

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

SVETLANA DANILOVA AND PAVEL DANILOV

Plaintiffs

- and -

ALLA NIKITYUK, VALENTIN NIKITYUK, YANA SKYBIN,
YOUNG MENS CHRISTIAN ASSOCIATION
operating as YMCA SIMCOE/MUSKOKA AND YMCA
SIMCOE/MUSKOKA NEWCOMER SERVICES

Defendants

AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM

of the Defendants Alla Nikityuk and Valentin Nikityuk

1. The Defendants Alla Nikityuk and Valentin Nikityuk (the "Defendants"), admit the allegations contained in the Statement of Claim at paragraphs 2 (except the date of immigration to Canada), 3, 4, 5, and 6 (the part about Yana Skybin being an employee of the YMCA only), 10 (first sentence only), 14 (first sentence only) and 27.
2. The Defendants deny the allegations contained in paragraphs 1, 9, 10 (second and third sentences only), 11, 12 (fourth and fifth sentences only), 13 (third sentence only), 14 (second sentence only), 15, 16 (first, second,

third, and fourth sentences only), 17, 18, 19, 20 (first sentence only), 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

3. The Defendants have no knowledge in respect of the allegations contained in paragraphs 2 (other than admitted in paragraph 1 above), 6 (other than admitted in paragraph 1 above), 7 and 8. 4, 10, 12 (first, second and third sentences only), 13 (first and second sentences only), 16 (fifth sentence only), 20 (second sentence only).

4. The Statement of Claim contains two paragraphs numbered 5, one on page 4 and another on page 5:

a. with respect to paragraph 5 on page 4, the Defendants admit the allegations:

b. with respect to paragraph 5 on page 5, the Defendants deny the allegations in the second sentence and have no knowledge with respect to the allegations in the first, third and fourth sentences.

5. The Statement of Claim contains two paragraphs numbered 6, one on page 4 and another on page 5:

- a. with respect to paragraph 6 on page 4, the Defendants have no knowledge of the allegations;
 - b. with respect to paragraph 6 on page 5, the Defendants have no knowledge with respect to the allegations contained in the first, second and third sentences and deny the allegations made in the fourth and fifth sentences.
6. The Statement of Claim contains two paragraphs numbered 7, one on page 4 and another on page 6:
- a. With respect to paragraph 7 on page 4, the Defendants have no knowledge with respect to the allegations;
 - b. with respect to paragraph 7 on page 6, the Defendants have no knowledge with respect to the allegations.
7. The Statement of Claim contains two paragraphs numbered 8, one on page 4 and another on page 6:
- a. With respect to paragraph 8 on page 4, the Defendants have no knowledge with respect to the allegations;

- b. with respect to paragraph 8 on page 6, the Defendants admit the allegations in the first, second, third and fourth sentences and have no knowledge with respect to the allegations in the fifth sentence.
8. The Statement of Claim contains two paragraphs numbered 9, one on page 5 and another on page 6:
- a. With respect to paragraph 9 on page 5, the Defendants admit the allegations in the third sentence, have no knowledge with respect to allegations in the first, second and fourth sentences, and deny the allegations in the fifth sentence:
 - b. with respect to paragraph 9 on page 6, the Defendants deny the allegations.

Alla and Valentin Nikityuk

- 9. The Defendant Alla Nikityuk is a 73 year old woman and wife to Valentin Nikityuk. She is the biological mother of the Plaintiff Svetlana Danilova.
- 10. The Defendant Valentin Nikityuk is a 75 year old man and husband to Alla Nikityuk.

11. The Defendants were born and spent all of their lives in Russia until they immigrated to Canada in 2008. Both were employed in Russia as professional engineers up until their respective retirements.
12. The Defendants do not read, write, speak or understand English.

Relevant events in Russia

13. In or around 2004, the health of the Defendants deteriorated. The Defendant Alla Nikityuk was diagnosed with cancer. Both Defendants underwent various costly surgeries and were prescribed expensive medications.
14. In or around 2004, the Plaintiff Svetlana Danilova proposed sponsoring the Defendants as Family Class immigrants to Canada.
15. In and around October 27, 2004, a Citizenship and Immigration Canada Sponsorship Agreement (the "Sponsorship Agreement") was completed, naming the Defendant Alla Nikityuk as the primary applicant and the Plaintiffs as the sponsors.

16. The Sponsorship Agreement included an undertaking by the Plaintiffs to provide for the Defendants' basic requirements for a period of 10 years following the day on which they became permanent residents of Canada.

17. In or around 2007, the Plaintiff Svetlana Danilova began sending the Defendants monthly gifts of money – approximately \$100 to \$200 Canadian – to help cover the cost of medications associated with the cancer treatment of the Defendant Alla Nikityuk. These monthly gifts stopped when the Defendants immigrated to Canada in June 2008.

18. On January 27, 2008, an email written in Russian was sent to the Defendants by the Plaintiff Pavel Danilov proposing an investment scheme managed by the Plaintiffs (the "Offer"). In the Offer, the Plaintiff Pavel Danilov:
 - a. proposed an annual living budget for the Defendants in Canada of \$24,900 a year, which would be financed primarily by interest earned on the Defendants' money when invested with the Plaintiffs; and

 - b. offered the Defendants several alternative "investments" with different risk and return options, including the option of a 10% annual interest rate, which was described as a "risk free option".

