



Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**MICHAEL CIARDULLO and MANOJKUMAR AGGARWAL**

Plaintiffs

- and -

**1832 ASSET MANAGEMENT L.P., BMO INVESTMENTS INC., CANADIAN  
IMPERIAL BANK OF COMMERCE, CIBC TRUST CORPORATION, MACKENZIE  
FINANCIAL CAPITAL CORPORATION, MACKENZIE FINANCIAL  
CORPORATION, NATCAN TRUST COMPANY, NATIONAL BANK INVESTMENTS  
INC., RBC GLOBAL ASSET MANAGEMENT INC., RBC INVESTOR SERVICES  
TRUST and TD ASSET MANAGEMENT INC.**

Defendants

Proceedings under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs.  
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 plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, 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.

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: August 12, 2022

Issued by \_\_\_\_\_

Local registrar

Address of  
court office

**TO: 1832 ASSET MANAGEMENT L.P.**

1 Adelaide Street East  
28<sup>th</sup> Floor  
Toronto, ON M5C 2V9

**AND TO: BMO INVESTMENTS INC.**

100 King Street West, 43<sup>rd</sup> Floor  
Toronto, ON M5X 1A1

**AND TO: CANADIAN IMPERIAL BANK OF COMMERCE**

18 York Street, Suite 1300  
Toronto, ON M5J 2T8

**AND TO: CIBC TRUST CORPORATION**

55 Yonge Street, Suite 900  
Toronto, ON M5E 1J4

**AND TO: MACKENZIE FINANCIAL CAPITAL CORPORATION**

180 Queen Street West  
Toronto, ON M5V 3K1

**AND TO: MACKENZIE FINANCIAL CORPORATION**

180 Queen Street West  
Toronto, ON M5V 3K1

**AND TO: NATCAN TRUST COMPANY**  
600 De La Gauchetière Street West, 28<sup>th</sup> Floor  
Montréal, Québec H3B 4L2

**AND TO: NATIONAL BANK INVESTMENTS INC.**  
1100 Robert-Bourassa Blvd., 10<sup>th</sup> Floor  
Montréal, Québec H3B 2G7

**AND TO: RBC GLOBAL ASSET MANAGEMENT INC.**  
155 Wellington Street West, Suite 2200  
Toronto, ON M5V 3K7

**AND TO: RBC INVESTOR SERVICES TRUST**  
155 Wellington Street West, 2nd Floor  
Toronto, ON M5V 3K7

**AND TO: TD ASSET MANAGEMENT INC.**  
66 Wellington Street West  
TD Bank Tower  
Toronto, ON M5K 1G8

## I. DEFINED TERMS

2. In this Statement of Claim, the following terms have the following meanings:

- (a) “**1832**” means 1832 Asset Management L.P.;
- (b) “**1832 Mutual Funds**” means all mutual fund trusts of which 1832 is trustee, was trustee, or may be trustee at any time before the conclusion of the trial of the common issues in this proceeding, but only for the period during which 1832 is trustee, was trustee or may be trustee, as applicable;
- (c) “**BMO Investments**” means BMO Investments Inc., including all predecessor and amalgamating entities, including without limitation each of BMO Investments Inc. and Guardian Group of Funds Ltd. before their amalgamation on or around November 1, 2009 to form BMO Investments Inc.;
- (d) “**BMO Mutual Funds**” means all mutual fund trusts of which BMO Investments is trustee, was trustee or may be trustee at any time before the conclusion of the trial of the common issues in this proceeding, but only for the period during which BMO Investments is trustee, was trustee or may be trustee, as applicable;
- (e) “**CIBC**” means Canadian Imperial Bank of Commerce;
- (f) “**CIBC Trust**” means CIBC Trust Corporation;
- (g) “**CIBC Trust Mutual Funds**” means all mutual fund trusts of which CIBC Trust is trustee, was trustee, or may be trustee at any time before the conclusion of the trial of the common issues in this proceeding, but only for the period during which CIBC Trust is trustee, was trustee or may be trustee, as applicable;

- (h) “**Class**” and “**Class Members**” means all the Trust Class Members and the MFC Shareholder Class Members;
- (i) “**Discount Broker**” means entities that provide “order-execution only services” as defined in Rule 3200 of the IIROC Rules or entities performing a similar function to “order-execution only services” before the introduction of that definition in Rule 3200 of the IIROC Rules;
- (j) “**Excluded Persons**” means the defendants, their past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns, and the past and present independent review committee members, board members or governors of the Mutual Funds;
- (k) “**IIROC**” means the Investment Industry Regulatory Organization of Canada;
- (l) “**IIROC Rules**” means the IIROC Dealer Member Rules, as amended;
- (m) “**Mackenzie Corporate Class Mutual Funds**” means all mutual funds that are, were or may be constituted as a separate class of shares of MFCC;
- (n) “**Mackenzie Trust Mutual Funds**” means all mutual funds of which MFC is trustee, was trustee or may be trustee at any time before the conclusion of the trial of the common issues in this proceeding but only for the period during which MFC is trustee, was trustee or may be trustee, as applicable;
- (o) “**Mackenzie Mutual Funds**” means the Mackenzie Corporation Class Mutual Funds and the Mackenzie Trust Mutual Funds;
- (p) “**Management Agreements**” means all management agreements to which the Manager Defendants act, have acted or may act as manager of the Mutual Funds;

