

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

B E T W E E N :

Claude Millard and Roger Grisé

- and -

North George Capital Management Limited, Triple A Financial Services Inc. North George Capital Limited Partnership, North George Capital II Limited Partnership, North George Capital III Limited Partnership, North George Capital IV Limited Partnership, North George Capital V Limited Partnership, Lionaird Capital Corp., Roderick Alton, Michael Magee, Robert McGillen, Kenneth Gill, Anne Gilmour, Michael Goselin, Goselin & Associates, Stewart and Associates, McColl Turner, Irv Dyck and M.R.S. Trust Company

Defendants

Proceeding under the *Class Proceedings Act*, 1992

AMENDED STATEMENT OF CLAIM
Notice of action issued on September 15, 1998

TO THE DEFENDANTS

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

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

AMENDED THIS	PREPARED TO
ACCOUNT OF	CONTRIBUTION A
<input checked="" type="checkbox"/> BY SPECIAL RULE 26(2)	
DATE OF SERVICE	11/11/98
FILED IN	18/10/98
FILED AT	Plaintiff
LOCAL REGISTRAR	GENERAL REGISTRAR
100 - 1000000 (ON DIV)	100 - 1000000 (ON DIV)

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: November 16, 1998

Issued by _____
Local Registrar

Address of Court Office:

393 University Avenue
10th Floor
Toronto, Ontario
M5G 1W9

TO: Mr. W.R. Maxwell
Barrister & Solicitor
37 Burnside Drive
Toronto, Ontario
M6G 2M9

telephone: (416) 538-0101
facsimile: (416) 538-1343

Solicitors for Roderick Alton and Michael Magee

AND TO: Mr. Eric Fournie
Lockwood & Associates
Barristers & Solicitors
2100 - 439 University Avenue
Toronto, Ontario
M5G 1Y8

telephone: (416) 598-2323
facsimile: (416) 598-5581

Solicitors for Kenneth Gill and Anne Gilmour

AND TO: Ms. Ann Dinnert
Gardiner, Roberts
Barristers & Solicitors
Scotia Plaza
3100 - 40 King Street West
Toronto, Ontario
M5H 3Y2

telephone: (416) 865-6613
facsimile: (416) 865-6636

Solicitors for Michael Goselin and Goselin & Associates

AND TO: Weir & Foulds
1600-2 First Canadian Place
P.O. Box 480
Toronto, Ontario
M5X 1J5

John O'Sullivan
416 947-5073
416 365-1876 (fax)

Solicitors for Lindquist Avey Macdonald, Baskerville Company, interim receivers
for North George Capital Limited Partnership, North George Capital II Limited
Partnership, North George Capital III Limited Partnership, North George Capital
IV Limited Partnership, North George Capital V Limited Partnership, North
George Capital Management Limited and Lionaird Capital Corp.

AND TO: Triple A Financial Services Inc.
#306 - 360 George Street North
Peterborough, Ontario
K9H 7E7

AND TO: Stewart & Associates
700 - 100 King Street W.
1 First Canadian Place
P.O. Box 160
Toronto, Ontario
M5X 1C7

AND TO: Robert C. McGillen
McGillen, Ayotte
244 Aylmer Street North
P.O. Box 1718
Station Main
Peterborough, Ontario
K9J 7X6

AND TO: McColl Turner
362 Queen Street
Peterborough, Ontario
K9H 3J6

AND TO: Irv Dyck
c/o Dual Financial Group
#301 347 Sherbrooke Street
North Bay, Ontario
P1B 2C1

CLAIM

A. The Claim

1. The plaintiffs claim on their own behalf and on behalf of each of the various class members:

- (a) as against Lionaird Capital Corp. ("Lionaird"):
 - (i) rescission of the subscription agreements made between Lionaird and each member of the Lionaird Class (as defined below) respecting the purchase and sale of promissory notes (the "Notes") issued by Lionaird to the Lionaird Class members;
 - (ii) the return of all monies advanced to Lionaird for the purchase of the Notes plus interest at the rate prescribed by the *Courts of Justice Act*;
 - (iii) an order that an investigation of Lionaird be conducted pursuant to s. 161 of the *Business Corporations Act* (Ontario) (the "OBCA"), at the cost and expense of Lionaird; and
 - (iv) an order appointing a receiver and manager to manage the assets and affairs of Lionaird;
- (b) as against North George Capital Management Limited ("North George"):
 - (i) an order that an investigation of North George be conducted pursuant to ss. 161 and 248 of the OBCA, at the cost and expense of North George;

- (ii) an order appointing a receiver and manager to manage the affairs and assets of North George; and
 - (iii) an order requiring North George to repay all amounts owed to the Partnerships (as defined below);
- (c) as against North George Capital Limited Partnership, North George Capital II Limited Partnership, North George Capital III Limited Partnership, North George Capital IV Limited Partnership and North George Capital V Limited Partnership (the "Partnerships"):
- (i) rescission of the subscription agreements made between the Partnerships and each member of the North George Class (as defined below) respecting the purchase and sale of limited partnership units ("Units") issued by the Partnerships to the North George Class members;
 - (ii) the return of all monies advanced to the Partnerships for the purchase of the limited partnership units plus interest at the rate prescribed by the *Courts of Justice Act*;
 - (iii) an order appointing a receiver and manager to manage the affairs and assets of the Partnerships; and
 - (iv) dissolution of the Partnerships;

- (d) as against all defendants (except for Lionaird and the Partnerships):
- (i) general damages in the amount of \$20,000,000;
 - (ii) interest pursuant to the *Courts of Justice Act*;
 - (iii) costs on a solicitor-client scale;
 - (iv) a declaratory order that the defendants hold all monies received directly or indirectly from any of Lionaird, North George or the Partnerships in constructive trust for the benefit of the plaintiffs and the Lionaird Class and North George Class members;
 - (v) such further relief that this Honourable Court deems just;
- (e) as against the defendants Roderick Alton ("Alton"), Michael Magee ("Magee"), Kenneth Gill ("Gill"), Anne Gilmour ("Gilmour"), North George and Triple A Financial Services Inc. ("Triple A"):
- (i) all the relief claimed in paragraph (d);
 - (ii) an order setting aside all contracts entered into between these parties and either North George, the Partnerships and/or Lionaird and the return to North George and/or Lionaird of any monies received with respect to these contracts;
 - (iii) punitive damages in the amount of \$10,000,000; and

- (iv) an interlocutory order restraining these defendants from removing any assets from the jurisdiction or disposing of any assets except as authorized by the court until the completion of this action; and
- (f) as against North George and Lionaird (collectively the "Corporations"), a declaratory order that the business and affairs of the Corporations have been carried on or conducted in a manner, and the powers of the directors of the Corporations have been exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the Partnerships, the plaintiffs and the other class members.

B. The Parties

- 2. The plaintiff, Claude Millard ("Millard"), resides in Millbrook, Ontario, and at all material times was the registered and beneficial owner of Units in one of the Partnerships and the registered and beneficial owner of Notes issued by Lionaird. The Units and Notes are hereinafter referred to collectively as the "Securities".
- 3. The plaintiff, Roger Grisé ("Grisé"), resides in Ontario and at all material times was the beneficial owner of Lionaird Notes. Grisé held these Notes in his Registered Retirement Savings Plan (RRSP) with the defendant M.R.S. Trust Company.
- 4. The defendant, North George, is incorporated pursuant to the OBCA and is the general partner of each of the Partnerships.

5. The defendant, Lionaird, is incorporated pursuant to the OBCA and was the issuer of the Notes.
6. The defendants, the Partnerships, are limited partnerships governed by the provisions of the *Limited Partnerships Act* (Ontario) and were the issuers of the Units.
7. The defendant, Triple A Financial Services Inc. ("Triple A"), is incorporated pursuant to the OBCA. Triple A is registered as a mutual fund dealer and limited market dealer pursuant to the *Securities Act* (Ontario) and acted as agent for the Partnerships and Lionaird with respect to the sale of the Units and the Notes.
8. The defendant, Alton, is the president, a director and a significant shareholder of North George and the president, a director and a significant shareholder of Lionaird. In addition, Alton represents himself as a self-employed limited market dealer, operating through Triple A, a corporation controlled by Alton. Alton also represents himself as having been a mutual fund dealer since 1994. From 1990 to 1991, Alton claims to have been a securities salesperson with Page Financial Services Inc. of Oshawa, Ontario.
9. The defendant, Magee, is an officer, director and a significant shareholder of North George and is an officer and a significant shareholder of Lionaird. Magee represents his principal occupation as Vice-President of North George. Magee represents that from

1991 to 1995, he was a self-employed life insurance representative operating in Barrie and Sault Ste. Marie, Ontario.