19. Sometime in February 2008, the Defendant Alla Nikityuk verbally accepted the Offer in a telephone conversation with the Plaintiff Svetlana Danilova, choosing the option that promised a risk-free 10% annual interest rate (the accepted Offer being referred to as the “Agreement”). The Defendants agreed to sell all their assets – being a two-room apartment, garage and summer cottage in St. Petersburg – as well as a car owned by the Defendant Valentin Nikityuk and invest the proceeds with the Plaintiffs on these terms.
20. After February 2008, no further agreement was made between the Plaintiffs and Defendants, either verbally or in writing, with respect to the Defendants’ money or investment.
21. In or around April 2008, the Plaintiffs notified the Defendants that their immigration sponsorship application had been accepted.
22. Following news of the sponsorship approval, the Defendants sold their assets in Russia and, relying on the terms set out in the Agreement, the Defendant Valentin Nikityuk wire-transferred \$260,842. 71 in United States Dollars (hereinafter “the Savings”) to the Plaintiff Svetlana Danilova’s TD Canada Trust account (Account No.: 00482-004-714578) in four instalments:
 - a. \$ 14,117.00 USD on April 21, 2008;

- b. \$ 31,000.00 USD on May 15, 2008;
- c. \$107,841.00 USD on May 27, 2008; and
- d. \$107,884.71 USD on June 9, 2008.

Relevant events in Canada

- 23. The Defendants arrived in Canada on June 13, 2008.
- 24. For approximately two months, the Defendants lived with the Plaintiffs, sleeping in the living room of the Plaintiffs' rented apartment in Etobicoke. The Plaintiffs did not offer to rent another apartment for the use of the Defendants.
- 25. The Defendants state that, upon their arrival in Canada, the Plaintiffs reported that part of their Savings had been used to purchase lands and premises municipally known as 1490 Rankin Way, Innisfil, Ontario and legally described as "LT 57, PL 51M892, S/T EASEMENT FOR ENTRY UNTIL 2013/08/15 AS IN SC672893; INNISFIL`, PIN 58075-0631 (LT)" (the "House"), and that a single dwelling premises on this land was still under construction at that time. The Plaintiffs told the Defendants that the

- House had been purchased with the Savings in the name of the Defendant Valentin Nikityuk. The Plaintiffs also told the Defendants that the balance of the Savings was invested in a “pension fund” to pay for living expenses.
26. On or around August 2008, the Defendants moved into the House. The Plaintiffs continued to live in Etobicoke, but used the House as a recreational property on weekends.
 27. The Defendants primarily lived on the proceeds of their Russian pension, which combined ranged approximately between \$1,800 and \$1950 every three months depending on exchange rate fluctuations. The Russian pension was deposited into a bank account controlled by the Plaintiff Svetlana Danilova.
 28. In addition to the Russian Pension, the Defendants also had access to a vehicle leased by the Plaintiffs. The Plaintiffs also paid for gas and car insurance. The Plaintiffs would also purchase groceries for the Defendants each week, which the Defendants estimate did not total more than \$200 each month.
 29. In or around July 2008, the Defendant Valentin Nikityuk obtained a valid Ontario driver’s licence, which he has maintained at all times since. The Defendants regularly drove around Barrie and Innisfil without the company

of either of the Plaintiffs. The Defendants were at all times fully able to and, in fact, did travel in and around Barrie and Innisfil without the assistance of the Plaintiffs.

30. On or around June 1, 2009, the Plaintiffs moved into the House with the Defendants.

31. The Defendants state that they were physically and verbally abused by Plaintiffs during the period between June 1, 2009 and October 17, 2011. On or around October 24, 2011, the Defendants moved out of the House under the protection of a police escort.

Alla and Valentin Nikityuk's missing Savings

32. The Plaintiffs breached the terms of the Agreement by failing to provide the promised 10% annual return on the Savings.

33. The Plaintiffs refused and continue to refuse to return the Savings to the Defendants.

34. The Plaintiffs have failed to provide an accounting of the Savings.

Defendants' response to Plaintiffs' claim

35. The Defendants deny that the Sponsorship Agreement makes them ineligible to apply for “government services available in Canada which would allow the parents to live independently from the Plaintiffs”. The Defendants rely on the provision of the Sponsorship Agreement stating that sponsored persons who are being abused by their sponsors should seek safety away from their sponsors even if this means the sponsored persons have to apply for social assistance.
36. The Defendants deny the Plaintiffs’ claim for damages.
- a. The Defendants specifically deny that they have breached an agreement with the Plaintiffs.
 - b. The Defendants deny that the Plaintiffs have incurred a loss.
 - c. Alternatively, the Defendants state that the Plaintiffs are the sole cause of any loss incurred by them.
 - d. The Defendants deny that an apartment had been rented for them by the Plaintiffs upon their arrival to Canada in 2008.
 - e. Alternatively, the Defendants state that any loss arising from the apartment allegedly rented for their benefit would have been incurred

in 2008. The Plaintiffs did not commence this action until May 6, 2012, more than two years after the statutory limitation period. The Defendants rely on the *Limitations Act, 2002*.

- f. The Defendants deny entering into an agreement with the Plaintiffs for out-of-Canada support. The out-of-Canada support provided by Defendants to the Plaintiffs were gifts made without consideration.

