

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

THE HONOURABLE ) FRIDAY THE 5<sup>TH</sup> DAY  
 )  
JUSTICE BELOBABA ) OF AUGUST 2022

B E T W E E N :

STEPHEN POZGAJ

Plaintiff

- and -

NATIONAL BANK INVESTMENTS INC.  
and NATCAN TRUST COMPANY

Defendants



Proceeding under the *Class Proceedings Act, 1992*

**ORDER**  
**(CERTIFICATION, NOTICE AND OPT-OUT)**

**THIS MOTION**, by the Plaintiff for an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6 ("**CPA**") and approving the certification notice, the notice plan, setting the opt-out process and deadline, and appointing RicePoint Administration Inc. ("**RicePoint**") as notice and opt-out administrator was heard this day in writing;

**ON READING** the materials filed by the Plaintiff;

**AND ON BEING ADVISED** that the Defendants do not oppose this Order and that RicePoint consents to being appointed as notice and opt-out administrator;

1. **THIS COURT ORDERS** that for the purposes of this order, except to the extent that they are modified in this order, the definitions set out in the proposed Second Fresh as Amended

Entered at Toronto on August 9, 2022 - mq

Statement of Claim (“**Claim**”), attached hereto as **Schedule “A”**, apply to and are incorporated into this order.

2. **THIS COURT ORDERS** that the within action is certified as a class proceeding pursuant to the *CPA* as against the Defendants, subject to the provisions of this order.

3. **THIS COURT ORDERS** that the Class is defined as:

All persons, wherever they may reside or be domiciled, who held or hold units of a National Bank Mutual Fund or NBI Private Portfolio Mutual Fund through a Discount Broker, except for the Excluded Persons\*, from December 28, 2003 to the date this Order is issued.

\* Excluded Persons means NBI and Natcan Trust; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of NBI or Natcan Trust; the past and present members of the independent review committee of each National Bank Mutual Fund or NBI Private Portfolio Mutual Fund; the past and present members of a board of any National Bank Mutual Fund or NBI Private Portfolio Mutual Fund; and the past governors of any National Bank Mutual Fund or NBI Private Portfolio Mutual Fund.

4. **THIS COURT ORDERS** that the following issues are certified as common issues for the Class:

***Breach of Fiduciary Duty***

- (a) Did Natcan Trust, as trustee, owe a fiduciary duty? If so, to whom was the duty owed?
- (b) Did NBI, as trustee, owe a fiduciary duty? If so, to whom was the duty owed?
- (c) Did NBI, as manager, owe a fiduciary duty? If so, to whom was the duty owed?
- (d) If the answer to the first question in (a), (b) and/or (c) is yes, did the relevant entity breach its fiduciary duty? If so, when and how?

***Breach of Trust***

- (e) Did Natcan Trust, as trustee, breach the standard of care set out in the Trust Instruments? If so, when and how?

- (f) Did NBI, as trustee, breach the standard of care set out in the Trust Instruments? If so, when and how?
- (g) Are the Defendants, or either of them, liable to account to the Class Members?

***Breach of Contract***

- (h) Did NBI, as the manager of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds, breach the Management Agreements? If so, when and how?

***Section 23.1 of the Trustee Act***

- (i) Should the payment of the Unearned Management Fees by Natcan Trust or NBI be disallowed as an expense pursuant to section 23.1 of the *Trustee Act*?

***Prospectus Misrepresentation***

- (j) Did the Fund Facts Documents, and the Simplified Prospectuses which incorporate the Fund Facts Documents, contain a misrepresentation within the meaning of the *OSA* (and, as applicable, the Other Canadian Securities Legislation)?
- (k) If the answer to (j) is yes, are the Defendants, or either of them, liable to the Class Members pursuant to section 130 of the *OSA* (and, as applicable, the Other Canadian Securities Legislation)?

***Remedies***

- (l) If the Defendants are found liable on any claims asserted by the Class Members, as set out above, what remedies, including damages and/or equitable remedies, are the Class Members entitled to receive?
- (m) How should recoveries under each type of remedy be measured?
- (n) Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that amount to the Class Members?

***Interest***

- (o) Should the Defendants be ordered to pay an equitable rate of interest and/or pre-judgment and post-judgment interest pursuant to the *CJA*? If so, what is the appropriate measure or amount of such interest?

***Administration and Distribution***

- (p) Should the Defendants pay the costs of administering and distributing the recovery? If so, what amount should the Defendants pay?

