Inc. ("Farbers") as Receiver over Global Learning Group Inc. ("GLGI") and Global Learning Trust Services Inc. (the "Trustee");
- (c) the costs of this motion, up to and including entry and service of the Order, on a substantial indemnity basis to be paid by the Receiver from the estates of GLGI and the Trustee (collectively, the "Debtor") with such priority and at such time as this Honourable Court may determine; and
- (d) such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

- (e) GLGI is an Ontario company that operated a charitable tax program called the Global Learning Giving Initiative (the "Program") between 2004 and 2014. GLGI described the Program in its marketing materials as:

The Global Learning Giving Initiative ("GLGI") is committed to providing online access to educational courseware and funding to those who are motivated to acquire the knowledge and skills needed to be more self-reliant. GLGI is a gifting arrangement tax shelter where Canadians are able to utilize available tax incentives by donating valuable courseware

licenses and cash to Canadian registered charities.

- (f) GLGI told participant taxpayers ("Taxpayers"), including the proposed representative plaintiffs:
 - (i) that the Program would allow them to make a cash donation to a registered charity (the "Cash Charity"), and the Program would allow them to also make an in-kind donation of software licenses to various not for profit "learning centres" throughout Canada;
 - (ii) that independent accounting firms had assessed the value of the software licenses, and that the value of the licenses that would be donated was higher than the cash donation;
 - (iii) that participant taxpayers would obtain legitimate tax credits that would be for several multiples of their cash donation; and
 - (iv) that the structure of the Program had been vetted by a national Canadian law firm, Cassels Brock & Blackwell LLP ("Cassels"), in a written opinion dated November 10, 2004 (the "Opinion").
- (g) By 2009, the Canada Revenue Agency ("CRA") had begun to scrutinize the Program. This included sending notices of reassessment and denying the tax credits claimed by the Program participants;
- (h) GLGI actively comforted participants in the Program and minimized the CRA's activities. In its public presentation materials, GLGI argued that the CRA's scrutiny was ordinary and routine, and that GLGI maintained a

litigation fund for "test cases" that would confirm the Program's legality. GLGI continued to boast that it was operating under a structure that had been vetted by "national law firms";

- (i) The CRA revoked the charitable status of the first Cash Charity used in the Program in January 2009. In response, GLGI obtained a report from Barrington Associates (the "Barrington Report"), which argued that the CRA's scrutiny was normal, and the real problem was that the Cash Charity simply failed to comply with its filing and paperwork obligations. The Barrington Report went on to tell participant taxpayers that their tax deductions were still valid;

A. DECISION OF THE TAX COURT OF CANADA

- (j) Despite GLGI's prior reassurances about the legitimacy of the Program, GLGI's test case challenging the CRA reassessments failed. An appeal from the CRA reassessment of several Taxpayers was decided by the Tax Court of Canada in *Mariano v. The Queen*, 2015 TCC 244 (CanLII) ("*Mariano*"), released October 19, 2015;
- (k) Justice Pizzitelli found that:
 - (i) The entire Program was a sham;
 - (ii) GLGI and its accomplices, including various contractors and the sales agents, received approximately 90% of the cash donations intended for the Cash Charity;

- (iii) The valuations of the software licenses made by GLGI's valuers were unsupported. The fair market value of the licenses was no more than the pennies paid for the licenses;
 - (iv) Each part of the leveraged donation Program was interconnected and part of the same transaction or series of transactions, despite a structure that tried to make the cash donation and the in-kind software license donation look like two separate transactions;
 - (v) The way the Program was set up meant that a Taxpayer did not own the software licenses at the time that she or he signed a direction to deliver them to the designated charity, rendering the direction invalid. How many and what licenses would be allocated to any particular Taxpayer was determined by a computer algorithm, and not by the Trustee; and
 - (vi) The structural failures described above were largely attributable to the fact that the Trustee did not exercise its discretion to either designate capital beneficiaries, or to determine the value of the software licenses that each Taxpayer was entitled to claim as a result of their donation. Instead, the Trustee unlawfully delegated its discretion to the accomplices of GLGI.
- (l) Justice Pizzitelli awarded costs against the Taxpayers in the test case, and against GLGI, totalling \$491,136.95;

- (m) No appeal was taken from the decision of Justice Pizzitelli;
- (n) The details of the operation of the Program, which are set out at paras. 6-12 of the *Mariano* decision, were unknown to the Taxpayers;
- (o) As of 2014, the GLGI website reported that over 60,000 Taxpayers had participated in the Program. Assuming the average Taxpayer donated a total of \$10,000, GLGI would have received \$600 million in cash donations from Taxpayers;
- (p) The plaintiffs have no idea where those funds are today, given the findings in *Mariano* that so little actually went to the Cash Charity, and so much was retained by GLGI and its accomplices;

B. THE CLASS PROCEEDINGS

- (q) Tens of thousands of Taxpayers who participated in the Program now face substantial liability for reassessed taxes, as well as penalties and interest on those taxes after CRA disallowed the claimed tax credits. As a result, this class proceeding (the "Class Proceeding") was commenced against GLGI, its principals, and its advisors, seeking damages to compensate them for their losses;
- (r) A separate class proceeding was commenced in Saskatchewan by The Merchant Law Group LLP (the "Merchant Action") on March 1, 2016. The Merchant Action articulates claims against GLGI and its advisors, as well as against the CRA and others;

- (s) The Merchant Action remains in the pleadings stage even 18 months after issuance; and
- (t) Notwithstanding the Merchant Action, the plaintiffs wish to proceed with this proposed class action in Ontario, and seek the appointment of the Receiver obtain production of documents for the proposed class action and to facilitate recovery efforts.