- g. Alternatively, the last out-of-Canada support payment made by Plaintiffs was in 2008. The Plaintiffs did not commence this action until May 6, 2012, more than two years after the statutory limitation period. The Defendants rely on the *Limitations Act, 2002*.

- h. The Defendants deny entering into a contract with the Plaintiffs to lease a car in the name of Plaintiffs and/or to insure the same except as set out in the Agreement.

- i. In the alternative, the Defendants state that it is the Plaintiffs' breach of the Agreement that is the cause of any loss to date or future loss attributed to the car lease payments and car insurance.

- j. The Defendants deny that the Plaintiffs have incurred a loss to-date in second household expenses.
 - k. In the alternative, the Defendants state that it is the Plaintiffs' breach of the Agreement that is the cause of any loss to-date or future loss attributed to second household expenses.
 - l. The Defendants deny that the difference of future tax returns constitutes a cause of action.
 - m. Alternatively, the Defendants deny that the Plaintiffs will incur a future loss from the difference in tax returns.
 - n. In the further alternative, the Defendants state that it is the Plaintiffs' breach of the Agreement that is the cause of any future loss from the difference in tax returns.
37. The Defendants respond to claims made the Plaintiffs' Amended Amended Statement of Claim:
- a. The Defendants deny that the Plaintiffs have incurred a loss.
 - b. Alternatively, the Defendants state that the Plaintiffs are the sole cause of any loss incurred by them.

- c. In the further alternative, the Defendants state the Plaintiffs failed to act reasonably in mitigating any loss incurred. The Defendants deny the Plaintiffs' claim for damages. Specifically, the Defendants deny that they have:
- i. breached a contract with the Plaintiffs;
 - ii. breached a duty of care to the Plaintiffs;
 - iii. made fraudulent or negligent misrepresentations;
 - iv. defamed or libelled the Plaintiffs;
 - v. acted negligently or otherwise tortiously with respect to the Plaintiffs;
 - vi. breached the Plaintiffs' trust;
 - vii. owed the Plaintiffs a fiduciary duty;
 - viii. conspired with any party and particularly "Ms. Skybin and YMCA" to cause the Plaintiffs harm; or
 - ix. harassed the Plaintiffs or acted in a manner that constitutes nuisance at law.
- d. In the alternative, by October 9, 2011, at the latest, the Plaintiffs were in possession of all the information they needed to know if they had the claims against the Defendants that are specifically denied in paragraph

27 above. The Plaintiffs did not commence this action until October 10, 2013. The Plaintiffs' claims are statute-barred, and the Plaintiff pleads and relies on the *Limitations Act, 2002*.

- e. Further, or in the alternative, the Plaintiffs have delayed unduly in bringing this action and are precluded by their knowledge of events and lack of action from asserting this claim. The Defendants rely on the doctrines of waiver, estoppels, laches, acquiescence and ratification.
- f. The Defendants specifically deny that an agreement was made with the Plaintiffs about the contents of the Defendants' wills.
- g. The Defendants specifically deny that the Plaintiffs offered an opportunity to move to a purchased condominium and that no such offer was rejected by the Defendants.
- h. The Defendants specifically deny purchasing "expensive gifts" for Yana Skyin

Alleged defamation

- i. Pursuant to a demand for particulars, the Plaintiffs particularized the following allegations of defamation (collectively, the "Particularized Communications") that the Defendants stated the Plaintiffs:
 - i. are individuals of bad character,
 - ii. emotionally abused the Defendants,

- iii. physically abused the Defendants and caused the Defendants physical injuries.
 - iv. had stolen the Defendants' money.
 - v. had breached their fiduciary duties, acting without the Defendants' authority.
 - vi. had stolen the Defendants' home, and
 - vii. did not provide the Defendants with financial support; and
- j. Pursuant to a demand for particulars, the Plaintiffs allege that the Defendants made the "Particularized Communications as follows:
- i. in writing (document marked "CLIENT REPORT TO OW"), dated November 2, 2011;
 - ii. in writing to Ontario Works, dated December 20, 2013;
 - iii. in writing to Citizenship and Immigration Canada, dated January 17, 2013; and
 - iv. by "statement to police services, oral and written statements to Salvation Army, statements to doctors, statements to defendant Yana Skybin...", undated.
- k. The Defendants plead that it is impossible to specifically plead in defence of those allegations of defamation and libel that have not been particularized.
- l. The Defendants specifically deny making a statement with the meaning that the Plaintiffs are individuals of bad character.

- m. The Defendants state that the Particularized Communications are not defamatory because:
- i. the words are incapable of sustaining a defamatory meaning;
 - ii. in the alternative, the statements were made with qualified privilege, without malice and in occasions of privilege where the Defendants had a duty to tell and the party receiving the communication had an obligation to hear;
 - iii. in the further alternative, the words uttered were fair comment, made on honestly held beliefs that are supported by the facts; or
 - iv. in the further alternative, the statements are true.
- n. The Defendants state that no damage has been incurred to the reputation of the Plaintiffs because:
- o. the Particularized Statements were made within confidential relationships with the recipients; and
- p. the Plaintiffs had no reputation to protect with recipients of the Particularized Communications.
- q. The Defendants ask that the Plaintiffs' claim be dismissed with costs on a substantial indemnity basis.

