



Court File No.

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

(Court Seal)

ALEXANDER LITVIN AND DAVID MCNAIRN

**Plaintiffs**

and

MACKENZIE FINANCIAL CORPORATION

**Defendant**

Proceeding commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

**STATEMENT OF CLAIM**

TO THE DEFENDANT

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.

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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.

IF YOU PAY THE PLAINTIFFS' CLAIM, and \$750 for costs, within the time for serving and filing your Statement of Defence you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiffs' claim and \$400 for costs and have the costs assessed by the Court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date \_\_\_\_\_ Issued by \_\_\_\_\_  
Local Registrar

Address of court office: Superior Court of Justice  
161 Elgin Street, 2<sup>nd</sup> Floor  
Ottawa ON K2P 2K1

TO: MACKENZIE FINANCIAL CORPORATION  
180 Queen Street West,  
Toronto, Ontario M5V 3K1

## **I. OVERVIEW**

1. This action arises as a result of a large scale cyberattack and data breach that occurred in or about January 2023.

2. Mackenzie Financial Corporation (“MFC”) is one of Canada’s largest investment management firms, with close to \$200 billion of assets under management. As an investment fund manager, MFC collects and retains highly sensitive personal information of its clients, for the purposes of its business, including social insurance numbers. It does so as a trustee or fiduciary to its customers.

3. MFC engaged and provided highly sensitive client information to a third party to carry out regulatory requirements. The third party implemented completely inadequate IT security and business practices to protect the highly sensitive information and was the subject of a significant data breach by criminal hackers. MFC, in turn, had completely inadequate business practices by failing to adequately audit and review the third party’s IT security which gave rise to the breach. The third party’s deficient IT security could have been easily detected and remedied.

4. MFC generated enormous fees, and owed fiduciary and trust duties to the Class, but nevertheless treated audits of the third party’s IT security in a cavalier and reprehensible manner. As a result of the data breach, highly sensitive financial information of the Class is now held by unknown hackers who can weaponize the data for the indefinite future: they can sell it, they can post it for free, or they can use it themselves to effect harm on the Class through identity theft, among other things. As the breach involves social insurance numbers, which can be used to obtain many other forms of sensitive financial information, and because they cannot be readily changed,

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these risks will follow the Class for the rest of their lives. The Class includes thousands of impacted persons, including retirees who purchased MFC's mutual funds for financial peace of mind and financial security. However, due to MFC's breaches of its duties, resulting in the holding of highly sensitive financial information by unknown hackers, these class members now have the opposite of financial peace of mind and financial security. In the circumstances, MFC's offer to provide two years of credit monitoring services to class members is completely inadequate.

## II. DEFINED TERMS

5. In this claim, the following terms have the following meanings:

- a) "**CIRO**" means the Canadian Investment Regulatory Organization;
- b) "**Class**" means the Proposed Class of all persons in Canada whose personal information held by MFC was exposed to appropriation by unauthorized persons (i.e. "hackers") as a result of a security breach occurring on or about January 18, 2023. Excluded from the Class is MFC and any subsidiaries or affiliates;
- c) "**IIROC**" means the Investment Industry Regulatory Organization of Canada;
- d) "**InvestorCOM**" means InvestorCOM Inc.
- e) "**MFC**" means the Defendant, Mackenzie Financial Corporation;
- f) "**MFCC**" means Mackenzie Financial Capital Corporation;
- g) "**Mackenzie Mutual Funds**" means, collectively:

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- i. All mutual funds held by the Class that are or were or may be constituted as a separate class of shares of MFCC, including for greater certainty, (i) those mutual funds that have been or may be terminated, (ii) those mutual funds that have been or may be merged into other mutual funds, and (iii) those mutual funds that have undergone or may undergo name changes (the “**Mackenzie Corporate Class Mutual Funds**”); and
  - ii. All mutual fund trusts held by the Class of which MFC is trustee, or was trustee, including, for greater certainty, (i) those mutual funds that have been or may be terminated, (ii) those mutual funds that have been or may be merged into other mutual funds, and (iii) those mutual funds that have undergone or may undergo name changes (the “**Mackenzie Trust Mutual Funds**”);
- h) “**MFDA**” means the Mutual Fund Dealers Association of Canada;
  - i) “**NI 81-107**” means National Instrument 81-107 – *Independent Review Committee for Investment Funds*, as amended;
  - j) “**OSA**” means Ontario *Securities Act*, RSO 1990, c. S.5;
  - k) “**Personal Information**” means information that can be used to identify a member of the Class, through direct or indirect means, including but not limited to names, addresses, SINs, or Mackenzie account numbers;
  - l) “**SIN**” means Social Insurance Number;

### III. RELIEF SOUGHT

6. The Plaintiffs claim:

- (a) an order pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”) certifying this action as a class proceeding and appointing them as representative plaintiffs for the Class;
- (b) an aggregate assessment of damages in an amount to be determined for:
  - (i) negligence;
  - (ii) breach of fiduciary duty/breach of trust;
  - (iii) joint and several liability for intrusion upon seclusion;
  - (iv) breach of contract;
- (c) exemplary, punitive and/or aggravated damages in an amount to be determined;
- (d) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (e) post-judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (f) the costs of this proceeding, plus applicable taxes; and
- (g) such further and other relief as this Honourable Court may deem just.

## **IV. THE PARTIES**

### **A. The Plaintiffs**

7. The plaintiff, Alexander Litvin (“**Litvin**”), is a resident of Oakville, Ontario. Litvin purchased and sold a number of Mackenzie Mutual Funds between 2016 and 2021, including Mackenzie US Small Mid Cap Growth; Mackenzie US Mid Cap Growth; and Mackenzie Ivy Foreign Equity.

8. Litvin was notified by MFC in a letter dated April 27, 2023, that his Mackenzie account number, name, address and SIN had been exposed in a data breach that occurred on January 30, 2023.

9. The plaintiff, David McNairn (“**McNairn**”), is a resident of Ottawa, Ontario. He purchased and sold Mackenzie Mutual Funds since the late 1990s, including Mackenzie Global Environmental Equity Fund, Mackenzie Global Dividend Fund, Mackenzie Canadian Growth Balanced Fund, Mackenzie Growth Fund, and Mackenzie US Small Mid Cap Growth Fund.

10. McNairn was notified by MFC in a letter dated April 27, 2023, that his Mackenzie account number, name, address and SIN had been exposed in a data breach that occurred on January 30, 2023.

### **B. The Defendant**

11. MFC, is an Ontario corporation with its registered office address at 180 Queen Street West, Toronto, Ontario. MFC operates as an investment management company. It offers asset management, research, portfolio construction, financial planning and advisory services.

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12. MFC is and was an investment fund manager of all Mackenzie Mutual Funds, as defined in the *OSA*, and the trustee of Mackenzie Trust Mutual Funds. As an investment fund manager, MFC was at all material times subject to the duty under s. 116 of the *OSA* and/or section 2.1 of NI 81-107 to (a) exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the Mackenzie Mutual Funds, and (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

### **C. Mackenzie Financial Capital Corporation**

13. MFCC is and was the issuer of the Mackenzie Corporate Class Mutual Funds.

## **V. THE DATA BREACH**

### **i. Background facts regarding the breach**

14. In its capacity as an investment fund manager pursuant to the *OSA*, MFC holds highly sensitive Personal Information of the Class, including SINs.

15. MFC engages third party companies as agents to carry on business, including companies like InvestorCOM. InvestorCOM provides regulatory compliance and communications solutions for financial services. MFC transferred personal data and personal information of the Class to InvestorCOM. MFC is liable to the Class for the acts and omissions of InvestorCOM, as MFC's agent.

16. To carry out its functions, InvestorCOM used secure managed file transfer software known as "GoAnywhere MFT". GoAnywhere MFT is a web-based and managed file transfer tool



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designed to help organizations transfer files securely with partners and keep audit logs of who accessed the shared files.