5. **THIS COURT ORDERS** that Stephen Pozgaj is appointed as the representative plaintiff for the Class.
6. **THIS COURT ORDERS** that the relief sought by the Class is as set out in paragraph 3 of the Claim.
7. **THIS COURT ORDERS** that the nature of the claims asserted on behalf of the Class are relief arising out of or under: (i) breach of trust; (ii) breach of fiduciary duty; (iii) breach of contract; (iv) section 23.1 of the *Trustee Act*; and (v) section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
8. **THIS COURT ORDERS** that the litigation plan attached hereto as **Schedule “B”** is hereby approved.
9. **THIS COURT ORDERS** that any other class proceeding in Ontario relating to the subject matter of this action is hereby stayed, except for (1) *Frayce et al. v BMO InvestorLine Inc. et al.*, Ontario Superior Court of Justice, Court File No. CV-20-00638868-00CP; and (2) *Frayce v BMO InvestorLine Inc. et al.*, Ontario Superior Court of Justice, Court File No. CV-20-00634551-00CP.
10. **THIS COURT ORDERS** that no other class proceeding relating to the subject matter of this action may be commenced in Ontario without leave of the Court.
11. **THIS COURT ORDERS** that RicePoint is hereby appointed as the notice and opt-out administrator and will perform the duties and responsibilities set out herein, and any other related duty or responsibility.

12. **THIS COURT ORDERS** that the long-form notice, short-form notice and internet banner, substantially in the form attached hereto as **Schedules “C”, “D” and “E”**, respectively, are hereby approved.
13. **THIS COURT ORDERS** that the notices shall be published and disseminated by RicePoint (or Siskinds LLP (“**Class Counsel**”) with respect to paragraphs 13(b)(i) and (ii) below or the Defendants with respect to paragraph 13(a)(v) below) substantially in the following manner:
- (a) Short-form notice:
- (i) disseminated as a news release in Canada across Canada NewsWire (in English and French);
  - (ii) published once in the business section of the national weekend edition of The Globe and Mail, in English;
  - (iii) published once in the business section of La Presse, in French;
  - (iv) sent electronically and/or in paper form to Discount Brokers in Canada with a cover letter requesting that they post the notice on their electronic message/news boards;
  - (v) filed by the Defendants as a news release on SEDAR;
- (b) Long-form notice:
- (i) posted by Class Counsel on <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/>, in English and French;

- (ii) provided by Class Counsel to any potential Class Member who has previously contacted Class Counsel for the purposes of receiving notice of developments in the action;
- (c) Internet banner:
  - (i) published as a Google banner ad for approximately 700,000 impressions/views across Canada to an investor focused audience, in English and French, over 30 days;
  - (ii) published as a 12-day sponsored news link on Stockhouse.
- 14. **THIS COURT ORDERS** that the opt-out form (“**Opt-Out Form**”), substantially in the form attached as Appendix “A” to the long-form notice, is hereby approved.
- 15. **THIS COURT ORDERS** that:
  - (a) a person may opt out of this class proceeding by sending (by mail or courier) a fully completed Opt-Out Form in accordance with the instructions set out in the long-form notice to be postmarked on or before the date that is ninety (90) days after the day on which the short-form notice is first published (“**Opt-Out Deadline**”);
  - (b) no person may opt out of this class proceeding after the Opt-Out Deadline; and
  - (c) a person who validly opts out of the class proceeding in accordance with this Order shall not be a Class Member on and after the date that such person opts out of the class proceeding.
- 16. **THIS COURT ORDERS** that the costs of disseminating notice and receiving Opt-Out Forms shall be paid by the Plaintiff.

17. **THIS COURT ORDERS** that there shall be no costs of this motion.

*Justice Edward P. Belobaba*

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The Honourable Justice Belobaba

**SCHEDULE "A"**  
**PROPOSED SECOND FRESH AS AMENDED**  
**STATEMENT OF CLAIM**



Court File No. CV-18-00611745-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