AND BY WAY OF COUNTERCLAIM

BETWEEN:

ALLA NIKITYUK AND VALENTIN NIKITYUK

Plaintiffs by Counterclaim

- and -

SVETLANA DANILOVA AND PAVEL DANILOV

Defendants by Counterclaim

COUNTERCLAIM

of the Defendants Alla Nikityuk and Valentin Nikityuk

38. The Defendants, Plaintiffs by Counterclaim, Alla Nikityuk and Valentin Nikityuk (the “Nikityuks”) claim from the Plaintiffs, Defendants by Counterclaim, Svetlana Danilova (“Danilova”) and Pavel Danilov (“Danilov”):
- a. Damages for fraud, fraudulent misrepresentation, misappropriation and conversion of property, fraudulent conveyance, unjust enrichment, breach of contract, and breach of fiduciary duty in the amount of \$500,000, plus further sums, the particulars of which will be provided prior to trial;

- b. in the alternative, disgorgement of monies had and received by Danilova and Danilov from the Nikityuks;
- c. an accounting of all funds, assets and property of any kind had and received by Danilova and Danilov from the Nikityuks;
- d. a declaration that the Nikityuks possess an equitable interest in the real and personal property of Danilova and Danilov on the basis of a constructive or resulting trust, which property will be more particularly described prior to trial, but which property includes without limitation, the lands and premises municipally known as 1490 Rankin Way, Innisfil, Ontario and legally described as "LT 57, PL 51M892, S/T EASEMENT FOR ENTRY UNTIL 2013/08/15 AS IN SC672893; INNISFIL", PIN 58075-0631 (LT)" (the "House").
- e. a Certificate of Pending Litigation over the House;
- f. an Order entitling the Nikityuks to an equitable tracing of all monies of the Nikityuks into the assets, property, and interests of Danilova and Danilov; and
- g. punitive damages in the amount of \$100,000.

Further relevant events in Russia

39. In 2004, Danilova and Danilov proposed that the Nikityuks immigrate to Canada as sponsored family class immigrants. Danilova and Danilov volunteered to make all the necessary arrangements with Citizenship and Immigration Canada. The Nikityuks said they were interested and trusted Danilova and Danilov to attend to the application process.

40. The Nikityuks relied upon Danilova and Danilov to tell them what actions were necessary to complete the immigration process. Correspondence about the Nikityuks' immigration to Canada was conducted exclusively by Danilova and Danilov on the Nikityuks' behalf. This included applications and other communications with the government, including Citizenship and Immigration Canada and the Canada Revenue Agency.

41. On or around October 27, 2004, a Citizenship and Immigration Canada Sponsorship Agreement (the "Sponsorship Agreement") was completed, naming the Alla Nikityuk as the primary applicant and Danilova and Danilov as the sponsors.

42. The Sponsorship Agreement included an undertaking by Danilova and Danilov to provide for the Nikityuks' basic requirements for a period of 10

years following the day on which they became permanent residents of Canada.

43. On January 27, 2008, over three years after the Sponsorship Agreement, an email written in Russian was sent to the Nikityuks by Danilov proposing a retirement investment scheme managed by Danilova and Danilov (the “Offer”). In the Offer, Danilov:
- a. proposed an annual living budget for the Nikityuks in Canada of \$24,900 a year, which would be financed primarily by interest earned on the Nikityuks’ money when invested with Danilova and Danilov;
 - b. represented to the Nikityuks that a lot of retired people in Canada sell their paid-off houses, invest their money and live on the interest on the capital;
 - c. represented to the Nikityuks that it was completely normal in Canada and that such an arrangement fully matched the situations of the Nikityuks;
 - d. advised the Nikityuks to sell their property in Russia and invest the proceeds with Danilova and Danilov in order to finance the Nikityuks’ retirement in Canada;

- e. offered the Nikityuks several alternative “investments” with different risk and return options, including the option of a 10% annual interest rate, which was described as a “risk free option”, and projected \$20,000 a year in income for the Nikityuks from interest on a hypothetical \$200,000 investment by the Nikityuks;
 - f. advised that this option, as compared to living off the rental income of the Nikityuks’ property in Russia, would make the Nikityuks financially independent; and
 - g. promised that Danilova and Danilov would be there for the Nikityuks if necessary and that a top-up payment of \$200 to \$300 a month to the Nikityuks would not be a problem for Danilova and Danilov.
44. Sometime in February 2008, Alla Nikityuk verbally accepted the Offer in a telephone conversation with Danilova, choosing the promised risk-free 10% annual interest rate (the accepted Offer being referred to as the “Retirement Agreement”). The Nikityuks agreed to sell all their assets – being a two-room apartment, garage and summer cottage in St. Petersburg – as well as a car owned by the Valentin Nikityuk and invest the proceeds with Danilova and Danilov on these terms.

45. In or around April 2008, Danilova and Danilov notified the Nikityuks that their immigration sponsorship application had been accepted.
46. Following news of the sponsorship approval, the Nikityuks sold their assets in Russia and, relying on the terms set out in the Retirement Agreement, Valentin Nikityuk wire-transferred \$260,842.71 in United States Dollars (hereinafter “the Savings”) to Danilova’s TD Canada Trust account (Account No.: 00482-004-714578) in four instalments:
- a. \$ 14,117.00 USD on April 21, 2008;
 - b. \$ 31,000.00 USD on May 15, 2008;
 - c. \$107, 841.00 USD on May 27, 2008; and
 - d. \$107,884.71 USD on June 9, 2008.
47. The Nikityuks asked Danilova and Danilov to keep the savings in an account separate from accounts containing money belonging to Defendants. Danilova and Danilov told the Nikityuks that a bank account could not be opened at a Canadian bank in the Nikityuks’ name because of their immigration status, but promised to keep the Savings in a separate account.