- (q) “**Manager Defendants**” means 1832, BMO Investments, CIBC, MFC, NBI, RBC GAM and TDAM;
- (r) “**MFC**” means Mackenzie Financial Corporation;
- (s) “**MFC Shareholder Class Members**” means all persons or entities, wherever they may reside or be domiciled, who held or hold before the conclusion of the trial of the common issues in this proceeding shares of a Mackenzie Corporate Class Mutual Fund, other than through as Discount Broker, except the Excluded Persons;
- (t) “**MFCC**” means Mackenzie Financial Capital Corporation;
- (u) “**Mutual Funds**” means 1832 Mutual Funds, BMO Mutual Funds, CIBC Mutual Funds, McKenzie Mutual Funds, National Bank Mutual Funds, NBI Private Portfolio Mutual Funds, RBC Mutual Funds, PH&N Mutual Funds and TD Mutual Funds;
- (v) “**National Bank Trust**” means National Bank Trust Inc.;
- (w) “**National Bank Mutual Funds**” means all mutual funds trusts of which either NBI or Natcan Trust is a trustee, was a trustee or may be a trustee at any time before the conclusion of the trial of the common issues in this proceeding, but only for the period during which either NBI or Natcan Trust is trustee, was trustee or may be trustee, as applicable;
- (x) “**Natcan Trust**” means Natcan Trust Company;
- (y) “**NBI**” means National Bank Investments Inc., including all predecessor amalgamating entities, including without limitation Altamira Financial Services Ltd., Altamira Investment Services Inc. and National Bank Securities Inc. before their amalgamation on or around November 1, 2008 to form National Bank Securities Inc., which later changed its name to National Bank Investments Inc.;

- (z) “**NBI Private Portfolio Mutual Funds**” means all mutual fund trusts of which National Bank Trust is trustee, was trustee or may be trustee at any time before the conclusion of the trial of the common issues in this proceeding, but only for the period during which National Bank Trust is a trustee, was a trustee or may be a trustee, as applicable;
- (aa) “**PH&N Mutual Funds**” means all mutual fund trusts of which RBC IS is trustee, was trustee or may be trustee at any time before the conclusion of the trial of the common issues in this proceeding, but only for the period during which RBC IS is a trustee, was a trustee or may be a trustee, as applicable;
- (bb) “**Prospectus**” means the prospectuses issued in respect of the Mutual Funds;
- (cc) “**RBC GAM**” means RBC Global Asset Management Inc., including all predecessor amalgamating entities, including, without limitation, each of RBC Asset Management Inc. and Phillips, Hager & North Investment Management Ltd. prior to their amalgamation on or around November 1, 2010 to form RBC Global Asset Management Inc.);
- (dd) “**RBC IS**” means RBC Investment Services Trust;
- (ee) “**RBC Mutual Funds**” means all mutual fund trusts of which RBC GAM is trustee, was trustee or may be trustee at any time before the conclusion of the trial of the common issues in this proceeding, but only for the period during which RBC GAM is a trustee, was a trustee or may be a trustee, as applicable;
- (ff) “**TDAM**” means TD Asset Management Inc.;
- (gg) “**TD Mutual Funds**” means all mutual funds trusts of which TDAM is a trustee, was a trustee or may be a trustee at any time before the conclusion

of the trial of the common issues in this proceeding, but only for the period during which TDAM is trustee, was trustee or may be trustee, as applicable;

- (hh) “**Trust Instrument**” means all declarations of trust or similar trust instruments that govern, have governed or may govern the Mutual Funds;
- (ii) “**Trust Class Members**” means all persons or entities, wherever they may reside or be domiciled, who held or hold, at any time before the conclusion of the trial of the common issues in this proceeding, units of 1832 Mutual Funds, BMO Mutual Funds, CIBC Mutual Funds, Mackenzie Trust Mutual Funds, National Bank Mutual Funds, NBI Private Portfolio Mutual Funds, RBC Mutual Funds, PH&N Mutual Funds and TD Mutual Funds, other than through a Discount Broker, except for the Excluded Persons; and
- (jj) “**Trustee Defendants**” means CIBC Trust, MFC, BMO Investments, TDAM, 1832, NBI, RBC GAM, RBC IS and Natcan Trust.

## II. CLAIM

### 3. The Plaintiffs on behalf of the Class claim:

- (a) an order certifying this action as a class proceeding and appointing the Plaintiffs as the representative Plaintiffs for the Class under the *Class Proceedings Act, 1992*;
- (b) a declaration that the Defendants are liable to the Class Members for damages and equitable compensation for breach of trust, breach of fiduciary duty, unjust enrichment, breach of contract and pursuant to section 130 of the Ontario *Securities Act* (and if necessary, the equivalent provisions of comparable legislation of other Canadian provinces);
- (c) an order requiring the Defendants to account to the Class Members for amounts improperly paid from the Mutual Funds as trailing commissions;



- (d) an order disallowing the unearned management fees as expenses under *Trustee Act* section 23.1 (and, if necessary, the equivalent provisions of comparable legislation of other Canadian provinces) and requiring the Defendants to repay the expenses to the Mutual Funds;
- (e) a declaration that under section 248 of the Ontario *Business Corporations Act* the acts or omissions of MFC and MFCC have effected a result, the business or affairs of MFC and MFCC have been carried on or conducted in a manner, or the powers of the directors of MFC and MFCC have been exercised in a manner, that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the MFC Shareholder Class Members;
- (f) an order prohibiting the Defendants from obtaining indemnity and reimbursement from the Mutual Fund assets for monetary relief paid or payable to the Class Members or its costs and expenses of this action;
- (g) an order directing a reference or giving such other directions as may be necessary to determine issues not determined in the trial of the common issues;
- (h) prejudgment interest and post-judgment interest under the *Courts of Justice Act*;
- (i) costs of this action, plus the costs of notice and of administering the plan of distribution of the recovery plus applicable taxes under *Class Proceedings Act, 1992* section 26(9); and
- (j) such further and other relief as to this Honourable Court seems just.