[^] 10. The defendant, Kenneth Gill ("Gill"), resides in the City of Peterborough and at all material times was an officer, director and a significant shareholder of Lionaird. Since 1986 Gill claims to have been a self-employed provider of business counsel in the areas of off-shore jurisdictions and for tax planning and asset protection.

[^] 11. The defendant, Anne Gilmour ("Gilmour"), was at all material times an officer of Lionaird and since 1991 claims to have acted as secretary/treasurer/administrative assistant for various private companies. Gilmour claims that since 1996 she has been a principal of Tristar Arabians Investments in the equine industry. Gilmour is married to Gill.

[^] 12. The defendant, Michael Goselin, is a financial planner operating out of the city of Peterborough. Goselin operates through the defendant, Goselin & Associates, whose slogan is "Professional Management of Your Money". Michael Goselin and Goselin & Associates are hereinafter collectively referred to as "Goselin". Goselin is a shareholder of and salesperson for Triple A and sold Notes and Units to members of the Lionaird Class and the North George Class, respectively.

[^] 13. The defendant, Stewart and Associates ("Stewart"), is a law firm practicing in Ontario. Stewart was retained by the Partnerships in or about September, 1996 to provide legal

advice in connection with the sale of the Units. Stewart was also retained by Lionaird prior to the issue of any Notes and continuing throughout the period during which all of the Notes were sold to the Lionaird Class members to provide legal advice in connection with the sale of the Notes.

- [^] 14. The defendant, Robert McGillen ("McGillen"), is a lawyer practicing in the City of Peterborough and was retained by the Partnerships (or some of them) prior to the issue of any Units to provide legal advice in connection with the sale of the Units.
- [^] 15. The defendant, McColl Turner ("McColl"), is an accounting partnership practicing in the City of Peterborough and was retained by the Partnerships to be the accountants in connection with the sale of the Units and the activities of the Partnerships. McColl prepared the financial statements for North George and the Partnerships.
- [^] 16. The defendant Irv Dyck ("Dyck") resides in Ontario. Dyck is an independent financial planner and a salesperson for Triple A and he sold Notes and Units to members of the Lionaird Class and the North George Class, respectively.
- [^] 17. The defendant, M.R.S. Trust Company ("M.R.S."), is a corporation, authorized under the laws of Ontario to carry on the business of offering to the public its services as trustee. The head office of M.R.S. is located in Toronto, Ontario.

C. The Class

18. The plaintiffs claim that Magee, Alton, Gill and Gilmour (the "Principals"), with others unknown, (i) illegally raised monies from the public through the Partnerships and Lionaird; (ii) wrongfully misappropriated, for themselves, a large portion of the monies raised; and (iii) illegally misappropriated or recklessly lost the remainder of the monies raised, all in a manner which breached various common law and statutory duties in favour of each class member and which resulted in significant financial loss to each class member. The plaintiffs further allege that the failure of all other defendants to act in accordance with the legal duty of care owed by them to the class members facilitated the operation of this illegal investment scheme and resulted in significant financial loss to each class member.

19. The plaintiff Millard states that he is representative of two classes of persons who have all sustained damages as a result of the defendants' breach of duties. The two classes are defined as follows:

Class 1: Persons who purchased Units (the "North George Class"); and

Class 2: Persons who purchased the Notes (the "Lionaird Class");

excluding the defendants, members of the immediate family of each of the individual defendants, any subsidiary or affiliate of any corporate defendant, any corporation or entity controlled by any excluded person and the legal representatives, heirs, successors

and assigns of any excluded person. Members of the North George Class and the Lionaird Class are sometimes herein collectively referred to as "class members".

20. The plaintiff Millard states that he is also representative of a subclass of persons who have all sustained damage as a result of Goselin's breaches of duty. This subclass is defined as follows:

Subclass A: Class members who purchased Units and/or Notes from Goselin (the "Goselin Subclass")

21. The plaintiff Gris  states that he is representative of two subclasses of persons who have all sustained damage as a result of breaches of duty by Dyck and M.R.S. respectively. These subclasses are defined as follows:

Subclass B: Class members who purchased Units and/or Notes from Dyck (the "Dyck Subclass"); and

Subclass C: Class members who established an RRSP with M.R.S. as trustee which purchased Notes (the "RRSP Subclass").

22. The plaintiffs state that a class proceeding is the preferable method for resolving the common issues in this litigation because resolution of the common issues will substantially advance the ultimate resolution of this action thus providing access to justice to members of the classes and significantly advancing judicial economy.

D. Experiences of Millard

i. Introduction

23. Millard was born November 1, 1946. He was a member of the Royal Canadian Mounted Police ("RCMP") and a Peace Officer from 1966 until August 1995 when he retired.

24. When he left the RCMP, Millard received a lump sum payment which was placed in his RRSP. At that time, he met Goselin, who represents himself as an independent financial planner. Goselin stressed to Millard that he should be in conservative, safe investments and suggested he invest his retirement allowance in the McKenzie World Balance Fund. Millard followed Goselin's advice.

ii. Initial Investments in North George

25. In or about October, 1995, Goselin recommended that Millard mortgage a property and place the funds in one of the North George Partnerships which Goselin represented as a conservative investment. Goselin represented to Millard that he would earn 5% on his money per month, that his principal was guaranteed and that his investment was redeemable on 30 days notice.

26. Millard is not a sophisticated investor. Goselin knew that. When Goselin described the investment features of the Units, Millard questioned him on it. Based on Goselin's representations and assurances Millard and other members of his family (including his 84 year old mother) purchased Units.

27. Goselin provided Millard with a draft Offering Memorandum ("OM") for the North George Partnership. Along with Goselin's assurances, the OM made the investment look official and legitimate. Millard did not understand much of what he read, but Goselin highlighted page 7 in the offering memorandum, where, according to Goselin, it verified that Millard's money was 100% guaranteed, and that there was no risk to Millard's principal.
28. Millard did not understand exactly how or in what North George was investing his money to obtain such substantial returns. Goselin represented that North George was investing in the same type of vehicles that enabled the banks to earn billions, which was not available to Millard individually. Based upon the representations of Goselin and the OM, Millard invested over \$100,000 in the Partnership.
29. Millard and his mother received correspondence from North George and Goselin which provided comfort to Millard that the investment in the Partnership was secure.
30. Initially Millard received 5% returns each month as Goselin had indicated.
31. Goselin provided schedules to Millard setting out his investments, returns and subsequent reinvestment in the Partnership. The schedules confirmed that Millard was earning 5% profits per month on his investment. Millard was quite pleased and for that reason, reinvested most of his profits in the Partnership.

32. In early 1997, Millard's profit payments changed from 5% a month to 4% a month, with 2% a month payable monthly plus another 2% per month payable at the end of the year. Millard continued to receive 2% payments per month until August 1997. He has received no payments since then.
33. Considering the substantial return on investment, Millard had to pay very little income tax. Goselin explained that this had something to do with the investment being in a limited partnership. Millard only recently discovered that the reason he paid so little tax was that he was primarily receiving a return of his capital investment, not income or profits thereon, as further described below.
34. When Millard stopped receiving his monthly cheques, he questioned Goselin. Goselin advised him that the monies had been invested by North George with a notary in Switzerland. Goselin indicated that there were some problems with the notary but that Goselin hoped that the problems would be remedied soon and that Millard would receive his continued profit payments.
35. Millard received very little documentation or explanations from North George and/or Goselin as to what was happening.

iii. Investment in Lionaird

36. In August, 1997 Goselin recommended to Millard that while waiting for things to be straightened out with North George, there was an opportunity to invest and achieve at least a 12% annual return by purchasing Notes of Lionaird. Goselin represented to Millard that unlike North George, Lionaird's investments were in Canada so there would be no problems. Goselin also said that Millard's principal was 100% guaranteed, and as safe as Canada Savings Bonds. Goselin represented that the Notes were redeemable on 90 days notice. Goselin also represented that these investments were RRSP eligible.
37. Relying upon Goselin's representations Millard invested \$25,000 in Lionaird Notes. He continued to receive his 1% return per month on Lionaird until September, 1998.
38. By this time, almost 33% of Millard's total assets (and approximately 33% of the assets of Millard's mother) were invested in North George and/or Lionaird on the recommendation of Goselin.
39. As Millard became more concerned about his lack of payments from the North George investment, he became concerned regarding the security of his investment in Lionaird. Accordingly, on July 6, 1998 he sent a letter to Lionaird to redeem his Notes. On July 16, 1998 he received a response saying he had no right to redeem the Notes prior to the maturity date in 2002. Millard complained to Goselin who provided him with a memorandum supposedly explaining the type of guarantee Millard had on his principal. Millard only now understands that contrary to representations of Goselin, the

memorandum states that he has never had any guarantee or any right to redeem the Notes on 90 days notice.

iv. Problems

40. As noted above, as of August 1997, payments from North George ceased. Little or no information was provided by North George to explain the problems. Almost one year later, Goselin organized a meeting of North George investors where he introduced the investors to a consultant who advised that his company was retained by individuals who had lost money they had invested with Alton and Magee through North George. The consultant explained that he understood that monies had been placed with a notary in Switzerland who had been arrested in April, 1998 and charged with embezzling significant sums of money from clients. The consultant did not know whether his clients' money or funds belonging to the Partnerships were part of the sums allegedly embezzled.
41. Millard believed he was in a high yield secure investment which would fund his and his mother's retirement. He was wrong. Millard only recently discovered that he was a victim of the Principals' illegal conduct and may have lost all of his investment.