17. Beginning on or about January 18, 2023, InvestorCOM experienced a data breach due to an exploit applicable to GoAnywhere MFT. The exploit was described as a remote code execution, a dangerous type of exploit that allows hackers to force vulnerable IT systems into running computer programs written by the hackers, which can make it easy to either steal data or establish a foothold in the vulnerable system. The weakness was highly dangerous and easy to exploit.

18. The software developer of GoAnywhere MFT, Fortra, stated that the attack required “access to the administrative console of the application, which in most cases is accessible only from within a private network, through VPN, or by allow-listed IP addresses (when running in cloud environments, such as Azure or AWS).” In other words, to be properly secured against outside attack, GoAnywhere MFT administrative consoles should not be exposed on the Internet; they must be shielded behind encrypted and protected systems. Only those instances of GoAnywhere MFT administrative consoles that were improperly exposed to the Internet were exposed to the exploit. Many organizations throughout the world use GoAnywhere MFT, but only a limited number that had misconfigured the administrative console were exposed to the exploit.

19. Contrary to basic security principles, InvestorCOM exposed its GoAnywhere MFT administrative console to the Internet. MFC, in turn, cavalierly and reprehensibly failed to review and to ensure that InvestorCOM’s IT security and business processes were adequate to protect the private financial information of the Class. The vulnerability was simple to identify and easy to remedy.

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20. Further, MFC and InvestorCOM retained sensitive Personal Information that was no longer required to be retained. By retaining sensitive information that was no longer required, MFC needlessly exposed the Class to the data breach.

21. MFC's actions and omissions in failing to review and to ensure that InvestorCOM's IT security was adequate, enabled a dangerous hacker group (the "**Unknown Hackers**") to penetrate InvestorCOM's IT systems and to appropriate personal information of the Class, including name, address and SIN information.

22. The Unknown Hackers have a website on the "dark web", which are sites on the Internet that can be accessed with special web browsers. The Unknown Hackers routinely publish highly confidential information of other breached companies, including SINs, passport information, tax records, and other highly sensitive financial information. The Unknown Hackers have disclosed the fact of the InvestorCOM data breach on their dark website, but appear to have yet to publish private information arising from the breach. However, as a result of the breach, the Class is exposed to the exploitation of their sensitive financial information by the Unknown Hackers or other unknown criminals, including SINs, for the indefinite future.

23. Beginning in or about March 2023, MFC began notifying the Class of the data breach. It offered two years of credit monitoring services and identity theft insurance through TransUnion, a Canadian credit reporting company. However, as the breach involves SINs, which can be used to obtain many other forms of sensitive financial information, and because SINs cannot be readily changed, these risks will follow the Class for the rest of their lives. In the circumstances, MFC's offer to provide two years of credit monitoring services to class members is completely inadequate.

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## **VI. CAUSES OF ACTION**

### **i. Breach of fiduciary duty**

24. Each of the Mackenzie Trust Mutual Funds is or was a trust governed by the terms of a trust instrument. Under the applicable trust instruments, MFC, as trustee, is and was required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable Mackenzie Trust Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. MFC is responsible for providing managerial, supervisory, administrative and investment advisory services to the applicable Mackenzie Trust Mutual Funds.

25. Each of the Mackenzie Corporate Class Mutual Funds is subject to an agreement pursuant to which MFCC appointed MFC to manage the Mackenzie Corporate Class Mutual Funds and the assets of the Mackenzie Corporate Class Mutual Funds. MFC is responsible for providing managerial, supervisory, administrative and investment advisory services to the Mackenzie Corporate Class Mutual Funds. Under the relevant agreement, MFC, as manager, is and was required to exercise its powers and discharge its duties as a manager honestly, in good faith and in the best interests of each Mackenzie Corporate Class Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Under the relevant agreement, MFC, as manager, is responsible for any loss arising out of MFC's failure to adhere to the standard of conduct.