### III. OVERVIEW

4. This class proceeding seeks recovery for the diminution in value and the improperly low investment returns on the Mutual Funds caused by the Defendants' improper dissipation of Mutual Fund assets.

5. The Class Members are persons who acquired units of the Defendants' Mutual Funds, other than through Discount Brokers.

6. The Mutual Funds (other than Mackenzie Corporate Class Mutual Funds) were structured as trusts under which each Class Member was a beneficiary. The Mackenzie Corporate Class Mutual Funds have a corporate structure with MFC acting as a fiduciary.

7. Each Trustee Defendant and MFCC pay management fees from its Mutual Fund to a Manager Defendant. A portion of these management fees are paid by the Trustee Defendants and MFCC and collected by the Manager Defendants for the payment of trailing commissions to Discount Brokers.

8. The purpose of trailing commissions is to compensate Mutual Fund dealers for providing ongoing investment service and advice. Yet Discount Brokers do not and are not permitted to provide investment service and advice.

9. The management fees paid by the Trustee Defendants and MFCC to the Manager Defendants are thus excessive, inflated and unearned.

10. The Mutual Fund assets are invested and generated investment returns. The Defendants' payment of management fees for trailing commissions to Discount Brokerages from the Mutual Fund assets improperly dissipated the Mutual Fund assets. As a result of the Defendants' improper

dissipation of the Mutual Fund trust assets, the value of the Class Members' Mutual Fund units were inappropriately diminished, as were their returns on their Mutual Funds units.

#### **IV. THE PARTIES**

##### **A. The Plaintiffs**

11. The Plaintiff, Michael Ciardullo, is an individual residing in Kleinburg, Ontario.

12. Mr. Ciardullo held units of Mutual Funds, including Mackenzie Cundill Recovery Fund and Mackenzie Canadian All Cap Dividend Fund-A mutual funds. He is a Class Member.

13. The Plaintiff, Manojkumar Aggarwal, is an individual residing in Mississauga, Ontario.

14. Mr. Aggarwal held units of Mutual Funds, including TD Canadian Bond Index Fund, TD Canadian Index Fund, TD US Index Fund, TD Monthly Income Fund, TD Canadian Money Market Fund, TD Resource Fund, TD Energy, TD Canadian Core Plus Bond Fund, TD Dividend Growth Fund, TD Balanced Index Fund, TD High Yield Bond Fund and TD Canadian Bond Fund. He is a Class Member.

##### **B. The Defendants**

15. 1832 is a limited partnership formed under the laws of Ontario. The general partner of 1832 was 1832 Asset Management G.P. Inc., whose name was changed from "Scotia Asset Management G.P. Inc." in 2013. The limited partner of 1832 was and is The Bank of Nova Scotia and Scotia Capital Inc. 1832 is the trustee and manager of the 1832 Mutual Funds.

16. BMO Investments is a corporation incorporated under the laws of Canada. BMO Investments is the trustee and manager of the BMO Mutual Funds.

17. CIBC is a financial institution governed by the *Bank Act*. CIBC was the manager of the CIBC Mutual Funds.
18. CIBC Trust is incorporated under the laws of Canada. CIBC Trust was the trustee of the CIBC Mutual Funds. CIBC Trust is a wholly-owned subsidiary of CIBC.
19. MFC is incorporated under the laws of Ontario. MFC was the manager of the Mackenzie Mutual Funds and the trustee of the Mackenzie Trust Mutual Funds.
20. MFCC is incorporated under the laws of Ontario. MFCC was the issuer of the Mackenzie Corporate Class Mutual Funds.
21. NatCan Trust is a corporation incorporated under the laws of Canada. NatCan Trust was the trustee of the National Bank Mutual Funds.
22. NBI is a corporation incorporated under the laws of Canada. NBI was the manager of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds. NBI was previously the trustee of certain National Bank Mutual Funds.
23. TDAM is a corporation registered under the laws of Ontario. TDAM is the trustee and the manager of the TD Mutual Funds.
24. RBC GAM is a corporation incorporated under the laws of Canada. RBC GAM was the manager of the RBC Mutual Funds and the PH&N Mutual Funds, as well as the trustee of the RBC Mutual Funds.
25. RBC IS is a trust company incorporated under the laws of Canada. RBC IS was the trustee of the PH&N Mutual Funds.

**V. EVENTS GIVING RISE TO THIS ACTION**

**A. The Mutual Funds**

26. Each Mutual Fund (other than the Mackenzie Corporate Class Mutual Funds) is a trust governed by a Trust Instrument.

27. The beneficial interest of each Mutual Fund trust is divided into units held by unitholders. The unitholders are the beneficiaries of the trust. The Trustee Class Members are or were unitholders of the Mutual Funds.

28. Each Mackenzie Corporate Class Mutual Fund is or was a class of shares of MFCC. The MFC Class Members are or were shareholders of the Mackenzie Corporate Class Mutual Funds.

