

Banyan Tree donors file class action

BY STEVE ARNOLD

It was supposed to be the deal of a lifetime — put down less than \$30,000 in cash and get a tax receipt for \$100,000.

Today, the young Oakville couple who bought that dream are the lead names in a Hamilton law firm's planned nationwide class action suit looking for more than \$50 million in damages.

At the centre of the action is Toronto-based Banyan Tree Foundation. Last year it was ranked as the third largest charity in Canada because of the volume of money it raised, but today it faces being cut from the country's list of approved charities and as many as 65,000 people who donated to it and similar programs face having to pay up to \$63 million in back taxes plus penalties and interest.

Lawyer David Thompson, of the Hamilton firm of Scarfone Hawkins, is hoping to sign up hundreds of those donors.

"These are people who had legitimate donative intent, who thought they were going to get a tax receipt, but now those donations are being

disallowed," he said. "The Canada Revenue Agency is taking the position that this whole thing is a sham."

Kathryn and Rick Robinson, the Oakville couple who have become the lead plaintiffs in the suit, are typical of the people ensnared in the plan.

It worked like this: in exchange for putting down small amounts of cash as a donation and a security payment, donors to the Banyan program could then take out a larger loan from a related company and claim the entire amount as a tax deductible donation to charity. The security deposit was to be invested for the benefit of all participants.

According to their statement of claim, which has yet to be proven in court, the Robinsons took part in the program for three tax years. They pledged a total of \$90,000 in charitable donations, putting down more than \$34,000 in cash, taking out \$103,000 in loans and getting a tax receipt for more than \$120,000.

That pot of gold turned into a chamber pot when the Canada Revenue Agency refused to allow the tax deductions on the grounds the company through which the loans were

arranged didn't have the money, so rather than cash for charity, all that was generated was a circle of accounting entries.

The Robinsons were ordered to pay back more than \$21,000 in taxes and interest for one year, with the warning reassessments were coming for other years they took part in the program.

The Robinsons refused to be interviewed for this article.

The statement of claim in the lawsuit also names Promittere Capital Group Inc., Promittere Asset Management Ltd., Rochester Financial Limited and the Toronto law firm of Fraser Milner Casgrain LLP. It is accused of issuing favourable tax opinion letters on the program.

Also named is Robert Thiessen, of Toronto. He is identified as an officer and director of Promittere Capital and Promittere Asset as

well as president and director of Banyan Tree.

Adding insult to injury, the suit also alleges the security deposits paid by participants have been

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— David Thompson

"compromised" — the investment manager who was supposed to be overseeing them was charged last year with fraud and theft by Toronto police. He's accused of using investor money to cover large losses in trades on the Chicago

Mercantile Exchange and to finance his personal lifestyle. The case has not yet been heard.

Thiessen did not return a telephone call seeking comment, but in a letter to donors posted on the foundation's Internet site he vows "the Foundation is defending its donors against any CRA reassessments. But all of you should know that we have always been, and will continue to be, absolutely above

board in how we structure and present our program. Our only priority is to ensure that the many charities we support receive the donations they so dearly need."

Since 2002, the foundation claims to have received cash donations of more than \$136 million, in-kind donations of more than \$67 million and to have given more than \$149 million to recipient charities. In the same period, it says, it has issued \$208 million in donation receipts. Of that, 32 per cent went into annuities for long-term charity funding, 40 per cent went out as cash payments and 26 per cent was held "as foundation assets for future charitable activities."

Payments to charities have been frozen pending the outcome of the challenge to the CRA ruling.

"When we win the appeal the monies will be released to the various charities as committed. In the meantime, we are extremely concerned about the devastating effect on these charities and those they help."

sarnold@thespec.com
905-526-3496