Further relevant events in Canada

48. The Nikityuks arrived in Canada on June 13, 2008.

49. The Nikityuks state that, upon their arrival in Canada, Danilova and Danilov reported that \$150,000 of their Savings had been used to purchase the House and that a single dwelling premise on this land was still under construction. Danilova and Danilov told the Nikityuks that the House had been purchased with the Savings in the name of Valentin Nikityuk. Danilova and Danilov also told the Nikityuks that the balance of the Savings was invested in a “pension fund” to pay for living expenses (these representations collectively constituting the “Verbal Report”).
50. Land registry office documents show that title was transferred from Crisdawn Construction Inc., the builder of the House, to Danilov and Danilova on August 8, 2008 for \$261,845. The only subsequent registration is a charge from Danilova and Danilov to The Bank of Nova Scotia of \$271,900 on the same day.
51. Upon the Nikityuks’ arrival in Canada, the Nikityuks were told by Danilova and Danilov that all their banking had to be managed by Danilova and Danilov because of the Nikityuks’ immigration status and inability to communicate in English. Danilova and Danilov said that the Savings could not be kept in a separate account, despite their earlier promise to do so, because of the Nikityuk’s immigration status. The Nikityuks believed and trusted Danilova and Danilov.

52. Danilova and Danilov instructed the Nikityuks to execute powers of attorney for property in favour of Danilova and Danilov. These documents were in written in English. The Nikityuks executed the powers of attorney, but they did not understand the purpose of these documents. The Nikityuks signed the documents because Danilova and Danilov indicated that these documents had to be signed because of the Nikityuks' immigration status. The Nikityuks believed and trusted Danilova and Danilov.
53. Danilova and Danilov used the powers of attorney to open bank accounts in the names of the Nikityuks without the Nikityuks' knowledge of the same.
54. From time to time, Danilova and Danilov instructed the Nikityuks to sign documents written in English without translating the content of the documents into Russian or explaining the purpose or effect of the documents. The Nikityuks signed these documents because Danilova and Danilov led them to believe that they were required to do so.
55. The Nikityuks did not authorize the use of the Savings to purchase the House. However, the Nikityuks liked the House and believed and trusted Danilova and Danilov's representations that this purchase was made

because it was in the best interests of the Nikityuks. The Nikityuks believed that the Savings had been used to purchase the House in the name of Valentin Nikityuk.

56. Danilova and Danilov did not pay the 10% annual return on the Savings as promised in the Retirement Agreement, but the Nikityuks believed that the Savings were secure because they had been used to purchase the House in the name of Valentin Nikityuk.

Nikityuks live independently

57. For approximately two months after arriving in Canada, the Nikityuks lived with Danilova and Danilov, sleeping in the living room of their rented apartment in Etobicoke, Ontario.
58. On or around August 2008, the Nikityuks moved into the House. Danilova and Danilov continued to live in Etobicoke, but used the House as a recreation property on weekends. The Nikityuks welcomed these visits because they were happy with the House and apparent stewardship of the Savings by Danilova and Danilov.

59. In contravention of the Retirement Agreement, the Nikityuks primarily lived on the proceeds of their Russian pension. The Nikityuks' combined pension ranged in amount, between approximately \$1,800 and \$1950 every three months, depending on the exchange rate. The Russian pension was deposited into a bank account controlled by Danilova.
60. In addition to the Russian pension, the Nikityuks also had access to a vehicle leased by Danilova and Danilov. Danilova and Danilov also paid for gas and car insurance. Danilova and Danilov would also purchase groceries for the Nikityuks each week, which the Nikityuks estimate totalled less than \$200 each month.
61. On or around April 11, 2009, credit inquiries were made about the Nikityuks by TD Canada Trust. The Nikityuks learned about these inquiries from an Equifax credit report generated in 2011. The Nikityuks believe that the inquiries were made by Danilova and Danilov acting on their behalf without their knowledge or approval.

Danilova and Danilov move in

62. On or around June 1, 2009, Danilova and Danilov moved into the House with the Nikityuks.

63. Shortly after moving into the House, Danilova and Danilov undertook new construction on the House including finishing the basement and constructing a fence and gazebo. Danilova and Danilov reported that this construction cost approximately \$30,000.
64. In 2009, the Nikityuks began attending classes for newcomers to Canada sponsored by the YMCA of Simcoe/Muskoka (the "YMCA").
65. The Nikityuks state that they were physically and verbally abused by Danilov and Danilova during the period between June 1, 2009 and October 17, 2011.
66. The abuse was often triggered by conversations about money. This included instances when Danilova and Danilov told the Nikityuks to use their Russian pension to pay for things that Danilova and Danilov had promised to pay for such as gas, internet and computer use. The abuse also followed demands from the Nikityuks for an accounting of the Savings purportedly invested for retirement.
67. Specifically, the Nikityuks state that Danilova and Danilov:
- a. restricted access to the mailbox of the House, so that all of the Nikityuks' mail was received by Danilova and Danilov;