29. Each Mutual Fund is or was an “investment fund” and a “mutual fund” as defined in the *Ontario Securities Act*.

30. Each Mutual Fund is or was a reporting issuer in Ontario and all other provinces in Canada.

**B. The Trust Instruments**

31. The Trust Instruments govern the Mutual Funds, other than the Mackenzie Corporate Class Mutual Funds.

32. Under the Trust Instruments, the Trustee Defendants hold in trust all property of the Mutual Funds for the benefit of their unitholder Trust Class Members.

**C. Management of the Mutual Funds**

33. The Trustee Defendants and MFCC have delegated authority and responsibility for the provision of management and administrative services of the Mutual Funds to the Manager Defendants.

34. The Trustee Defendants and MFCC appointed the Manager Defendants to manage the Mutual Fund assets, including providing managerial, supervisory, administrative and investment advisory services to the Mutual Funds.

35. Management fees are paid out of the assets of the Mutual Funds, calculated as a percentage of the Mutual Fund net asset value.

36. The payment of management fees to the Manager Defendants reduces the net asset value of the Mutual Funds, which in turn reduces the value of the units of the Mutual Funds.

37. Each Manager Defendant is entitled to earn a management fee from the Mutual Funds. Each Manager Defendant may reduce, waive or cancel its management fee in whole or part.

**D. Payment of Trailing Commissions Generally**

38. Investment dealers (hereinafter referred to as dealers) sell investment products to their clients, including the Mutual Funds.

39. When a dealer sells Mutual Funds to its clients, the Manager Defendants of the Mutual Funds pays the dealer trailing commissions.

40. Trailing commissions are ongoing fees calculated based on Mutual Fund asset value. They are calculated as a percentage of the dollar value of the investor's Mutual Fund investment.

41. Manager Defendants pay trailing commissions to dealers on an ongoing basis for as long as an investor holds the Mutual Funds.

42. The purported rationale and/or purpose for the payment of trailing commissions by the Manager Defendants to dealers is to compensate dealers for service and/or ongoing investment advice they provide to their clients holding the Mutual Funds.

43. The truth is that trailing commissions are a sales commission. The Defendants pay trailing commissions in consideration of services provided by dealers, including Discount Brokers, to the Defendants (rather than for services provided by the dealers to the Class Members).

44. Trailing commissions incentivize dealers, including Discount Brokers, to offer for sale, or provide "shelf space", for the Mutual Funds.

45. This is to the detriment of the Class Members, because the payment of trailing commissions from the Mutual Fund assets reduces the value of the Mutual Fund units and the Class Members' investment returns.

**E. Payment of Trailing Commissions to Discount Brokers**

46. Under the IIROC Rules, Discount Brokers provide "order-execution only" services to trade in equity securities, including Mutual Fund units. Under the IIROC Rules, Discount Brokers are prohibited from providing investment recommendations or advice to clients.

47. The Defendants pay trailing commissions to Discount Brokers that sold Mutual Funds to their clients.

48. The Defendants did not adequately disclose the practice of paying trailing commissions to Discount Brokers.

49. The Defendants' payment of trailing commissions to Discount Brokers is improper. Discount Brokers do not earn trailing commissions. This is because Discount Brokers do not provide services or advice to Mutual Fund investors.

50. Further or in the alternative, the Manager Defendants' payment of trailing commissions to Discount Brokers for services is improper because:

- (a) in consideration for the trailing commissions, the Manager Defendants do not impose an obligation on Discount Brokers to provide particular services to Class Members for the Mutual Funds;
- (b) the Manager Defendants have taken no or inadequate steps to ensure that the assets of the Mutual Funds are used for proper purposes and in reasonable amounts, including but not limited to by failing to:
  - (i) ascertain the nature of services provided by Discount Brokers to Mutual Fund purchasers;
  - (ii) ascribe a reasonable value to any such services;
- (c) the Discount Brokers do not:
  - (i) provide the Class Members with any services;
  - (ii) provide the Class Members with any services specific to the Mutual Funds;



- (d) any services provided by Discount Brokers to their clients (for example, research and educational tools):
  - (i) are provided to clients regardless of whether they hold the Mutual Funds;
  - (ii) are available to all Discount Broker clients; and
  - (iii) do not justify payment of trailing commissions to Discount Brokers for the Mutual Funds.

51. The payment of management fees including trailing commissions by the Trustee Defendants and MFCC to the Manager Defendants is improper.

52. The Manager Defendants' payment of trailing commissions to Discount Brokers is also improper.

53. The Defendants knew or ought to have known that the trailing commissions forming part of the management fees paid by the Trustee Defendants and MFCC to the Manager Defendants were paid by the Manager Defendants to Discount Brokers, thereby causing damages to the Class Members.

54. Some mutual funds are offered by series, typically known as Series D, that were only sold through Discount Brokers. Series D mutual funds pay a lower management fee than other mutual funds. This is because they include a reduced trailing commission, which partially reflects that Discount Brokers do not provide investors with services and/or advice.

55. Each Manager Defendant may change the terms of the trailing commission portion of the management fees or redesignate or switch the units of the Mutual Funds to a series for which no trailing commissions are paid (i.e., Series D). No Manager Defendant has done so.

**F. Payment of Trailing Commissions Depletes Mutual Fund Assets**

56. The Trustee Defendants and MFCC's payment of management fees, which includes trailing commissions payable to Discount Brokers, improperly depletes the Mutual Fund assets.

This in turn:

- (a) reduces the value of the Class Members' units of the mutual Funds; and
- (b) reduces the Class Members' investment returns on the Mutual Funds.

**IX. THE RIGHTS OF ACTION**

**A. Breach of Trust**

57. The Class Members assert a claim for breach of trust against the Trustee Defendants and the Manager Defendants as trustees and managers of the Mutual Funds.