E. Experiences of Grisé

42. Grisé was born September 28, 1945. He is a construction contractor.

43. Until meeting the defendant, Dyck, in approximately 1987, Grisé had no investment experience. At the time, all of his RRSP was held in guaranteed investment certificates through one of the major banks.
44. In 1987, Dyck approached Grisé and suggested that Grisé and his wife place the contents of their RRSP into certain mutual funds. Dyck advised Grisé that they should invest for the long-term, approximately 10 years.
45. Relying upon Dyck's advise, Grisé and his wife transferred virtually all of their retirement funds into the mutual funds recommended by Dyck. Following Dyck's advise, Grisé transferred his RRSP into an account arranged for by Dyck at M.R.S.
46. In 1997, Dyck advised Grisé that mutual funds could drop in price and that he should sell his mutual funds and place all of the proceeds into Lionaird. Dyck represented to Grisé, and Grisé believed, that the principle invested in Lionaird was completely guaranteed, that he would earn at least 12% interest annually and possibly as much as 24%. Based upon his conversations with Dyck, Grisé also understood that he could redeem his money at the end of a one year term after providing 30 days' notice to Dyck.
47. Dyck advised Grisé that the Lionaird Notes were RRSP eligible and could continue to be held at M.R.S. Grisé would not have invested any funds in Lionaird if he was not advised by Dyck that the Notes were RRSP eligible.

48. Based upon Dyck's advice, Grisé sold all of his mutual funds and transferred all of the proceeds into Lionaird Notes. Grisé was not provided with the Lionaird Offering Memorandum. At Dyck's direction, Grisé signed various documents which Dyck stated were mere formalities.
49. From the initial purchase of the Notes until very recently, Grisé was receiving interest payments as promised by Dyck and Dyck invested these interest payments into other mutual funds.
50. In September 1998, Grisé discovered Lionaird's financial difficulties. Grisé contacted Dyck to inquire on the status of Lionaird and Dyck responded that everything at Lionaird was okay, but that interest payments may not be received until December, 1998 because of problems the principals at Lionaird were having with the North George Partnerships.
51. The experiences of the other North George Class and Lionaird Class members are substantially the same as Millard's and Grisé's as outlined above.

F. Liability of the Parties

52. Through the Partnerships and Lionaird, the Principals raised over \$10 million from investors such as Millard and Grisé by the sale of the Securities.

53. Triple A, a registered securities dealer under the control of Alton, promoted the sale of the Securities. The defendants Goselin and Dyck (the "Sales Agents") and Alton were all active in the sale of the securities on behalf of Triple A.
54. The Principals, Triple A and the Sales Agents, knew or ought to have known that the sale of the Securities was conducted in a manner contrary to the *Securities Act* (Ontario). Specifically, the Principals breached the prospectus requirements of that Act. In addition, necessary statutory filings under that Act to disclose the trading activity were never made, and statutory records required by the *Limited Partnerships Act* were never maintained.
55. The business and affairs of the Corporations were carried on and conducted in a manner, and the Principals exercised their powers as directors of the Corporations in a manner, that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of Millard and Grisé, the other security holders of Lionaird (members of the Lionaird Class), the other limited partners of the Partnerships (members of the North George Class) and the Partnerships (all of which are creditors of North George).
56. The essence of the oppressive conduct was that the Principals unlawfully raised \$10 million from the class members on the basis of material misrepresentations, kept the appearance of a legitimate investment fund through the dissemination of further material misrepresentations, and then wrongfully took at least \$3 million of the investors' moneys for themselves and their sales agents and misappropriated or

recklessly lost the balance. Particulars of the oppressive conduct and other breaches of statutory and common law obligations are outlined below.

North George - Misrepresentations

57. Material misrepresentations regarding the terms of the Partnerships Units were fraudulently, recklessly or, in the alternative, negligently made to Millard and other members of the North George Class by the Principals, North George, Triple A and the Sales Agents. These misrepresentations were calculated to induce, and succeeded in inducing, Millard and other members of the North George Class to purchase the Partnerships' securities. Millard and others relied upon the misrepresentations and suffered damages as a result of such reliance.

Investment Features

58. Specifically, Millard and other investors were advised that (i) they would receive earnings on their investment each month, at a fixed rate (initially 5% per month, later reduced to 4% per month), (ii) the principal amount of their investment was guaranteed and (iii) the investments were redeemable on thirty (30) days notice. All of these representations were false.

Sales Commissions

59. The Offering Memorandums ("OM") prepared by or on the instructions of the Principals with respect to the sale of the Partnerships' securities contained material

misrepresentations regarding the benefits accruing to the Principals, Triple A and the Sales Agents in connection with the sale of the Partnerships' securities and the management and operation of the Partnerships.

60. Specifically, the OM's for the Partnerships provide that no sales commissions were payable in connection with the sale of the Partnerships' securities. This gave the appearance that those who were recommending the purchase of such securities were independent. In fact, North George paid or agreed to pay the Sales Agents both sales commissions at the time of sale plus a "trailing" commission at the rate of 3% to 4% per month of the principal amount invested by their clients. North George paid in excess of US\$470,000 in sales commissions to the Sales Agents and others.

Management Fees

61. With respect to management fees, North George was not paid any management fees by the Partnerships. This accords with (i) the OM for the first North George Partnership which stipulates that North George will be entitled to compensation if and only if the obligations to each individual investor have been met, which was never the case and (ii) the OM's for all of the Partnerships which state that any fees payable to the general partner will be based upon performance (since the general partner's performance was horrendous, resulting in the loss of all or substantially all of the Partnerships' funds, no fees could have been paid).

62. Nevertheless, North George itself paid management and similar fees to the Principals and Triple A which the Partnerships could not properly pay directly, and, furthermore, used the Partnerships' funds to make such payments. Accordingly, they indirectly did what they could not do directly.
63. North George paid management fees to Triple A and Magee and "legal fees" to Gill. Triple A had no contract to provide management services to North George. Gill is not a lawyer, and only a portion of such "legal fees" were applied to payment for legal services provided by Stewart to the Partnerships.
64. In total, North George paid in excess of US\$400,000 by way of management and "legal fees" to the Principals and Triple A.
65. The sales commissions and management fees were funded primarily by loans which North George took from the Partnerships. North George borrowed funds from all five Partnerships, making each of them a creditor of North George. The aggregate amount owing by North George to the Partnerships as at July 31, 1997 was US\$843,000.
66. North George had nominal net worth, a fact highlighted in the OM's. It had no sources of income, as the Partnership Agreements prohibited it from carrying on any business other than being the general partner of the Partnerships.

67. Accordingly, North George does not currently have, and has never had, any means or potential to repay the funds borrowed from the Partnerships. North George showed huge financial losses resulting from its lack of income and its significant sales and management expenses. It is a sham to book a transaction as a "loan" when the borrower which causes the lender to lend the funds, is insolvent and has no means, potential or intention of repaying the funds.
68. Any management contracts or similar arrangements with officers or directors of North George, an OBCA corporation, require disclosure of conflicts of interest and compliance with s. 132 of the OBCA and By-law No. 1 of North George. In addition, the transactions must be "fair and reasonable" to the corporation, failing which they are void or voidable. Neither of these requirements were met with respect to any arrangements respecting (i) the payment of sales commissions to Triple A (and its salespersons) and (ii) the payment of management or similar fees to the Principals. All of these contracts or arrangements are void or voidable.
69. The OM's state that the Partnership Agreements provide, and they indeed provide, that standards of care and duties are imposed upon the general partner, North George, which are not less than those imposed upon officers and directors of an Ontario business corporation by statute and common law and includes an undertaking of the general partner to exercise its powers in good faith and in the best interests of the Partnerships. This duty of care was clearly violated by the improvident loans to North George to fund payments to the Sales Agents, Triple A and the Principals personally.