- b. communicated with the Nikityuks in a demeaning manner and made frequent derogatory remarks;
 - c. discouraged and obstructed the Nikityuks from having company or socializing with others;
 - d. advised the Nikityuks to buy burial insurance because they were expected to die soon and indicated that it had been Danilova and Danilov's hope and expectation that the Nikityuks would have died by this time;
 - e. set up a home Local Area Network ("LAN") to which all computers in the House were connected, which the Nikityuks state Danilova and Danilov used to monitor their electronic mail.
68. In August 2011, Danilov threw plates at a wall in the House in the presence of Valentin Nikityuk. Danilov then threw a glass cup at the feet of Valentin Nikityuk and threatened to next throw a plate at his head.
69. Also in August, 2011, Danilova grabbed and shook her mother, Alla Nikityuk, by the arms and shoulders. Alla Nikityuk sustained bruising because of Danilova's attack.
70. Because of the escalating abuse, the Nikityuks were referred by the YMCA to a non-profit organization called SupportLink, part of the Victim Crisis Assistance Referral Service. With the assistance of SupportLink,

the Nikityuks prepared a personal safety plan. SupportLink provided the Nikityuks with an emergency cellular telephone.

The Nikityuks flee the House

71. On October 17, 2011, the Nikityuks attempted to leave the House because of concerns for their personal safety. Danilova and Danilov physically prevented the Nikityuks from leaving. The Nikityuks attempted to use the emergency cellular telephone, but it did not work. Later that day, the Nikityuks successfully left the House and obtained assistance from the Salvation Army and Barrie Women's Shelter including seven nights of emergency shelter at a local motel.

72. On October 18, 2011 the Nikityuks applied for income assistance from Ontario Works.

73. On October 18, 2011, Danilova and Danilov sent a cheque made out to the Nikityuks for \$1,741.94 to the YMCA. Danilova and Danilov indicated that the cheque was an income support payment for the Nikityuks for half of October and all of November 2011. The Nikityuks received the cheque from the YMCA and cashed it. Within days, the Nikityuks' bank abruptly removed this money from the Nikityuks' account mailed them a copy of the cashed Danilova and Danilov cheque, which was stamped by the bank

- with the words “Item dishonoured”. Danilova and Danilov had made a stop-payment order for the cheque.
74. On October 24, 2011, the Nikityuks returned to the House with police escort to revoke all powers of attorney made in favour of Danilova and Danilov. The Nikityuks personally served Danilova with copies of new powers of attorney, signed on September 14, 2011, made in favour of each of the Nikityuks to the other (together, the “new POAs”) Danilova was advised that this had the effect of revoking powers of attorney previously made in favour of Danilova and Danilov. The Nikityuks also retrieved their belongings from the House at this time.
75. On October 28, 2011, Danilova and Danilov transferred the entire \$13,155.90 balance of TD Waterhouse account 81R108-J in Alla Nikityuk’s sole name and the entire \$1,705.09 balance of TD Waterhouse account 81R128-J in Valentin Nikityuk’s sole name to TD Canada Trust account 0048-6414315, which wa in the Nikityuks’ name jointly. The transfer was made by Danilova and Danilov in the name of the Nikityuks using two revoked powers of attorney; the first purportedly with respect to TD Waterhouse account 81R128-J, signed on October 1, 2009, (“TD POA #1”) and the second purportedly with respect to TD Waterhouse account 81R108-J, signed on October 1, 2009 (“TD POA #2”). The Nikityuks had

no knowledge of these transactions nor were they aware of the prior existence of any such powers of attorney.

76. The same day, Danilova and Danilov transferred the entire balance of TD Canada Trust account 0048-6414315 in the Nikityuks' name to another account, which was not in the Nikityuks' name. The transfers were made by Danilova and Danilov in the name of the Nikityuks using a revoked power of attorney, purportedly with respect to TD Canada Trust account 0048-6414315 ("TD POA #3"), and without the knowledge of either of the Nikityuks. The Nikityuks were not aware of the prior existence of this power of attorney. The following two transfers were made from the Nikityuks' account:

- i. \$5,242.00 to an account numbered 65L079J; and
- ii. \$9,618.99 to an account numbered 65J997J.

77. The day before the withdrawals, Danilova and Danilov wrote to the YMCA alleging that the Nikityuks immigrated to Canada because they could not care for themselves in Russia, had no idea about managing their finances and stated that "if they have been ordered a mental capacity assessment they would never pass it".

78. Two weeks later, Danilova called the Ontario Works Fraud Hotline and accused the Nikityuks of manufacturing a sponsorship breakdown in order to obtain government assistance.
79. Three days after the call, Danilova sent a letter to the Ministry of Community & Social Services Welfare Fraud Hotline alleging that:
- a. the Savings had been “loaned” to Danilova and Danilov on a “long-term no cash-out” basis as a condition of the Sponsorship Agreement;
 - b. the sponsorship arrangement with the Nikityuks had not broken down and that the Nikityuks had gone to a shelter to qualify for government income support; and,
 - c. the Nikityuks had received a cheque for \$1,741.92 from Danilova and Danilov for income support for half of October and all of November.
80. Danilova failed to disclose that the Offer made by Danilov, which led to the transfer of the Savings by the Nikityuks, was not made until four years after Danilova and Danilov had signed the Sponsorship Agreement and associated undertakings.
81. The Ministry of Community & Social Services opened an investigation into the allegations made by Danilova against the Nikityuks (the “Investigation”).