58. The Mutual Funds, other than Mackenzie Corporate Class Mutual Funds, were structured as trusts and was governed by Trust Instruments.

59. Each of the Trustee Defendants is a trustee.

60. Each Trustee Defendant holds the assets in its Mutual Fund in trust for its Class Member unitholder beneficiaries.

61. Each of the Manager Defendants owed a duty of trust to the Class Members:

- (a) the Trust Instruments and Management Agreements delegate to the Manager Defendants the administration of the business and affairs of the Mutual Funds;

- (b) the Manager Defendants:
  - (i) were granted the right to administer the trust assets and to assume the office and function of a trustee;
  - (ii) undertook to possess and administer the trust property as if they were trustees;
  - (iii) had possession and control over the assets of the Mutual Funds and administered the trust assets to carry out these responsibilities;
  - (iv) undertook to act in the best interests of the Class Members, including by the standard of care binding on them under the Management Agreements and the Ontario *Securities Act* and equivalent legislation across Canada;
  - (v) had power, discretion and control in relation to the business and affairs of the Mutual Funds, including the Mutual Fund assets;
  - (vi) could unilaterally exercise that power, discretion and control to affect the legal and practical interests of the Class Members;
- (c) the Class Members:
  - (i) are defined persons or classes of persons vulnerable to the Manager Defendants' power, discretion and control; and
  - (ii) had a financial interest that stood to be adversely affected by the Manager Defendants' exercise of power, discretion and control.

62. Each Manager Defendant must comply with:

- (a) the investment fund manager standard of care in section 116 of the Ontario *Securities Act* and equivalent legislation across Canada; and

- (b) the manager standard of care in section 2.1 of National Instrument 81-107 *Independent Review Committee for Investment Funds*.

63. The Trustee and Manager Defendants had a duty of trust to:

- (a) exercise their powers and discharge their duties honestly, in good faith and in the best interests of the Class Members; and
- (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

64. The Trustee and Manager Defendants breached their duty of trust by:

- (a) wrongfully paying and/or receiving management fees, including trailing commissions, from the Mutual Fund trust assets;
- (b) failing to:
  - (i) preserve the assets of the Mutual Funds;
  - (ii) maximize the value of the units of the Mutual Funds;
  - (iii) ensure that all remuneration paid for services rendered to the Mutual Fund is reasonable and properly earned;
  - (iv) ascertain the nature of any services provided by Discount Brokers;
  - (v) ascribe a reasonable value to any services provided by Discount Brokers to ensure that the Mutual Fund assets are used for proper purposes and in reasonable amounts;
  - (vi) impose an obligation on Discount Brokers to provide particular services to Mutual Fund purchasers in consideration for trailing commissions;

- (vii) conduct any or adequate diligence, auditing or inquiries into whether Discount Brokers provide particular services to Mutual Fund purchasers for the Mutual Funds;
  - (viii) conduct any or adequate diligence, auditing or inquiries into whether Discount Brokers provide particular services to Mutual Fund purchasers for the Mutual Funds;
  - (ix) prohibit Mutual Fund series carrying trailing commissions from being acquired and/or held through Discount Brokers;
  - (x) advise, permit or cause Class Members to convert their non-Series D units to Series D units of the Mutual Funds;
  - (xi) advise, permit or cause Discount Broker Mutual Fund purchasers to re-designate or switch non-Series D securities of the Mutual Funds into Series D or equivalent securities of the Mutual Funds;
  - (xii) create and make available a series of Mutual Funds through Discount Brokers that carried no trailing commission;
  - (xiii) pay and accept management fees reduced by the amount that was not properly earned, and distributing that amount back to the Class Members or the Mutual Fund;
  - (xiv) waive payment of unearned trailing commissions;
  - (xv) reduce, cancel or waive trailing commissions;
- (c) acting in conflict of interest by:
- (i) acting as trustee and manager of the Mutual Funds, paying unearned management fees to themselves and negotiating Management Agreements and management fees with themselves;

- (ii) paying trailing commissions to Discount Brokers for the Defendants' own benefit, effectively as a marketing expense to secure access to the Discount Brokers' clients, leading to increased management fees for the Manager Defendants as the Mutual Fund assets grow through new investment capital from Discount Broker platforms;
  - (iii) failing to make available Mutual Funds through Discount Brokers paying no trailing commission or alternatively a reduced trailing commission because of a concern that it would adversely affect the distribution of the Mutual Funds through full-service or advisory distribution channels and thereby reduce the Manager Defendant management fees;
  - (iv) receiving unearned management fees to pay trailing commissions to affiliate Discount Brokers for the ultimate benefit of parent corporations;
  - (v) paying trailing commissions to Discount Brokers to provide a pecuniary incentive for the Discount Brokers to sell Mutual Funds and increase their management fees;
- (d) further or in the alternative, by:
- (i) permitting non-Series D units of the Mutual Funds to be acquired and/or held through Discount Brokers;
  - (ii) failing to advise, permit or cause Class Members to convert their non-Series D units to Series D units of the Mutual Funds; and
  - (iii) failing advise, permit or cause Discount Broker Mutual Fund purchasers to re-designate or switch non-Series D securities of the Mutual Funds into Series D or equivalent securities of the Mutual Funds.

65. The Trustee Defendants also breached their duty of trust by failing to:
- (a) adequately supervise the Manager Defendants;
  - (b) prevent or rectify the Manager Defendants' misconduct in breach of the Manager Defendants' standard of care.
66. Each Trustee and Manager Defendant is responsible for losses arising from its failure to discharge its responsibilities to exercise the requisite degree of care and skill.