Profit Sharing

70. Under normal commercial practice, the general partner is entitled to a *pro rata* share of a limited partnership's profits, in proportion, as with all limited partners, to its capital contributions to the partnership. Since a general partner generally makes a nominal contribution only, it receives a nominal share of any profits.
71. Consistent with normal practice, North George made only a nominal contribution to each of the partnerships, in the amount of US\$100. Totally inconsistent with normal practice, however, the general partner drew up Partnership Agreements which provided that the general partner is entitled to 40% of all profits earned by the Partnership. This material provision was never disclosed in any of the OM's. The class members never saw the Partnership Agreements, as they were signed on their behalf by the general partner, utilizing powers of attorney provided to them by the North George Class members.

North George – Operations - Dealings with Investors

72. North George was operated in a manner known as a "Ponzi" or pyramid scheme, namely:
- (a) investors were promised unusually high rates of return (5% per month for initial investors), well in excess of market rates of return for "guaranteed" investments, but supposedly without any additional risk;

- (b) no proper description of the manner or method by which these unusually high rates of return would be earned was provided to the investors; reference would be made to foreign markets and securities trading systems and mechanisms unavailable to "ordinary" investors and much too complicated for the class members to fully comprehend;
- (c) during the initial sales period, the promised rates of return were paid regularly and promptly;
- (d) this created confidence in the investors that the Partnerships were a *bona fide* investment opportunity, and encouraged class members to re-invest their returns, add to their investments with other funds and promote the investment to friends and relatives;
- (e) in fact, these returns were illusory:
 - (i) the Partnerships generated earnings which were only a fraction of the amounts paid to investors;
 - (ii) to a large extent, the funds paid to the investors constituted a return of their capital investments - not a share of any income or earnings of the Partnerships; while the class members were told that their full principal amount of their investment was still "at work" generating these huge returns, the Partnerships' financial statements recorded that substantial amounts of capital had been returned to the investors; and

- (iii) funds from later investors were used to pay returns to early investors, maintaining the illusion of a successful investment;
- (f) class members were never advised by the Partnerships, North George or the Principals that the Partnerships were in any financial difficulty; delays in making the monthly payments were always accompanied by an appropriately vague excuse or promise from the Sales Agents and/or the Principals that funds would begin flowing again soon;
- (g) class members wishing to remove their funds were told they cannot do so, despite earlier representations to the contrary; however, investors who made appropriately threatening gestures promising to "disclose" the scheme managed to get repaid; again, to maintain appearances, these investors received a return of the full principal amount invested, not the lower amount shown as standing to their credit in their capital account after the returns they had previously received;
- (h) once the pyramid got too large, it collapsed under its own weight - there were simply insufficient funds to keep the payments flowing to all the investors; members of the North George Class have not received any funds for more than a year.

73. The Partnerships have investments on their books with a collective book value of US \$2,350,000. These investments are, however, worthless.
74. One "investment" of US \$250,000 was simply a loan to a US attorney who agreed to repay the loan, plus interest at a rate in excess of 100%, within a two-month period. The entering into of such an arrangement by the Partnership may be a criminal offense in Canada (under s. 347 of the Criminal Code) and a California court has denied the Partnership's claim for repayment of this "investment" on the basis that it is usurious. This "investment" is not a normal commercial transaction and does not meet the investment criteria set out in the Partnership's OM.
75. The remaining investments of the Partnership (totaling US \$2,100,000) have all allegedly been "rolled" into "Investment Contracts" with a Swiss notary who has since been arrested for financial misdealings. Funds allegedly covered by this agreement were wire transferred from the accounts of North George and the Partnerships to a host of parties around the globe, including Capital Accumulation Company ("CAC"), Intraco Intertrade and Consult AG ("Intraco"), Regal and Primesorb, in addition to the notary himself.
76. It is unclear how the funds transferred are reflected in the "Investment Contracts", how these transactions arose in the first place, who is liable to the Partnerships for the return of the funds, who the parties are, whether they are still in business and solvent or how the Partnerships' funds were "lost".

77. The Principals appear to have connections with a number of the parties who received the wire transfers of the Partnerships' funds in connection with these investments: Magee was a director of CAC, together with an associate of his, Mr. Nael Al-Khleifat. Mr. Al-Khleifat was a signatory for Intraco. Magee has a business card which shows him to be an officer or representative of Primesorb.

Lionaird – Misrepresentations

78. Material misrepresentations regarding the terms of the Lionaird securities were made to Millard, Grisé and other investors by the Principals, Triple A and the Sales Agents. These misrepresentations were calculated to induce, and succeeded in inducing, Millard, Grisé and other investors to purchase the Lionaird securities. These misrepresentations were relied upon causing damage to the plaintiff and other members of the Lionaird Class.

Investment Features

79. Specifically, Millard, Grisé and other investors were advised that (i) they would receive interest on their investment each month, at a fixed rate (1% per month), (ii) the principal amount of their investment was guaranteed and (iii) the investments were redeemable on ninety (90) days notice. All of these representations were false.

Sales Commissions

80. The Offering Memorandums prepared by or on the instructions of the Principals with respect to the sale of the Lionaird securities contained material misrepresentations regarding the benefits accruing to the Principals, Triple A and the Sales Agents in connection with the sale of the Lionaird securities and the management and operation of Lionaird.
81. Specifically, the OM for Lionaird provided that the company would conduct the sale of the securities. No sales commissions were to be payable unless the services of an investment dealer were required, which was "not anticipated". In fact, Lionaird paid or agreed to pay the Sales Agents sales commissions at the rate of 1% at the time of sale plus a "trailing" commission at the rate of 1% per month of the principal amount invested by their clients on every Note sold.
82. Additionally, "sales commissions" of an additional 6% of the face amount of each Lionaird Note was paid to the Principals (2% to each of Alton, Gill and Magee).

Management Fees

83. With respect to management fees, the Lionaird OM states that (i) Gill will provide services relating to office administration and will be remunerated therefor and (ii) Alton, Gill and Magee will provide management services and receive a fee "entirely based on performance" expected to be in the range of 1% to 17% of capital invested. Elsewhere

in the OM, it is stated that all fees, including all sales commissions, will range from 1% to 10% of capital invested.

84. The Principals caused Lionaird to enter into contracts with them personally (or, in the case of Gill, with his company, The Black Dog Company) providing for:
- (a) a management fee of 4% per annum shared by Alton, Gill and Magee;
 - (b) management services payments of US\$10,000 per month to each of Alton, Gill and Magee, plus US\$3,000 per month to Gilmour;
 - (c) signing bonuses to each of Alton, Gill and Magee of US\$120,000;
 - (d) consulting services payments to Gill of not less than US\$5,000 per month.
85. Based on \$4,100,000 of Lionaird Notes sold, 22% (12% to Sales Agents, 10% to the Principals) or \$943,000 was payable "off the top" in the first year. Management fees and consulting fees payable to the Principals in the first year totalled an additional US\$38,000 per month, or US\$456,000, plus signing bonuses of US\$360,000 for a total of US\$816,000 (which equals CDN\$1,142,400 at an exchange rate of CDN\$1.00 equals US\$1.40). In total, these sales and management agreements obliged Lionaird to pay, in the first year of operation alone, \$2,044,400 by way of sales commissions and management fees to the Sales Agents and the Principals, a staggering 50% of the principal amount invested by the investors.

86. Lionaird in fact paid \$966,000 to the Principals and \$365,000 to the Sales Agents. It appears that an additional US\$120,000 was paid to Alton as his signing bonus. This amount was "booked" as an investment in Meridian Capital (US\$120,000). Alton has stated that this investment is "unrecoverable", that is, worthless. In fact, Meridian Capital is Alton's personal offshore holding company and this "investment" represented his signing bonus at the time the transaction was effected.
87. Any management contracts or similar arrangements with officers or directors of Lionaird, an OBCA corporation, require disclosure of conflicts of interest and compliance with s. 132 of the OBCA and By-law No. 1 of Lionaird. In addition, the transactions must be "fair and reasonable" to the corporation, failing which they are void or voidable. These requirements were not met with respect to (i) the payment of sales commissions to Triple A (and its salespersons) and the Principals and (ii) the payment of management and consulting fees (including signing bonuses) to the Principals and companies controlled by them. All of these contracts or arrangements are void or voidable.