C. CURRENT STATUS OF GLGI AND THE TRUSTEE

- (u) Following the decision in *Mariano*, GLGI went dark, and ceased all operations. GLGI's website, at <http://www.glgi.ca>, thanks Taxpayers for their donations in 2014, and does not appear to have been updated since then;
- (v) GLGI's corporate profile report lists its status as "Canc. By C.T.", which indicates that GLGI's corporate status has been cancelled as a result of its failure to comply with the *Corporations Tax Act*;
- (w) GLGI owes more than \$3.5 million to the Minister of Finance;
- (x) GLGI is likely insolvent, it is no longer carrying on business, and it appears to have been abandoned;
- (y) The owner, officer, and director of the Trustee, Ronald Clare Knechtel, died prior to the hearing in *Mariano*. However, the corporate profile report for the Trustee, attached at Schedule B, still lists Mr. Knechtel as the only individual officer or director of the corporation;

D. OTHER CREDITORS

- (z) The only known creditors/potential creditors of GLGI are:
 - (i) the proposed Class Members in the Class Proceeding, for the amounts claimed therein;
 - (ii) the Minister of Finance, in the amount of \$3.5 million as described above;
 - (iii) the Federal Government with respect to the costs award in *Mariano*; and
 - (iv) any Class Members in the Merchant Action who are not included in the proposed class definition in the Class Proceeding, for the amounts claimed therein.

- (aa) There is good reason to believe that GLGI has not paid the costs of the *Mariano* decision;

E. APPOINTMENT OF RECEIVER

- (bb) Given the current status of GLGI and the Trustee, they are unlikely to be able to satisfy a judgment in the Class Proceeding;

- (cc) It also appears that GLGI has no ability or desire to prosecute claims against the various professionals and other entities who designed, carried out, and benefitted from the sham Program (the "Receivership Claims"), as described in the *Mariano* decision, even though that decision identifies that the professionals failed to design the Program in a manner that would result

in a valid trust structure, and that the valuations of the courseware were wrong;

- (dd) The release of the *Mariano* decision on October 19, 2015, means that the Receivership Claims, made on behalf of GLGI, may become limitation barred if they are not started by October 18, 2017. The Plaintiffs in the Class Proceeding are therefore seeking the appointment of a receiver on an expedited basis, so that it will have time to commence any actions it deems appropriate;
- (ee) The Plaintiffs in the Class Proceeding are seeking the appointment of a receiver over GLGI and the Trustee in order to:
 - (i) issue a Notice of Action, substantially in the form attached as **Exhibit "L"** to the affidavit of Lynn Wintercorn sworn September 27, 2017, in order to preserve potential claims before the limitation period expires;
 - (ii) assume responsibility for and make documentary production in this action; and,
 - (iii) gather the books and records of GLGI and the Trustee in order to assess their financial circumstances, provide an accounting for the funds received, and investigate potential claims by GLGI against third parties.

- (ff) The Plaintiffs are proposing that A. Farber & Partners Inc. ("Farbers") be appointed as Receiver in this matter. Farbers is affiliated with Tax Solutions Canada, which has assisted Taxpayers in navigating the fallout from the GLGI Program. Farbers have a great deal of experience in forensic receivership cases;
- (gg) The proposed counsel for Farbers is Paliare Roland Rosenberg Rothstein LLP, which has experience in other tax shelter litigation, (e.g. the successfully resolved *Cannon v. Funds for Canada Foundation*), and in receivership and insolvency matters generally;
- (hh) Because GLGI and the Trustee do not appear to have any liquid assets, Farbers' willingness to accept the appointment is subject to a number of conditions. In particular, Farbers requires assurances that:
 - (i) it will not incur any liability for costs solely by virtue of the issuing the Notice of Action, pending service of the related Statement of Claim, while it investigates the affairs of the Debtor; and,
 - (ii) it will be entitled to be discharged in the event that, following its initial investigations, Farbers concludes that the costs or risks associated with the receivership proceedings are disproportionate to the benefits.
- (ii) The Plaintiffs and their counsel ("Class Counsel") have had confidential discussions with Farbers regarding the terms of a contingency fee

agreement in favour of Farber and its counsel, together with how the compensation of the Receiver and its counsel might relate to the fees charged by Class Counsel. A preliminary agreement has been reached in that regard, subject to Farbers' ability to consult with affected stakeholders following its appointment, and subject to approval by the Court following such consultations;

- (jj) It is in the interests of justice for Farbers to be appointed as the Receiver of GLGI and the Trustee, which will benefit all of its creditors and potential creditors, and facilitate the prosecution of this proposed class proceeding against the Debtor;
- (kk) Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
- (ll) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The affidavit of Lynn Wintercorn sworn September 27, 2017;
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court permit.

October 3, 2017

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