**B. Breach of Fiduciary Duty**

67. The Trustee Defendants, as trustees, owe a fiduciary duty to the Trust Class Members.
68. The Manager Defendants, as managers, owe a fiduciary duty to the Class Members because, among other things:
- (a) the Trust Instruments and Management Agreements delegate to the Manager Defendants the administration of the business and affairs of the Mutual Funds;
  - (b) the Manager Defendants:
    - (i) were granted the right to administer the trust assets and to assume the office and function of a trustee;
    - (ii) undertook to possess and administer the trust property as if they were trustees;
    - (iii) had possession and control over the assets of the Mutual Funds and administered the trust assets to carry out these responsibilities;

- (iv) undertook to act in the best interests of the Class Members, including by the standard of care binding on them under the Management Agreements and the Ontario *Securities Act* and equivalent legislation across Canada;
  - (v) had power, discretion and control in relation to the business and affairs of the Mutual Funds, including the Mutual Fund assets;
  - (vi) could unilaterally exercise that power, discretion and control to affect the legal and practical interests of the Class Members;
- (c) the Class Members:
- (i) are defined persons or classes of persons vulnerable to the Manager Defendants' power, discretion and control; and
  - (ii) had a financial interest that stood to be adversely affected by the Manager Defendants' exercise of power, discretion and control.

69. Each Manager Defendant must comply with:

- (a) the investment fund manager standard of care in section 116 of the Ontario *Securities Act* and equivalent legislation across Canada; and
- (b) the manager standard of care in section 2.1 of National Instrument 81-107 *Independent Review Committee for Investment Funds*.

70. The Trustee and Manager breached their fiduciary duties by:

- (a) wrongfully paying and/or receiving management fees, including trailing commissions, from the Mutual Fund trust assets;
- (b) failing to:
  - (i) preserve the assets of the Mutual Funds;



- (ii) maximize the value of the units of the Mutual Funds;
- (iii) ensure that all remuneration paid for services rendered to the Mutual Fund is reasonable and properly earned;
- (iv) ascertain the nature of any services provided by Discount Brokers;
- (v) ascribe a reasonable value to any services provided by Discount Brokers to ensure that the Mutual Fund assets are used for proper purposes and in reasonable amounts;
- (vi) impose an obligation on Discount Brokers to provide particular services to Mutual Fund purchasers in consideration for trailing commissions;
- (vii) conduct any or adequate diligence, auditing or inquiries into whether Discount Brokers provide particular services to Mutual Fund purchasers for the Mutual Funds;
- (viii) conduct any or adequate diligence, auditing or inquiries into whether Discount Brokers provide particular services to Mutual Fund purchasers for the Mutual Funds;
- (ix) prohibit Mutual Fund series carrying trailing commissions from being acquired and/or held through Discount Brokers;
- (x) advise, permit or cause Class Members to convert their non-Series D units to Series D units of the Mutual Funds;
- (xi) advise, permit or cause Discount Broker Mutual Fund purchasers to re-designate or switch non-Series D securities of the Mutual Funds into Series D or equivalent securities of the Mutual Funds;
- (xii) create and make available a series of Mutual Funds through Discount Brokers that carried no trailing commission;

- (xiii) pay and accept management fees reduced by the amount that was not properly earned, and distributing that amount back to the Class Members or the Mutual Fund;
  - (xiv) waive payment of unearned trailing commissions;
  - (xv) reduce, cancel or waive trailing commissions;
- (c) acting in conflict of interest by:
- (i) acting as trustee and manager of the Mutual Funds, paying unearned management fees to themselves and negotiating Management Agreements and management fees with themselves;
  - (ii) paying trailing commissions to Discount Brokers for the Defendants' own benefit, effectively as a marketing expense to secure access to the Discount Brokers' clients, leading to increased management fees for the Manager Defendants as the Mutual Fund assets grow through new investment capital from Discount Broker platforms;
  - (iii) failing to make available Mutual Funds through Discount Brokers paying no trailing commission or alternatively a reduced trailing commission because of a concern that it would adversely affect the distribution of the Mutual Funds through full-service or advisory distribution channels and thereby reduce the Manager Defendant management fees;
  - (iv) receiving unearned management fees to pay trailing commissions to affiliate Discount Brokers for the ultimate benefit of parent corporations;

- (v) paying trailing commissions to Discount Brokers to provide a pecuniary incentive for the Discount Brokers to sell Mutual Funds and increase their management fees;
- (d) further or in the alternative, by:
  - (i) permitting non-Series D units of the Mutual Funds to be acquired and/or held through Discount Brokers;
  - (ii) failing to advise, permit or cause Class Members to convert their non-Series D units to Series D units of the Mutual Funds; and
  - (iii) failing advise, permit or cause Discount Broker Mutual Fund purchasers to re-designate or switch non-Series D securities of the Mutual Funds into Series D or equivalent securities of the Mutual Funds.

71. The Trustee Defendants also breached their fiduciary duty by failing to:

- (a) adequately supervise the Manager Defendants;
- (b) prevent or rectify the Manager Defendants' misconduct in breach of the Manager Defendants' standard of care.

72. Each Trustee and Manager Defendant is responsible for losses arising from its failure to discharge its responsibilities to exercise the requisite degree of care and skill.

### **C. Breach of Contract**

73. The Manager Defendants are liable to the Class Members for breach of contract for breaching the Management Agreements and the Trust Instruments.