Lionaird - Operations - Dealings with Investors

88. Lionaird was operated in the same "Ponzi" or pyramid manner as the Partnerships, namely:
- (a) Lionaird Class members were promised unusually high rates of return (1% per month), in excess of market rates of return for "guaranteed" investments, but supposedly without any additional risk;
 - (b) no proper description of the manner or method by which these unusually high rates of return would be earned was provided to the investors; reference would be made to foreign markets and securities trading systems and mechanisms unavailable to "ordinary" investors and much too complicated for the Lionaird Class members to fully comprehend;
 - (c) Lionaird Class members were advised that they could invest RRSP moneys in Lionaird, although the Lionaird Notes do not appear to be RRSP eligible under the relevant provisions of the Income Tax Act; this opened up access to new funds that were not previously available;
 - (d) Lionaird Class members resident outside of Ontario were also advised that they could purchase Lionaird notes; this also opened up access to new funds;
 - (e) the promised rate of return was paid regularly and promptly prior to commencement of these proceedings;

- (f) this created confidence in the Lionaird Class members that Lionaird was a *bona fide* investment opportunity, and encouraged Lionaird Class members to re-invest their returns, add to their investments with other funds and promote the investment to friends and relatives;
- (g) in fact, these returns were illusory:
 - (i) Lionaird generated earnings which were only a fraction of the amounts paid as interest on the Notes to investors;
 - (ii) to a large extent, the funds paid to the Lionaird Class members constituted a return of their capital investments - not a share of any income or earnings of Lionaird; and
 - (iii) funds from later investors were used to pay returns to early investors, maintaining the illusion of a successful investment;
- (h) Lionaird Class members were never advised by Lionaird, the Principals or the Sales Agents that the company was in any financial difficulty; this allowed the Principals to continue to bring in new investors as late as August, 1998, although the company was clearly insolvent at that point in time and would not be able to repay the Notes it was selling at that time;
- (i) Lionaird Class members wishing to remove their funds were told they cannot do so, despite earlier representations to the contrary; the Notes are called "Redeemable" notes yet there is no redemption provision in favour of the

noteholder prior to a five year maturity date; again, however, investors who made appropriately threatening gestures promising to "disclose" the scheme managed to get repaid;

- (j) once the pyramid got too large, it collapsed under its own weight - there were simply insufficient funds to keep the payments flowing to the Lionaird Class members; Lionaird Class members in Lionaird are owed in excess of \$4,000,000; with luck, Lionaird may have \$1,500,000 of assets to cover this debt.

Lionaird - Operations - Investments

- 89. Lionaird's sole investment of any significant value is a trading account with a maximum value of US\$1,000,000 and CDN\$200,000. This trading account is with a UK outfit run by an individual who resides in the UK. The funds are in Switzerland and Lionaird cannot get an up to date statement of account for weeks, since it must await a visit to Geneva by the account manager. Lionaird put up 100% of the funds in the account yet the fund manager earns 50% of the profits generated.
- 90. The account is not maintained in the name of Lionaird. Rather, Alton is personally shown as the beneficial owner of the account.

G. Fear of Removal or Dissipation of Assets

- 91. Gill holds himself out to be a self-employed provider of business counsel in the areas of offshore jurisdictions for tax planning and asset protection.
- 92. The Principals have all had dealings in Switzerland and elsewhere in connection with placing the investments of the Partnerships and Lionaird.
- 93. Alton invested Lionaird money in an account in Switzerland which he had recorded as being held beneficially by himself personally.
- 94. Investment Contracts with the Swiss Notary provide for payments due to the Partnerships thereunder to be paid to a personal account of Magee at UBS in Zurich.
- 95. Alton has a personal offshore holding company, Meridian Capital Corporation, registered in Nuie in the South Pacific, with a bank account on the Isle of Man, UK.
- 96. Magee has a personal offshore holding company, Highland Capital Corporation, registered in Niue in the South Pacific.
- 97. Alton had correspondence with a lawyer in the Turks and Caicos regarding the creation of another personal holding company.

98. It appears that the Principals attempted to disguise payment by Lionaird to Alton of US\$120,000 of "signing bonuses" by utilizing Solaris Investments SA, a Panamanian company set up by Gill, and circling the funds around the globe through other corporate shells.
99. Solaris was set up by Gill solely for the purpose of diverting income earned by Lionaird from its investments, to an off-shore tax haven.
100. Magee was out of the country in the first week of September, 1998, after this matter had received press coverage, and his counsel (now former counsel) refused to divulge his whereabouts when asked by counsel for the plaintiff.
101. Alton has commenced disposing of his interest in Triple A, completing the sale of 49.9% thereof for \$100,000 in March or April of 1998. Triple A is currently attempting to sell all or substantially all of its assets out of the ordinary course of business and is currently arranging for all of its sales representatives to transfer their authority to sell securities pursuant to the *Securities Act* (Ontario) to another registered dealer.
102. The plaintiff Millard was solicited by Goselin, one of the Sales Agents, to open an offshore account.
103. The Principals have received in excess of \$1,000,000 from North George and Lionaird in the past three years, yet Alton and Magee have represented that they could not (as

opposed to would not) personally pay any fees of an investigator and/or interim receiver in this matter.

[^] 104. The Principals made no disclosure to the investors about the monies they received or the problems associated with the Corporations.

[^] 105. Given the lack of disclosure, self-dealing by the Principals, the misappropriation of funds and the transfer of such funds outside the jurisdiction not in the ordinary course of business, unless the relief sought in this motion is granted, there is a serious risk that the Principals will deal with their assets in a manner to frustrate future orders of the Court.

[^] H. Causes of Action

Against Lionaird

[^] 106. Lionaird issued the Notes to the members of the Lionaird Class:

- (a) in violation of the prospectus requirements of the *Securities Act* (Ontario); and
- (b) based on fraudulent or negligent misrepresentations regarding the terms and conditions of the Notes.

Accordingly, the members of the Lionaird Class are entitled to rescission of the agreements respecting the purchase of the Notes and to the return of all moneys paid to Lionaird in respect of the purchase price for the Notes.

Against the Partnerships

107. The Partnerships issued the Units to the members of the North George Class:

- (a) in violation of the prospectus requirements of the *Securities Act* (Ontario); and
- (b) based on fraudulent or negligent misrepresentations regarding the terms and conditions of the Units.

Accordingly, the members of the Units Class are entitled to rescission of the agreements respecting the purchase of the Units and to the return of all moneys paid to the Partnerships in respect of the purchase price for the Units.

Against North George

108. North George was a promoter of the securities issued by the Partnerships. North George was the general partner of each of the Partnerships, charged with responsibility for the management and administration thereof. In such capacities, North George:

- (a) is responsible for all violations of the *Securities Act* (Ontario) made in connection with the issue and sale of the Units;
- (b) is responsible for all fraudulent or negligent misrepresentations made by or on behalf of the Partnerships in connection with the issue and sale of the Units and the conduct of the business and affairs of the Partnerships;

(c) owed a fiduciary duty to each limited partner to exercise its powers and discharge its duties as general partner honestly, in good faith and in the best interests of the Partnerships and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; it breached this duty and caused loss and damages to members of the North George Class in the method and manner by which it:

- (i) caused the Units to be issued and sold to members of the North George Class; and
- (ii) managed and administered the business and affairs of the Partnerships including, without limitation, by
 - A. allocating 40% of the profits of the Partnerships to itself, without disclosure to members of the North George Class;
 - B. fraudulently, recklessly or negligently investing the assets of the Partnerships;
 - C. borrowing funds from the Partnerships for its own purposes, without the capacity to repay such funds;
 - D. paying sales commissions and management and other fees to the Principals and Sales Agents, contrary to representations made to members of the North George Class, without proper corporate authority and in a manner which was not "fair and reasonable";

and

- E. pretending to pay significant returns to North George Class members as their share of profits or earnings of the Partnership when, in fact, profits of the Partnership were insignificant and these payments were recorded as returns of capital; and
- (d) owed a duty of care to each member of the North George Class, in contract, pursuant to the Partnership Agreements, and in tort, to cause the issuance and sale of the Units and the management and administration of the Partnerships to be carried out and conducted in a manner which would not cause reasonably foreseeable loss or damage to the North George Class members; North George breached this duty of care, causing loss or damage to members of the North George Class.

Against the Principals

- 109. Each of the Principals was a promoter of the Securities issued by Lionaird and each of Alton and Magee was a promoter of the Securities issued by the Partnerships.
- 110. The Principals were the sole shareholders, directors and officers of Lionaird. In such capacity they owed fiduciary duties to the creditors of Lionaird, including all members of the Lionaird Class.

[^] 111. Alton and Magee were the sole shareholders, directors and officers of North George. In such capacity, they owed fiduciary duties to the creditors of North George, including all of the Partnerships.

[^] 112. The Principals carried out the issue and sale of the Securities and the management and administration of the Corporations in such a manner that all tortious acts committed thereby were acts of the Principals personally, not merely acts of the Corporations. The conduct of the Principals was:

- (a) fraudulent;
- (b) deceitful;
- (c) dishonest;
- (d) exhibited a separate, personal, interest or identity from that of the Corporations;
- (e) outside of the scope of their authority on behalf of the Corporations;
- (f) not in the best interests of the Corporations; and/or
- (g) otherwise demonstrative of that level of participation and that degree and kind of personal involvement;

so as to make the tortious acts those of the Principals, personally.