STEPHEN POZGAJ

Plaintiff

- and -

NATIONAL BANK INVESTMENTS INC.  
and NATCAN TRUST COMPANY

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**SECOND FRESH AS AMENDED STATEMENT OF CLAIM**

**Notice of action issued on December 28, 2018**

## CURRENCY AND DEFINITIONS

1. Unless otherwise stated, all dollar amounts stated herein are in Canadian dollars.
2. In this Second Fresh as Amended Statement of Claim, in addition to the terms that are defined elsewhere herein, the following definitions apply:
  - (a) “**CJA**” means the *Courts of Justice Act*, RSO 1990, c C-43, as amended;
  - (b) “**Class**” and “**Class Members**” means, collectively, all persons, wherever they may reside or be domiciled, who held or hold units of a **National Bank Mutual Fund** or **NBI Private Portfolio Mutual Fund** through a **Discount Broker**, except for the **Excluded Persons**, from December 28, 2003 to [Certification Order Date];
  - (c) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
  - (d) “**CSA**” means the Canadian Securities Administrators;
  - (e) “**Current Group I DOTs**” means, collectively, the **Current NBI DOT**, the **Current NBI-A DOT**, the **Current NBI-B DOT** and the **Current NBI-D DOT**;
  - (f) “**Current Group II DOTs**” means, collectively, the **Current NBI-C DOT**, the **Current NBI-E DOT** and the **Current NBI-G DOT**;
  - (g) “**Current Meritage Portfolios DOT**” means the Amended and Restated Master Declaration of Trust for the Meritage Portfolios as amended and restated on May 14, 2020, as amended and supplemented from time to time;
  - (h) “**Current NBI-1 Management Agreement**” means the Amended and Restated Master Management and Distribution Agreement for the NBI Funds, NBI-A Funds, NBI-B Funds, NBI-C Funds, NBI-D Funds, NBI-E Funds, NBI-F Funds (also known as the NBI Private Portfolios) and NBI Income Fund as amended and restated on October 9, 2020, as amended and supplemented from time to time;
  - (i) “**Current NBI-2 Management Agreement**” means the Amended and Restated Master Management and Distribution Agreement for the NBI Jarislowsky Fraser Funds as amended and restated on August 31, 2016, as amended and supplemented from time to time;
  - (j) “**Current NBI-3 Management Agreement**” means the Amended and Restated Master Management and Distribution Agreement for the NBI-G Funds as amended and restated on November 18, 2016, as amended and supplemented from time to time;
  - (k) “**Current NBI-4 Management Agreement**” means the Amended and Restated Master Management Agreement for the Meritage Portfolios as amended and restated on May 14, 2020, as amended and supplemented from time to time;

- (l) “**Current NBI-A DOT**” means the Amended and Restated Master Declaration of Trust for the NBI-A Funds as amended and restated on May 14, 2020, as amended and supplemented from time to time;
- (m) “**Current NBI-B DOT**” means the Amended and Restated Master Declaration of Trust for the NBI-B Funds as amended and restated on October 1, 2020, as amended and supplemented from time to time;
- (n) “**Current NBI-C DOT**” means the Amended and Restated Master Declaration of Trust for the NBI-C Funds as amended and restated on May 14, 2020, as amended and supplemented from time to time;
- (o) “**Current NBI-D DOT**” means the Amended and Restated Master Declaration of Trust for the NBI-D Funds as amended and restated on May 14, 2018, as amended and supplemented from time to time;
- (p) “**Current NBI DOT**” means the Amended and Restated Master Declaration of Trust for the NBI Funds as amended and restated on May 14, 2020, as amended and supplemented from time to time;
- (q) “**Current NBI-E DOT**” means the Amended and Restated Master Declaration of Trust for the NBI-E Funds as amended and restated on May 14, 2020, as amended and supplemented from time to time;
- (r) “**Current NBI-F DOT**” means the Amended and Restated Master Declaration of Trust for the NBI Private Portfolio Funds (or NBI-F Funds) as amended and restated on May 14, 2020, as amended and supplemented from time to time;
- (s) “**Current NBI-G DOT**” means the Amended and Restated Master Declaration of Trust for the NBI-G Funds as amended and restated on March 1, 2017, as amended and supplemented from time to time;
- (t) “**Current NBI Income Fund DOT**” means the Amended and Restated Master Declaration of Trust for the NBI Income Fund dated February 19, 1970, as amended and supplemented from time to time;
- (u) “**Current NBI Jarislowsky Fraser DOT**” means the Amended and Restated Master Declaration of Trust for the NBI Jarislowsky Fraser Funds as amended and restated on May 14, 2018, as amended and supplemented from time to time;
- (v) “**Defendants**” means, together, **NBI and Natcan Trust**;
- (w) “**Discount Brokers**” means entities providing “order-execution only services” as defined in Rule 3200 of the **IIROC Rules** or entities performing a function similar to “order-execution only services” prior to the introduction of that definition in Rule 3200 of the **IIROC Rules**, including (without limitation) **National Bank Direct Brokerage**;
- (x) “**Excluded Persons**” means **NBI and Natcan Trust**; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives,

heirs, predecessors, successors and assigns of **NBI** or **Natcan Trust**; the past and present members of the independent review committee of each **National Bank Mutual Fund** or **NBI Private Portfolio Mutual Fund**; the past and present members of a board of any **National Bank Mutual Fund** or **NBI Private Portfolio Mutual Fund**; and the past governors of any **National Bank Mutual Fund** or **NBI Private Portfolio Mutual Fund**;