74. Under the Management Agreements and Trust Instruments, the Manager Defendants were required to:

- (a) exercise their powers and discharge their duties honestly, in good faith and in the best interests of each Mutual Fund;
- (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances; and
- (c) comply with the applicable law, including section 116 of the Ontario *Securities Act* and equivalent legislation across Canada and section 2.1 of National Instrument 81-107 *Independent Review Committee for Investment Funds*.

75. The Manager Defendants breached the Management Agreements and the Trust Instruments arising from their failure to:

- (a) exercise the powers and discharge their duties honestly, in good faith and in the best interests of each Mutual Fund;
- (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances; and
- (c) comply with the applicable law, including section 116 of the Ontario *Securities Act* and equivalent legislation across Canada and section 2.1 of section 2.1 of National Instrument 81-107 *Independent Review Committee for Investment Funds*.

76. Under the Management Agreements and the Trust Instruments, the Manager Defendants are responsible for all losses arising from their failure to adhere to these duties.

77. The Class Members can enforce the Management Agreements and the Trust Instruments against the Manager Defendants.

78. Under the Management Agreements and the Trust Instruments:

- (a) the Trustee Defendants and MFCC delegated the managerial functions of the Mutual Funds to the Manager Defendants; and
- (b) the Trustee Defendants structured the Mutual Funds as trusts so that they had direct relationships and obligations to the Class Member beneficiaries.

79. The Class Members are third-party beneficiaries of the Management Agreements and the Trust Instruments.

80. The Management Agreements and the Trust Instruments evidence an intention to extend the benefit of the Manager Defendants' duties to the Class Members:

- (a) these duties are:
  - (i) for the protection and benefit of the Class Members;
  - (ii) intended to ensure that the Manager Defendants act in accordance with a minimum standard of care;
  - (iii) intended to ensure that the Manager Defendants comply with the law in administering the business and affairs of the Mutual Funds;
  - (iv) intended to ensure that the Manager Defendants are accountable for any loss that arises if the Manager Defendants do not comply with their duties thereunder; and
- (b) the Class Members are intended beneficiaries of these duties as they have the only realistic interest in enforcing those provisions against the Manager

Defendants, since the Trustee Defendants and MFCC are the same, related or affiliated parties to the Manager Defendants and will thus not seek recovery from the Manager Defendants for breaches of the Management Agreements and the Trust Instruments.

81. The Manager Defendants' misconduct falls within the scope of the Manager Defendants' duties and obligations under the Management Agreements and the Trust Instruments.

82. In the alternative, the Class Members seek recovery against the Manager Defendants for breach of contract based on the cause of action accruing to the Trustee Defendants and MFCC.

83. The Trustee Defendants and MFCC have failed or refused to enforce the Manager Defendants compliance with the Management Agreements and Trust Instruments or to seek compensation for breaches thereof.

84. There are special circumstances permitting the Class Members to step into the shoes of the Trustee Defendants and MFCC to bring a breach of contract claim against the Manager Defendants:

- (a) there is no other reasonable avenue of relief to force the Trustee Defendants and MFCC to assert claims against the Manager Defendants because of conflict of interest;
- (b) the Trustee Defendants and MFCC have not enforced the Management Agreements and Trust Instruments;
- (c) the Trustee Defendants and MFCC have failed to:
  - (i) protect the Mutual Fund assets;
  - (ii) protect the interests of the beneficiaries in of the Mutual Funds; and

(d) action is required to recover Mutual Fund property.

85. The Class Members have suffered damages from the Manager Defendants' breach of contract.

**D. Breach of Section 23.1 of the *Trustee Act***

86. *Trustee Act*, RSO 1990, c T.23, section 23.1(1) states:

Expenses of trustees

23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,

- (a) pay the expense directly from the trust property; or
- (b) pay the expense personally and recover a corresponding amount from the trust property.

Later disallowance by court

(2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

87. The unearned management fees are expenses paid by the Trustee Defendants from the trust property of the Mutual Funds.

88. The expenses are not properly incurred in carrying out the trust because they are for trailing commissions paid or payable to Discount Brokers.

89. The trailing commissions are not properly paid or payable to Discount Brokers because the Discount Brokers do not provide services or advice to Discount Broker Mutual Fund purchasers.

90. The payment of the expenses ought to be disallowed pursuant to *Trustee Act* section 23.1(2) and, if necessary, the equivalent provisions of comparable Canadian legislation.

**E. Unjust Enrichment**

91. The Manager Defendants were enriched by:

- (a) the receipt of unearned management fees from the Mutual Fund assets;
- (b) paying themselves unearned management fees out of the Mutual Fund assets for the purpose of paying trailing commissions to Discount Brokers for shelf space on their trading platforms; and
- (c) saving themselves from incurring marketing expenses that they would otherwise be obliged to pay.

92. The Class Members suffered a corresponding deprivation by the reduction in value of their Mutual Fund units resulting from the payment of unearned management fees out of the assets of the Mutual Funds.

93. There is no juristic reason for the enrichment:

- (a) the payment of trailing commissions from the Mutual Fund assets was a result of the Manager Defendants' wrongful acts and omissions; and
- (b) any contracts on which the Manager Defendants purport to rely to justify receipt of the unearned management fees do not require receipt of any such fees, or alternatively, are void and illegal.



**F. Oppression**

94. The MFC Shareholder Class Members assert a right of action against MFC and MFCC.

95. MFC owns the outstanding common shares of MFCC.

96. MFC is an affiliate of MFCC.

97. The MFC Shareholder Class Members are complainants under sections 245 and 248 of the Ontario *Business Corporations Act*.