[^] 113. The Principals were the operating minds who guided all aspects of North George and Lionaird. The Principals utilized these corporate vehicles to perpetrate their fraud upon the class members. Accordingly, it is just and equitable that the corporate veils of the Corporations be lifted or pierced and that the Principals be held personally liable for all liabilities of the Corporations.

[^] 114. In the capacities and on the bases set out in paragraphs [^] 109 to [^] 113, inclusive, the Principals:

- (a) are responsible for all losses suffered by all members of the North George Class and the Lionaird Class as a result of the fraud and deceit carried out by the Principals in connection with the issue and sale of the Securities and the management and operation of the Partnerships and Corporations;
- (b) are responsible for all violations of the *Securities Act* (Ontario) made in connection with the issue and sale of the Securities;
- (c) are responsible for all fraudulent or negligent misrepresentations made by or on behalf of the Partnerships or the Corporations in connection with the issue and sale of the Securities and the conduct of the business and affairs of the Corporations and the Partnerships;
- (d) owed a fiduciary duty to each member of the Lionaird Class to exercise his powers and discharge his duties as a director and/or officer in good faith, and in the best interests of Lionaird, and to exercise the degree of care, diligence and

skill that a reasonably prudent person would exercise in comparable circumstances; they breached this duty and caused loss and damages to members of the Lionaird Class by:

- (i) causing the Notes to be issued and sold to members of the Lionaird Class;
 - (ii) fraudulently, recklessly or negligently investing the assets of Lionaird; and
 - (iii) paying sales commissions and management and other fees to the Principals and Sales Agents, contrary to representations made to members of the Lionaird Class, without proper corporate authority and in a manner which was not "fair and reasonable";
- (e) owed a fiduciary duty to each Partnership, the scope and breach of which is described in paragraph [^] 108(c) above;
- (f) owed a duty of care to each member of the North George Class and the Lionaird Class to cause the issue and sale of the Securities and the management and administration of the Corporations and the Partnerships to be carried out in a manner which would not cause reasonably foreseeable loss or damage to such class members; the Principals breached this duty of care, causing loss or damage to the class members;

- (g) are personally liable to restore and disgorge all payments received by them pursuant to void or voidable contracts or arrangements providing for the payment to them of sales commissions, management fees, consulting fees, signing bonuses or other fees or amounts from the Corporations or the Partnerships; and
- (h) are personally liable to make payment to all members of the North George Class and the Lionaird Class of all losses and damages suffered by them resulting from their purchase of the Securities, including payment of all amounts due to all class members arising upon the rescission of all contracts providing for the purchase by them of the Securities.

Liability of the Sales Agents

115. The Sales Agents marketed themselves as financial planners. They represented themselves as skilled, knowledgeable and "independent" advisors. Goselin took all steps to inspire trust from Millard and the other Goselin Subclass members. Dyck took all steps to inspire trust from Grisé and the other Dyck Subclass members. Accordingly, Goselin owed Millard and the other members of the Goselin Subclass and Dyck owed Grisé and the other members of the Dyck Subclass a fiduciary duty, a contractual and tortious duty and a duty pursuant to the *Securities Act* to:

- (a) conduct reasonable due diligence before recommending the purchase of the Securities;

- (b) recommend only investments suitable to their clients, given their investment needs and financial circumstances;
- (c) disclose fully the risks of all investments recommended;
- (d) disclose any conflicts of interests and all compensation received as a result of the recommended investments;
- (e) keep apprised of all material developments with respect to the Securities, the Corporations and the Partnerships and disclose same to their clients; and
- (f) advise and deal with their clients honestly, fairly and in utmost good faith.

[^] 116. The Sales Agents performed no significant due diligence prior to recommending the purchase of the Securities. They received substantial commissions which were not disclosed. They failed to monitor the securities or to disclose the events described above once discovered.

[^] 117. In addition, the Sales Agents not only failed to disclose the risks associated with the Securities, they negligently misrepresented them as being safe, when they were, at best, highly speculative securities.

[^] 118. The Sales Agents negligently misrepresented the most significant terms and conditions of the Securities, regarding their security and liquidity.

119. On any reasonable due diligence, the Sales Agents would have discovered the Principals' breach of duties and, at the very least, the highly speculative nature of the Securities, which made them totally unsuitable for all Class members, particularly those at, or close, to retirement age living off a fixed income. Yet because of the high compensation they were receiving, the Sales Agents negligently recommended the purchase of the Securities to all their clients as safe, secure investments.
120. The Sales Agents failed to disclose that they were acting as salesmen for Triple A and that Triple A was related to the issuers of the Securities.
121. The Sales Agents were aware, or ought to have been aware, that the Securities were being sold in violation of the prospectus requirements of the *Securities Act* (Ontario).
122. The Sales Agents negligently or recklessly misrepresented to the Class that the early returns were "profit" or "interest", when in fact they were not.
123. The Sales Agents thus breached their obligations owed to the members of the Goselin Subclass and the Dyck Subclass, respectively, as set out above, which breach directly caused such class members to suffer loss and damages.
124. Accordingly, Goselin:
- (a) is personally liable to restore and disgorge to the Corporations all payments received by him pursuant to void or voidable contracts or arrangements

providing for the payment to him of sales commissions by the Corporations;
and

- (b) is personally liable to the members of the Goselin Subclass for all losses and damages suffered by them resulting from their purchase of the Securities.

125. As well, Dyck:

- (a) is personally liable to restore and disgorge to the Corporations all payments received by him pursuant to void or voidable contracts or arrangements providing for the payment to him of sales commissions by the Corporations; and
- (b) is personally liable to the members of the Dyck Subclass for all losses and damages suffered by them resulting from their purchase of the Securities.

Liability of Triple A

126. Triple A was a limited market dealer registered pursuant to the *Securities Act* (Ontario).
127. At all material times, Triple A was owned or controlled by Alton.
128. Each of the members of the North George Class and the Lionaird Class was a client or customer of Triple A.

129. Triple A owed Millard and the other members of the North George Class and the Lionaird Class a fiduciary duty, a contractual and tortious duty and a duty pursuant to *Securities Act* to:

- (a) conduct reasonable due diligence before recommending the purchase of the Securities;
- (b) recommend only investments suitable to their clients, given their investment needs and financial circumstances;
- (c) disclose fully the risks of all investments recommended;
- (d) disclose any conflicts of interests and all compensation received as a result of the recommended investments;
- (e) keep apprised of all material developments with respect to the Securities, the Corporations and the Partnerships and disclose same to their clients; and
- (f) advise and deal with their clients honestly, fairly and in utmost good faith.

130. Triple A received management fees in the amount of US\$163,064 and "rent" in the amount of US\$27,010 directly from North George.

131. Triple A failed to disclose that it was related to the Issuers of the Securities.

- [^] 132. Triple A was aware, or ought to have been aware, that the Securities were being sold in violation of the prospectus requirements of the Securities Act (Ontario).
- [^] 133. Triple A is vicariously liable for all breaches of duty, fiduciary and otherwise, by the Sales Agents.
- [^] 134. Triple A breached its obligations to members of the North George Class and the Lionaird Class, as set out above, which breach directly caused such class members to suffer loss and damages.
- [^] 135. Accordingly, Triple A:
- (a) is liable to restore and disgorge to the Corporations all payments received by them pursuant to void or voidable contracts or arrangements providing for the payment to them of sales commissions by the Corporations; and
 - (b) is liable to the members of the North George Class and the Lionaird Class for all losses and damages suffered by them resulting from their purchase of the Securities.

Liability of the Lawyers – McGillen – North George Class

- [^] 136. McGillen was the lawyer for the Partnerships and thus owed a fiduciary duty and duty of care to both the general partner, North George, and to the limited partners, all of whom are members of the North George Class.

137. McGillen provided legal advice to the Partnerships respecting the sale of the Units, including preparation of the Partnership OM's and Partnership Agreements. As a result, McGillen had an obligation and a fiduciary duty to:

- (a) perform adequate due diligence to ensure that North George was a legitimate investment vehicle and that the sale of Partnership Units was not part of some fraudulent scheme;
- (b) ensure that the OM's and the proposed method of raising capital from the public complied with the Securities Act (Ontario) and provided prospectus-like disclosure;
- (c) because he prepared and permitted the Partnership OM to be distributed with the featured protection that no Partnership funds were to be invested outside of Canada until he was personally satisfied that all conditions with respect to the requisite guarantees and/or letters of credit referred to in the OM had been met, to so satisfy himself of the conditions in the OM and to personally hold the letter or letters of credit; and
- (d) to ensure that the Partnership OM accurately reflected the terms of the Partnership Agreement, as drafted by him.