82. Between September and December 2011, Danilova called friends of the Nikityuks seeking information on the whereabouts of the Nikityuks and alleging that the Nikityuks were “crazy”. Staff at non-profit organizations assisting the Nikityuks also received telephone calls from Danilova warning that the Nikityuks might falsely accuse Danilova and Danilov of abuse and threatening legal action in the event the staff repeated these allegations to others.
83. Danilova telephoned one service worker of the YMCA repeatedly—once, six times in a single day.
84. On or around December 5, 2012, the Nikityuks received preliminary disclosure of the findings of the Investigation. The Nikityuks learned for the first time that other bank accounts existed in their name, including TD Canada Trust account 0048-6414315 and TD Waterhouse accounts 81R128-J and 81R108-J. As described above, these accounts had been emptied of \$14,860.99 on October 27, 2011.
85. On or around December 5, 2012, the Nikityuks attended at TD Canada Trust to close the TD Canada Trust account 0048-6414315 that was opened in their name. Alla Nikityuk also closed TD Waterhouse account 81R108-J that had been opened in her name. Valentin Nikityuk also closed TD Waterhouse account 81R128-J that had been opened in his

name. The Nikityuks were advised that TD Canada Trust had powers of attorney on file for each account (TD POA #1, TD POA #2 and TD POA #3) in favour of Danilova and Danilov and that money had been moving through these accounts on a regular basis since October 2009.

86. On or around March 1, 2012, the Nikityuks learnt that title to the House was in the name of Danilova and Danilov and had at no time been in the name of either of the Nikityuks.

Fraud, Fraudulent Misrepresentation, Misappropriation and Conversion

87. As described above, Danilova and Danilov caused the transfer of the Savings from the account to which it had been wire-transferred by the Nikityuks without the authorization of the Nikityuks, and thereby misappropriated the property of the Nikityuks.
88. Danilova and Danilov converted the misappropriated property of the Nikityuks unto their own use and benefit. Particulars of the conversion are within the knowledge of Danilova and Danilov but include the transfer of the Nikityuks property as described above.
89. Danilova and Danilov made fraudulent statements and provided the Nikityuks with false information to conceal the true use of the Savings.

The Nikityuks reasonably relied on Danilova and Danilov's false statements and misrepresentations that the Savings would be used to provide an annual income of ten percent of the Savings and then later that the Savings had been used in-part to purchase the House in the Nikityuks' name.

90. Danilova and Danilov knew that the Offer contained fraudulent statements and false information. In particular, Danilova and Danilov knew that:
- a. the Savings would not generate a risk-free 10% annual return;
 - b. most retired people in Canada invest their life savings for the purposes of retirement with financial institutions and not with family members who are unlicensed to deal in securities;
 - c. the Nikityuks would rely on the fraudulent representations; and
 - d. the Nikityuks did in fact rely on the fraudulent representations.
91. Danilova and Danilov knew that the Verbal Report contained fraudulent statements and false information. In particular, Danilova and Danilov knew that:
- a. title to the House was not in Valentin Nikityuk's name;
 - b. the Savings had not been used to purchase clear title to the House;
 - c. the Nikityuks were unaware that the title to the House was encumbered with a mortgage charge in favour of Danilova and Danilov in an amount greater than the purchase price of the House;

- d. the Nikityuks would rely on the fraudulent representation and omission;
and,
 - e. the Nikityuks did in fact rely on the fraudulent representation and
omission.
92. Danilova and Danilov knew that the Nikityuks were unaware of the terms
of the Sponsorship Agreement. In particular, Danilova and Danilov knew
that:
- a. there was no legal reason arising from the immigration process or
otherwise for not to keeping the Savings in a separate account from
accounts containing funds belonging to Danilova and Danilov;
 - b. there was no legal reason arising from the immigration process or
otherwise requiring the Nikityuks to sign powers of attorney in favour of
Danilova and Danilov;
 - c. the Nikityuks would rely on the fraudulent representation and omission;
and
 - d. the Nikityuks did in fact rely on the fraudulent representation and
omission.
93. Danilova and Danilov knew that the Nikityuks were unaware of the powers
of attorney that had been executed in favour of Danilova and Danilov. In
particular, Danilova and Danilov knew that:

- a. the Nikityuks did not know that they had executed powers of attorney in favour of Danilova and Danilov nor the legal effect of such powers of attorney;
 - b. the Nikityuks did not know how many powers of attorney they had signed in favour of Danilova and Danilov;
 - c. The Nikityuks would rely on the fraudulent representation and omission; and,
 - d. The Nikityuks did in fact rely on the fraudulent representation and omission.
94. Danilova and Danilov knew that the Nikityuks had revoked all powers of attorney made in favour of the Defendants on October 17, 2011. In particular, Danilova and Danilov knew that:
- a. the Nikityuks believed all powers of attorney in favour of Danilova and Danilov had been revoked;
 - b. TD POA #1 had been revoked on October 24, 2011;
 - c. TD POA #2 had been revoked on October 24, 2011;
 - d. TD POA #3 had been revoked on October 24, 2011;
 - e. the Nikityuks were not aware of the existence of any of the powers of attorney, nor did they know of any which had been on file with TD Canada Trust;