26. MFC is a trustee, manager and fiduciary for the Class. MFC undertook full responsibility for the administration of the day-to-day business and affairs of all Mackenzie Mutual Funds. MFC

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owes duties of utmost good faith and full disclosure and to act prudently to protect the private information of the Class.

27. Further, as manager of each of the Mackenzie Mutual Funds, MFC has significant discretion, power or control in relation to the business and affairs of the Mackenzie Mutual Funds. MFC can unilaterally exercise or fail to exercise that discretion, power or control so as to affect the Class Members' legal interests. MFC has expressly or impliedly undertaken to act in the best interests of the Class Members, including by virtue of the standard of care imposed on MFC under relevant management agreements, s. 116 of the *OSA* and s. 2.1 of NI 81-107.

28. MFC breached its fiduciary duties and committed a breach of trust to the Class, as follows:

- (a) it failed to audit or review the IT security systems of InvestorCOM to ensure that the administrative console of GoAnywhere was only accessible through private network, through VPN, or by allow-listed IP addresses;
- (b) it failed to audit or review the IT security systems of InvestorCOM to ensure that adequate layered defence and monitoring extended beyond its external-facing perimeter to ensure that options remained to detect and defeat nefarious activity after the initial access point was exposed by the Unknown Hackers;
- (c) it retained and stored client information and allowed InvestorCOM to retain and store client information that was no longer reasonably required and failed to securely dispose of personal financial information once it was no longer required, contrary to Principle 5 of the *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5) and guidelines specified by the Office of the

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Privacy Commissioner of Canada's guidelines in the *Personal Information Retention and Disposal: Principles and Best Practices*;

- (d) it breached cybersecurity guidelines specified by IIROC, MFDA and CIRO by failing to adequately assess, manage or mitigate threats posed by InvestorCOM and by failing to maintain an adequate system of supervision and control over InvestorCOM, which held the Class's personal financial information;
- (e) it breached guidelines specified by the Government of Canada in *The Social Insurance Number (SIN) Code of Practice*, by (i) collecting, using and holding the SINS for identification purposes, (ii) sharing the SINS with a third party as a unique identifier, and (iii) storing SINS along with their clients' other personal information;
- (f) it failed to encrypt the personal financial information of the Class and failed to store personal information separate from the encryption keys;

29. The plaintiffs and the Class have suffered loss and damage as a result of MFC's breach of fiduciary duty and breach of trust.

30. As a result of the MFC's breach of fiduciary duty and breach of trust, an award of damages should be made to the Class to deter the breach of duties and to uphold the public concern about the maintenance of the integrity of fiduciary and trust relationships.

## **ii. Negligence**

31. MFC owed the Class a duty of care in the collection, use, retention and disclosure of personal information, and a duty to safeguard the confidentiality of their Personal Information.

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32. MFC breached the standard of care, as specified in paragraph 28 above.

33. As a result of the MFC's actions and omissions, the Class suffered and continues to suffer reasonably foreseeable damages and losses, for which it is liable.

**iii. Joint and several liability for intrusion upon seclusion**

34. By recklessly or negligently failing to take appropriate security safeguards, and thereby facilitating the cyber-breach, MFC is jointly and severally liable for the tort of intrusion upon seclusion with the Unknown Hackers who intentionally invaded the class members' privacy and intruded upon the class members' seclusion. But for MFC's negligence, the Unknown Hackers would not have been able to appropriate the class members' Personal Information. MFC and the Unknown Hackers engaged in tortious conduct. The class members' loss is indivisible.

35. The Unknown Hackers intentionally intruded upon the seclusion of the class members by intentionally invading the class members' privacy. The personal financial information that was invaded was highly sensitive and personal. A reasonable person would consider the invasion to be highly offensive, causing anguish, humiliation or distress.

36. The plaintiff pleads and relies on s. 2 of the *Negligence Act*, R.S.O. 1990, c. N.1 and related provincial negligence statutes in Canada where class members reside.