138. McGillen failed to conduct sufficient or any due diligence with respect to North George. This breach of duty enabled the Principals and Sales Agents to perpetrate the

pyramid or Ponzi scheme thereby causing the North George Class member investors to incur substantial damages.

139. McGillen knew or ought to have known that the sale of the Units did not comply with the *Securities Act* (Ontario). McGillen's conduct in facilitating the sale Units given this knowledge constitutes negligence and a breach of his fiduciary duty.

140. Given that he prepared the Partnership Agreement, McGillen knew or ought to have known that the Partnership OM was inaccurate in several material ways as noted above. McGillen's failure to ensure that the Partnership OM was accurate or to correct it once he discovered the inaccuracies constitutes negligence and a breach of his fiduciary duty.

141. McGillen failed to ensure that no Partnership funds left Canada until he was satisfied that the conditions in the Partnership OM had been complied with.

142. The foregoing breaches of duty, contractual and/or fiduciary, were a direct cause of the damages suffered by Millard and the other members of the North George Class.

Liability of the Lawyers – Stewart – North George Class

143. In or about September, 1996, Stewart was retained as the lawyer for the Partnerships and thus owed a fiduciary duty and duty of care to both the general partner, North

George, and to the limited partners, all of whom are members of the North George Class.

144. Stewart was specifically retained to advise the Partnerships respecting compliance with the *Securities Act* (Ontario) in connection with the sale of the Units.

145. As a result, Stewart had an obligation to:

- (a) perform adequate due diligence to ensure that North George was legitimate and that the sale of Partnership Units was not part of some fraudulent scheme; and
- (b) ensure that the OM's and the proposed method of raising capital from the public complied with the *Securities Act* and provided prospectus-like disclosure.

146. Stewart failed to conduct sufficient or any due diligence with respect to North George. This breach of duty enabled the Principals and Sales Agents to continue to operate their investment scheme thereby causing the investors who purchased Units after the date of Stewart's retainer to incur substantial damages.

147. Stewart knew or ought to have known that the Partnership OM was inaccurate in several material ways as noted above and that the distribution of Units by any of the Partnerships formed after the date of Stewart's retainer was contrary to the provisions of the *Securities Act* (Ontario). Stewart's failure to ensure that the Partnership OM was accurate or to correct it once he discovered the inaccuracies and his failure to advise

the Partnerships of the illegal nature of the continuing distribution of Units constitutes negligence and a breach of his fiduciary duty.

[^] 148. These breaches of duty, contractual and/or fiduciary, was a direct cause of the damages suffered by Millard and the other members of the North George Class.

Liability of the Lawyers – Stewart – Lionaird Class

[^] 149. Stewart was the lawyer for Lionaird and owed a fiduciary duty and duty of care to Lionaird.

[^] 150. Stewart was retained to incorporate Lionaird and to advise Lionaird in connection with the sale of the Notes.

[^] 151. As a result, Stewart had an obligation to:

- (a) perform adequate due diligence to ensure that Lionaird was legitimate and that the sale of Notes was not part of some fraudulent scheme;
- (b) ensure that the proposed method of raising capital from the public by the sale of Notes complied with the *Securities Act*; and
- (c) once Stewart was advised that Lionaird had been created for the purpose, among others, of raising money held in RRSP accounts, ensure that the representations made by Lionaird with respect to the Notes being RRSP eligible was accurate.

[^] 152. Stewart failed to conduct sufficient or any due diligence with respect to Lionaird. This breach of duty enabled the Principals and Sales Agents to perpetrate the pyramid or Ponzi scheme thereby causing the Lionaird Class members to incur substantial damages.

[^] 153. Stewart knew or ought to have known that Lionaird could not utilize the "seed capital" exemption in clause 72(1)(p) of the *Securities Act* (Ontario) due to the known prior activities of the promoters in North George. Stewart failed to advise Lionaird accordingly.

[^] 154. Stewart knew or ought to have known that even if Lionaird could have utilized this prospectus exemption,

- (a) it could only sell Notes to sophisticated investors; and
- (b) it could not sell Notes to more than 25 investors.

Stewart failed to advise Lionaird accordingly.

[^] 155. Stewart knew, or ought to have known, that Lionaird Notes did not qualify as RRSP eligible investments. Stewart failed to advise Lionaird accordingly.

[^] 156. As a result of the negligent advice provided by Stewart to Lionaird, Lionaird illegally sold Notes to the Lionaird Class members.

157. Stewart was in a special relationship with the Lionaird Class members and owed each of them a duty of care for the following reasons:

- (a) Stewart met with the Lionaird Class members or some of them;
- (b) Stewart received funds into its trust account for the purchase of Notes from the Lionaird Class members or some of them;
- (c) Stewart knew or ought to have known that the Lionaird Class members were unrepresented by independent legal counsel;
- (d) Stewart knew or ought to have known that the Lionaird Class members were proceeding under the impression that their interests were being protected by Stewart;
- (e) Stewart failed to urge the Lionaird Class members to obtain independent legal advice regarding matters relating to their purchase of Notes;
- (f) Stewart ought to have provided a legal opinion to each Lionaird Class member that the sale of the Notes to them complied with the Securities Act (Ontario); if it did so, such opinion was incorrect and negligently prepared; if it did not do so, it had a duty to warn each Lionaird Class member that it was entitled to such an opinion and to seek independent legal advice with respect thereto;
- (g) it was reasonably foreseeable to Stewart that the Lionaird Class members would purchase Notes based on the advice provided by Stewart to Lionaird; and

(h) but for the negligent advice of Stewart, Lionaird would not have been able to sell Notes to the Lionaird Class members.

158. Accordingly, Stewart owed a duty of care to each Lionaird Class member which duty was breached by the negligent acts and omissions of Stewart.

159. These breaches of duty, tortious and/or fiduciary, were a direct cause of the damages suffered by Millard and the other members of the Lionaird Class.

Liability of the Accountants

160. McColl was the accountant to the Partnerships and thus owed a fiduciary duty and duty of care to both North George, the general partner, and the members of the North George Class in their capacity as limited partners.

161. McColl had a duty to perform a minimum level of due diligence to satisfy itself that the Partnerships and their investments were legitimate and not simply vehicles to perpetrate a fraud. McColl failed to perform any due diligence and thus breached its obligations, thereby causing damages to Millard and the other members of the North George Class.

162. McColl prepared the Partnership statements in an unusual manner providing more information to the Principals than it provided to Millard or the other members of the North George Class. By doing so, McColl assisted the Principals in their efforts to

mislead the investors as to the true state of affairs. Such conduct constitutes a breach of the duty to disclose and highlight any unusual transactions.

163. McColl also prepared the Statements of Partnership Income distributed to each member of the North George Class annually for purposes of preparing their individual tax returns. McColl knew, or ought to have known, that the members of the North George Class had been advised, and believed, that amounts received by them from the Partnerships represented profits or earnings on their investments. McColl also knew that, in fact, such amounts represented primarily a return of capital and were reflected as such on the books and records of the Partnerships. By failing to warn or advise the North George Class members of the true state of affairs, McColl assisted the Principals in their efforts to mislead the North George Class members. Such conduct constitutes a breach of their fiduciary duty or duty of care which they owed to the North George Class members.

Liability of M.R.S.

164. Each of the RRSP Subclass members was advised by Lionaird and the Sales Agents that the Notes were eligible investments for a registered retirement savings plan (an "RRSP"), as such term is defined for purposes of the Income Tax Act (Canada) (the "ITA").

165. Each of the RRSP Subclass members were further advised by Lionaird and the Sales Agents that:

- (a) M.R.S. would act as trustee for each new RRSP to be created for the purpose of acquiring Notes;
- (b) Lionaird and M.R.S. had settled the documentation necessary to complete the creation of the new RRSP's and the purchase by such RRSP's of Notes for and on behalf of the RRSP Subclass members;
- (c) all that the RRSP Subclass members had to do was complete and sign the documents and forward the purchase price for the Notes to M.R.S., either by transferring funds from a pre-existing RRSP or by making a fresh RRSP contribution.

166. Each of the RRSP Subclass members completed and signed the documents and forwarded funds to M.R.S. as required.

167. Each RRSP so created established a trust with respect to which:

- (a) M.R.S. was appointed as trustee;
- (b) the relevant RRSP Subclass member was the beneficiary;
- (c) the funds transferred to M.R.S. comprised the property of the trust; and
- (d) the purpose of the trust was to provide the RRSP Subclass member with a retirement income from the trust property and, prior to the commencement of payment of such retirement income, to provide tax benefits to the RRSP Subclass member by deferring tax on the income earned by the trust, all in compliance with the provisions of the ITA.