98. The MFC Shareholder Class Members had reasonable expectations about how the business and affairs of the MFC and MFCC would be conducted. The reasonable expectations of the Plaintiffs and the other MFC Shareholder Class Members included that:

- (a) the assets of each Mackenzie Corporate Class Mutual Fund would be used for proper purposes; and
- (b) MFC and MFCC would enter into commercially reasonable agreements.

99. Those reasonable expectations arose in part from the statutes governing MFC and MFCC's formation and internal governance, applicable securities law and the disclosure documents for the Mackenzie Corporate Class Mutual Funds.

100. MFC and MFCC acted in a manner contrary to the reasonable expectations of the MFC Shareholder Class Members by, among other things:

- (a) entering into agreements to pay unearned management fees and paying such fees out of the assets of the Mackenzie Corporate Class Mutual Funds when

they knew that the unearned management fees would be disbursed to the Discount Brokers for no purpose; and

- (b) treating the MFC Shareholder Class Members unfairly by requiring them to pay, directly or indirectly, a trailing commission to a Discount Broker in circumstances where the Discount Broker purchasers are not receiving services or advice from the Discount Broker.

101. The conduct of MFC and MFCC was oppressive and unfairly prejudicial to the MFC Shareholder Class Members and unfairly disregarded their interests.

102. The MFC Shareholder Class Members have suffered loss and damage from MFC and MFCC's acts and omissions as particularized herein.

103. The MFC Shareholder Class Members seek relief under section 248 of the Ontario *Business Corporations Act*, including compensation for the loss and damage that they have suffered.

#### **G. Prospectus Liability**

104. The Defendants are liable to the Class Members for prospectus misrepresentation under section 130 of the Ontario *Securities Act* (and if necessary, the equivalent provisions of comparable legislation of other Canadian provinces).

105. The Defendants prepared, filed and disseminated the Prospectuses to permit the continuous offering of Mutual Fund units to the public.

106. The Prospectuses are prospectuses under section 130 of the Ontario *Securities Act* (and if necessary, the equivalent provisions of comparable legislation of other Canadian provinces).

107. The Prospectuses incorporate by reference “Fund Fact Documents” which form part of the Prospectuses.

108. The Fund Fact Documents forming part of the Prospectuses state that trailing commissions are paid to dealers for services and advice provided by those dealers to their clients.

109. This statement is false and misleading. It falsely represents that trailing commissions are only paid to dealers that provide services and advice to investors. However, trailing commissions are also paid to Discount Brokers, even though they do not and cannot provide services or advice to their clients.

110. Further or in the alternative, the Fund Fact Documents forming part of the Prospectuses state that trailing commissions are paid to dealers for services and/or advice provided by those dealers to their clients.

111. This statement is false and misleading:

- (a) it falsely represents that trailing commissions are paid for services and/or advice;
- (b) it falsely represents that trailing commissions are only paid to dealers that provide services and/or advice to investors, yet trailing commissions are also paid to Discount Brokers, even though they do not and cannot provide services or advice to their clients;
- (c) it falsely represents that trailing commissions are only paid to dealers that provide services and advice to investors, yet trailing commissions are also paid to Discount Brokers, even though Discount Brokers do not:
  - (i) provide the Class Members with any services;

- (ii) provide the Class Members with any services specific to the Mutual Funds;
  
- (d) it omits to state the following material facts that are required to be stated to make the statement not misleading in light of the circumstances in which it was made:
  - (i) in consideration for the trailing commissions, the Manager Defendants do not impose an obligation on Discount Brokers to provide particular services to Class Members for the Mutual Funds;
  - (ii) the Manager Defendants have taken no or inadequate steps to ensure that the assets of the Mutual Funds are used for proper purposes and in reasonable amounts, including but not limited to by failing to ascertain the nature of services provided by Discount Brokers to Mutual Fund purchasers and/or ascribe a reasonable value to any such services;
  
- (e) the Discount Brokers do not:
  - (i) provide the Class Members with any services;
  - (ii) provide the Class Members with any services specific to the Mutual Funds;
  
- (f) any services provided by Discount Brokers to their clients (for example, research and educational tools):
  - (i) are provided no matter if clients hold the Mutual Funds;
  - (ii) are available to all Discount Broker clients; and
  - (iii) do not justify payment of trailing commissions to Discount Brokers for the Mutual Funds.

112. These statements are material to Class Members.

113. The Defendants certified and signed the Prospectuses.

114. The Class Members have suffered damages from the Defendants' acts and omissions as particularized herein.

## **H. Damages**

115. The Class Members have suffered damages from the Defendants' misconduct.

116. As a result of payment of unearned management fees and trailing commissions from the assets of the Mutual Funds:

- (a) the value of the assets of the Mutual Funds has been reduced;
- (b) the value of the units of the Mutual Funds held by the Class Members has been reduced;
- (c) the returns achieved by the Class Members on their investments have been reduced;
- (d) the Class Members have suffered the loss of opportunity to earn a reasonable return on investments.

## **XI. LEGISLATION**

117. The Plaintiffs plead the *Trustee Act*, the *Courts of Justice Act*, the *Securities Act* and, if necessary, equivalent legislation of other Canadian provinces.

## **XII. PLACE OF TRIAL**

118. The Plaintiffs propose that this action be tried in the City of Toronto, in the Province of Ontario.

August 12, 2022

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**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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