**iv. Breach of contract**

37. MFC entered into a contract with the Class, pursuant to which MFC agreed that it is "committed to protecting the privacy of personal information that it collects and maintains in the course of carrying on its business" and that when it "transfers personal information to our [third

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party] service providers, we ensure by contractual means that the transferred personal information is used only for the purposes for which the service provider is retained and is protected to the same degree as it is when in our possession.”

38. Further, under relevant management agreements pursuant to which MFC acts or has acted as manager of the Mackenzie Mutual Funds, MFC, as manager of the Mackenzie Mutual Funds, had a duty to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each Mackenzie Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent manager would exercise in comparable circumstances. The management agreements make MFC responsible for any loss that arises out of its failure to act in accordance with the manager’s standard of care. Further, under the management agreements, MFC was required to comply with securities legislation, including s. 116 of the *OSA* and s. 2.1 of NI 81-107.

39. The Plaintiffs and the Class are intended beneficiaries or third-party beneficiaries of the management agreements and the manager’s standard of care and compliance with law duties contained in the management agreements. The management agreements reflect an intention to extend the benefit of those provisions to the Class. The standard of care and compliance with law duties are for the protection and benefit of the Class who hold Mackenzie Mutual Funds.

40. By its acts and omissions, MFC breached the management agreements and is responsible for losses arising from the breach. MFC breached its contract with the Class by failing to audit or review the IT security systems of InvestorCOM to ensure that the administrative console of GoAnywhere was only accessible through private network, through VPN, or by allow-listed IP addresses. In so doing, MFC exposed the Personal Information of the Class in a massive

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cybersecurity breach. MFC breached its contract with the Class by failing to ensure that InvestorCOM protected the personal financial information of the Class to the same degree as it was when in the possession of the MFC. MFC is liable to repay fees paid by the Class.

## **VII. DAMAGES**

41. As a result of MFC's actions and omissions, the Class has suffered and will continue to suffer damages, including:

- a) damages resulting from synthetic or fictitious identity fraud schemes;
- b) damages to credit ratings and perceived credit worthiness;
- c) costs incurred due to wasted time and inconvenience of dealing with the breach, including time spent in corresponding with MFC and TransUnion;
- d) the costs of long-term credit monitoring and identity theft insurance to remedy and prevent identity theft;
- e) damage to reputation;
- f) out-of-pocket expenses;
- g) general damages to be assessed in the aggregate; and
- h) special damages caused by unlawful conduct by third parties, including identity theft, occasioned by or attributable to the MFC's breaches as alleged herein.



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42. Damages should be awarded on both an aggregate and individual basis. Synthetic or fictitious identity schemes cost Canadians potentially \$1 billion a year in losses. MFC's acts and omissions have materially increased the risk to every member of the Class of being victimized by identity theft and have materially increased the quantum of damages that will arise from identity theft to the Class.

43. The plaintiff requests individual hearings under section 25 of the CPA for special damages pleaded above.

**i. Punitive and exemplary damages**

44. MFC's conduct was high-handed, reckless, without care, deliberate and in disregard of the Plaintiffs' and the class members' rights. It knew or ought to have known that its actions and omissions would have a significant adverse effect on all class members.

45. MFC owed fiduciary and trust duties to the Class, as particularized herein. It knew that cyber security incidents and data breaches have been increasing the past years. It knew that the nature of its business and the sensitivity of the information it collects makes it a prime target for data breaches, and that data breaches are of grave concern to its customers, particularly ones involving SINS. Nevertheless, MFC failed to audit or review the IT systems of InvestorCOM to ensure that adequate IT security was in place, and MFC failed to ensure that a simple solution that could have avoided the breach was implemented.

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**Plaintiffs**

-and-

**MACKENZIE FINANCIAL CORPORATION**  
**Defendant**

**Court File No.**

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED IN OTTAWA

Proceeding commenced under the *Class Proceedings Act*,  
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**STATEMENT OF CLAIM**

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