168. M.R.S. is a trust company authorized to carry on in Ontario the business of offering to the public its services as trustee. It was paid fees by each of the RRSP Subclass members for the trust services it provided to them. M.R.S. held itself out as having expertise in the administration of trusts generally and in the administration of the specific kinds of trusts which constitute RRSP's.

169. M.R.S. committed a breach of trust when it transferred the trust property in each trust to Lionaird in exchange for Notes. The Notes are not now, and were not at the date of purchase, eligible investments for an RRSP to acquire. The ITA imposes severe consequences on the beneficiary of an RRSP when RRSP assets are applied to non-eligible investments. Accordingly, the acquisition of the Notes was contrary to the primary purpose of each trust and in violation of the terms of the trust.
170. M.R.S. was also in breach of its duty of care owed by it as trustee to each of the RRSP Subclass members, as beneficiaries.
171. M.R.S. knew or ought to have known that the Notes, being promissory notes issued by a private corporation, were not eligible investments for RRSP's.
172. In addition, there were sufficient facts and circumstances present to cause M.R.S. to be concerned about the eligibility of the Notes for investment by RRSP's. Accordingly, M.R.S. had a duty to take care to investigate whether or not the Notes were so eligible for investment. M.R.S. failed to discharge this duty.
173. The Notes clearly constituted a type of security (promissory notes issued by a private corporation) with respect to which M.R.S. could have had no prior experience in purchasing for RRSP's administered by it. This factor alone should have put M.R.S. on notice that the proposed transactions were unusual and outside the normal course of its business, warranting further care, investigation and veracity.

174. Since the purchase of the Notes for the RRSP's of the RRSP Subclass members was outside of the ordinary and normal course of business of M.R.S., it became necessary for M.R.S. to develop, with Lionaird, special "Unit Certificates" and other documentation to complete the purchase of Notes for these RRSP's. M.R.S. clearly determined that it could not hold the Notes directly, but rather required another legal instrument, the "Unit Certificate", to indirectly hold the Notes in the RRSP accounts. This factor alone also should have put M.R.S. on notice that the transactions were unusual and outside the normal course of its business, warranting further care, investigation and veracity.
175. The "Unit Certificates" state that M.R.S. is the "registered holder" of the Notes. This statement is clearly and obviously false, and M.R.S. knew or ought to have known that the statement was false. The Note attached to each certificate is registered in the name of and made payable to the RRSP Subclass member, not M.R.S. No effort was made to endorse the Notes to M.R.S., to assign the Notes to M.R.S. or to re-register the Notes in the name of M.R.S. Any registers maintained by Lionaird showed the Notes as payable to the RRSP Subclass members, not M.R.S. M.R.S. failed to notice that the special documentation it created for this unique transaction was inappropriate for the purposes thereof.
176. The "Unit Certificates" further state that "Reference is made to the Subscription Agreement and all instruments supplemental thereto for a description of the terms, conditions and provisions under which this certificate and all other certificates

representing notes are issued and held and the rights and obligations of the holders of Notes". This statement is also clearly and obviously false, as the Subscription Agreements make no mention of any kind to the "Unit Certificates". Again, M.R.S. failed to notice that the special documentation it created for this unique transaction was false on its face and inappropriate for the transactions in respect of which it was prepared.

177. The "Unit Certificates", in stating that there are "conditions" applicable to the Notes which do not appear on the face thereof, threaten the status of the Notes as "promissory notes" within the meaning of Article 176 of the Bills of Exchange Act (Canada), with all the attendant rights and remedies thereof. The definition of a "promissory note" requires an "unconditional" promise to pay. Again, M.R.S. failed to notice that the special documentation it created for this unique transaction was inappropriate for the purposes thereof.

178. In connection with each purchase of Notes by M.R.S. on behalf of RRSP Subclass members, M.R.S. caused Lionaird to represent to it that "Lionaird is an eligible corporation within the meaning assigned by subsection 5100(1) of the Regulations made pursuant to the [ITA]". M.R.S. knew or ought to have known that this representation had no bearing whatsoever on the eligibility of the Notes for purchase by an RRSP. Again, M.R.S. failed to notice that the special documentation it created for this unique transaction was inappropriate for the purposes thereof.

179. The numerous errors, inconsistencies, false statements and inappropriateness of the special documentation created or approved by M.R.S. for these particular transactions should have put M.R.S. on notice that the transactions were unusual and outside the normal course of its business, warranting further care, investigation and veracity.

180. In each Subscription Agreement, M.R.S. represented that:

"it has been advised to seek independent legal advice from such persons as it deems fit and reasonable, that it has sought such independent advice, as it deems necessary and prudent, upon which it is relying"

Either this representation made by M.R.S. was clearly and obviously false or M.R.S. knew or ought to have known, in reliance on such independent legal advice, that the Notes were not eligible investments for RRSP's.

181. But for the negligence of M.R.S., the RRSP Subclass members would never have been able to invest their RRSP moneys in Notes. It is only through and as a result of the actions taken by M.R.S. to set up this "program" with Lionaird and to facilitate the application of RRSP moneys to the purchase of Lionaird Notes that the RRSP Subclass members have suffered the loss of their RRSP property and consequential damages.

182. As set out below, M.R.S. breached other duties it owed to members of the RRSP Subclass apart from its duties regarding the eligibility of the Notes for investment by RRSP's.

183. M.R.S. had no direct dealings with the RRSP Subclass members regarding the creation of the trusts. All of its dealings were with Lionaird. M.R.S. never met with any of the RRSP Subclass members, never contacted them by phone, never determined whether the RRSP Subclass members had the capacity to establish the trusts or whether they otherwise understood the nature and extent of their rights and obligations under the trust.

184. M.R.S. never communicated to the RRSP Subclass members the precise terms of the trusts, by providing written copies of the trust agreement or otherwise.

185. M.R.S. never advised the RRSP Subclass members that a purchase of Notes in an M.R.S. administered RRSP would result in the RRSP Subclass members receiving Notes with different terms and conditions from Notes issued to other investors. In fact:

(a) non-RRSP investors received Notes containing a provision securing the obligations of Lionaird under such Notes by the grant of a security interest over all of the property and assets of Lionaird; the Notes issued to M.R.S. contain no such grant of a security interest; and

(b) non-RRSP investors received a contractual right of action in their Subscription Agreements as contemplated by section 32 of the Regulation passed pursuant to the Securities Act (Ontario); the Subscription Agreements signed by M.R.S. contain no such provision;

These differences are materially adverse to the interests of the RRSP Subclass members.

186. M.R.S. was advised, at least as early as August 3, 1998 that there were significant financial difficulties being experienced by Lionaird. On that date, M.R.S. was advised by Lionaird that a "freeze" was put into effect, thereby canceling a proposed purchase

of Notes by an M.R.S. client. M.R.S. failed to take any action to protect the trust property then or ever, or to advise the RRSP Subclass members to take action to protect their investments. M.R.S. to this date has acted as if it had no responsibility or duty to take any steps at all regarding the protection of the assets held by it in trust for the RRSP Subclass members.

187. As a result of the aforementioned breaches of trust and breaches of the duty of care owed by M.R.S. to each of the RRSP Subclass members, M.R.S. is liable to the members of the RRSP Subclass for all losses and damages suffered by them resulting from the purchase of Notes by their RRSP accounts.

I. Damages

188. As a result of the defendants' breach of duty, the plaintiffs have lost virtually all of their investments in the Notes and Units.

189. The plaintiffs also claim that in all the circumstances, the fraudulent and high-handed conduct of the defendants makes it appropriate for an award of punitive damages.

190. The plaintiffs propose that this action be tried at the City of Toronto.

Date: November 16, 1998

Smith Lyons
Barristers and Solicitors
Suite 5800, Scotia Plaza
40 King Street West
TORONTO, Ontario
M5H 3Z7

Steven Sofer

telephone: (416) 369-7240
facsimile: (416) 369-7250

Jeffrey D. Glatt
Barrister and Solicitor
506 Russell Hill Road
Toronto, Ontario
M5P 2S9

telephone: (416) 484-7498
facsimile: (416) 484-8169

Solicitors for the plaintiffs

Court File No.:

Millards
v. **North George Capital Management Limited Partnership,
Lionaird Capital Corp.**
- Defendants -

- Plaintiff -

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

(PROCEEDING COMMENCED AT TORONTO)

AMENDED STATEMENT OF CLAIM

SMITH LYONS
Barristers and Solicitors
Suite 5800, Scotia Plaza
40 King Street West
TORONTO, Ontario

M5H 3Z7

Steven Sofer

Telephone: (416) 369-7240

Facsimile: (416) 369-7250

SOLICITORS FOR THE PLAINTIFFS