- f. TD Canada Trust did not know on October 28, 2011 that all powers of attorney of the Nikityuks in favour of Danilova and Danilov had been revoked on October 24;
 - g. the Nikityuks and TD Canada Trust would rely on the fraudulent representation and omission; and,
 - h. the Nikityuks and the TD Canada Trust did in fact rely on the fraudulent representation and omission.
95. Danilova and Danilov knowingly orchestrated the fraudulent scheme by which the Savings were wire-transferred to their account and then misappropriated for their own use and benefit. The Nikityuks reasonably believed that the Savings were used to acquire a risk-free investment that earned an annual income of 10%. Had the Nikityuks known that the Savings were being used for another purpose, they would have not have wire-transferred these monies to Danilova and Danilov.
96. Danilova and Danilov knowingly orchestrated the fraudulent scheme by which the misappropriation of the Savings was concealed from the Nikityuks. The Nikityuks reasonably believed that the Savings had been used to acquire the House in their name. Had the Nikityuks known that the Savings were being used for another purpose they would have taken steps to recover their property.

97. Danilova and Danilov knowingly orchestrated the fraudulent scheme by which the Nikityuks were led to believe that documents making out powers of attorney in favour of Danilova and Danilov were required to be signed as part of the immigration process. The Nikityuks reasonably believed this. Had the Nikityuks known the legal effect of the documents containing the powers of attorney or that no requirement existed for granting such authority to Danilova and Danilov, the powers of attorney would not have been signed.
98. Danilova and Danilov knowingly orchestrated the fraudulent scheme by which the Nikityuks were not told about the powers of attorney that had been executed in their name in favour of Danilova and Danilov. Danilova and Danilov used the powers of attorney to open and maintain bank accounts in the name of the Nikityuks without their knowledge. Had the Nikityuks known about the bank accounts they would have notified the banks where such accounts were open that they had revoked all powers of attorney in favour of Danilova and Danilov.

Unjust enrichment

99. Danilova and Danilov transferred the Savings for the benefit of themselves. By diverting funds from the Nikityuks to themselves, directly and indirectly, for the payment of personal expenses, personal accounts

and personal liabilities, Danilova and Danilov have caused themselves to be unjustly enriched. The Nikityuks have suffered a corresponding deprivation. There is no juristic reason for the enrichment of Danilova and Danilov.

100. In accepting the Savings from the Nikityuks without providing any benefit or providing nominal benefit in return, Danilova and Danilov have been unjustly enriched as they have obtained, received and enjoyed a significant sum of money while providing the Nikityuks with no or nominal goods, benefits, or other consideration, to the Nikityuks' detriment.

101. Danilova and Danilov are in possession of the Savings or have benefited as a result of the same. Danilova and Danilov are liable to make restitution to the Nikityuks and to disgorge all proceeds and benefits received from the funds of the Nikityuks by way of the Savings.

Breach of Contract and Breach of Fiduciary Duty

102. In knowingly and intentionally orchestrating the misappropriation of the Savings, with the intent of deceiving and defrauding the Nikityuks, Danilova and Danilov breached the terms of the Retirement Agreement causing the Nikityuks to suffer the damages and losses described herein, for which Danilova and Danilov are liable to the Nikityuks.

103. By virtue of their position of trust with the Nikityuks, Danilova and Danilov owed the Nikityuks a fiduciary duty and were required to act, at all times, honestly, in good faith and in the best interests of the Nikityuks. Instead, Danilova and Danilov used their position of trust with the Nikityuks to use the Savings for their own use and benefit to perpetuate the fraudulent scheme described herein in order to misappropriate the Savings from the Nikityuks in breach of their fiduciary duty.

Constructive Trust and Equitable Tracing

104. Danilova and Danilov received revenues, proceeds and profits from the Savings and the fraudulent activities pleaded herein, with actual or constructive knowledge of the illegality thereof. Danilova and Danilov used the Savings to purchase and improve various assets, property and interests, including the House.

105. Accordingly, Danilova and Danilov hold their assets, property and interests, including the House, in trust for the benefit of Danilova and Danilov and are liable to the Nikityuks for repayment of such funds. The Nikityuks claim a constructive trust over the assets, property and interests of Danilova and Danilov, including the House.

106. The Nikityuks are entitled to trace and recover the Savings and are entitled to an equitable tracing order in support thereof.

Damages

107. As a result of Danilova and Danilov's fraud against the Nikityuks, the Nikityuks have suffered loss, damage and expense, the particulars of which will be provided prior to trial. The loss, damage, and expense includes but is not limited to the Savings misappropriated through the fraudulent scheme described herein.

108. The Nikityuks have incurred and will continue to incur costs and expenses in connection with the detection, investigation and quantification of the losses suffered by them as a result of the action of Danilova and Danilov described herein, for which Danilova and Danilov are liable.

109. The actions taken by Danilova and Danilov, as described above, were high-handed, malicious and worthy of censure. Danilova and Danilov acted callously, maliciously, furtively and avariciously in engaging in the aforesaid scheme with the intent to deceive the Nikityuks. They implemented the scheme through misrepresentations, cover-ups and bad faith, in total disregard for the Nikityuks' rights. The Nikityuks are entitled to an award of punitive damages.

110. This counterclaim is to proceed under the ordinary procedure.

Date: April 1, 2014

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-and- NIKITYUK et al

Court File No. 12-0545-SR

Plaintiff

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Barrie

**AMENDED STATEMENT OF
DEFENCE AND COUNTERCLAIM**

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