- (y) “**Form 81-101F1**” means Form 81-101F1 – *Contents of Simplified Prospectus*, as amended;
- (z) “**Form 81-101F2**” means Form 81-101F2 – *Contents of Annual Information Form*, as amended;
- (aa) “**Form 81-101F3**” means Form 81-101F3 – *Contents of Fund Facts Document*, as amended;
- (bb) “**Fund Facts Document**” means a fund facts document as referred to in **NI 81-101** and **Form 81-101F3**;
- (cc) “**IIROC**” means the Investment Industry Regulatory Organization of Canada;
- (dd) “**IIROC Rules**” means the **IIROC Dealer Member Rules**, as amended;
- (ee) “**Management Agreements**” means, collectively, all management agreements pursuant to which **NBI** acts, has acted or may act as manager of the **National Bank Mutual Funds** and **NBI Private Portfolio Mutual Funds**, including, without limitation, the **Current NBI-1 Management Agreement**, the **Current NBI-2 Management Agreement**, the **Current NBI-3 Management Agreement** and the **Current NBI-4 Management Agreement**;
- (ff) “**Manager’s Standard of Care**” has the meaning given to that term in paragraph 134 hereof;
- (gg) “**Manager’s Compliance with Law Duty**” has the meaning given to that term in paragraph 135 hereof;
- (hh) “**Natcan Trust**” means the Defendant, Natcan Trust Company;
- (ii) “**National Bank Direct Brokerage**” means National Bank Direct Brokerage, a division of National Bank Financial Inc., which is a subsidiary of the National Bank of Canada, or such other discount brokerage business operated by National Bank Financial Inc. or National Bank of Canada from time to time;
- (jj) “**National Bank Mutual Funds**” means all mutual fund trusts (including, without limitation, all series of units thereof) of which either **NBI** or **Natcan Trust** is trustee, was trustee or may be trustee from December 28, 2003 to [Certification Order Date] (but only in respect of the period during which either **NBI** or **Natcan Trust** is trustee, was trustee or may be trustee, as applicable), 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;

- (kk) “**National Bank Trust**” means National Bank Trust Inc.;
- (ll) “**NBI**” means the Defendant, National Bank Investments Inc. (and including all predecessor amalgamating entities, including, without limitation, each of Altamira Financial Services Ltd., Altamira Investment Services Inc. and National Bank Securities Inc. prior to their amalgamation on or around November 1, 2008 to form National Bank Securities Inc., which later changed its name to National Bank Investments Inc.);
- (mm) “**NBI Private Portfolio Mutual Funds**” means all mutual fund trusts (including, without limitation, all series of units thereof) of which **National Bank Trust** is trustee, was trustee or may be trustee from December 28, 2003 to [Certification Order Date] (but only in respect of the period during which **National Bank Trust** is trustee, was trustee or may be trustee, as applicable), 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;
- (nn) “**NI 81-101**” means National Instrument 81-101 – *Mutual Fund Prospectus Disclosure*, as amended;
- (oo) “**NI 81-107**” means National Instrument 81-107 – *Independent Review Committee for Investment Funds*, as amended;
- (pp) “**OSA**” means the *Securities Act*, RSO 1990, c S.5, as amended;
- (qq) “**Other Canadian Securities Legislation**” means, collectively, the *Securities Act*, RSA 2000, c S-4; the *Securities Act*, RSBC 1996, c 418; *The Securities Act*, CCSM c S50; the *Securities Act*, SNB 2004, c S-5.5; the *Securities Act*, RSNL 1990, c S-13; the *Securities Act*, SNWT 2008, c 10; the *Securities Act*, RSNS 1989, c 418; the *Securities Act*, S Nu 2008, c 12; the *Securities Act*, RSPEI 1988, c S-3.1; the *Securities Act*, RSQ, c V-1.1; *The Securities Act, 1988*, SS 1988-89, c S-42.2; and the *Securities Act*, SY 2007, c 16, all as amended;
- (rr) “**Plaintiff**” means the Plaintiff, Stephen Pozgaj;
- (ss) “**SEDAR**” means the CSA’s System for Electronic Document and Analysis and Retrieval;
- (tt) “**Simplified Prospectus**” means a simplified prospectus as referred to in **NI 81-101** and **Form 81-101F1**;
- (uu) “**Trustee Act**” means the *Trustee Act*, RSO 1990, c T.23, as amended;
- (vv) “**Trust Instruments**” means, collectively, all declarations of trust or similar trust instruments that govern, have governed or may govern the **National Bank Mutual Funds** or **NBI Private Portfolio Mutual Funds**, including, without limitation, the

**Current Group I DOTs, the Current Group II DOTs, the Current NBI-F DOT, the Current NBI Income Fund DOT, the Current NBI Jarislowsky Fraser DOT and the Current Meritage Portfolios DOT; and**

- (ww) **“Unearned Management Fees”** means, in respect of management fees that have been paid or may be paid out of the assets of the **National Bank Mutual Funds** and the **NBI Private Portfolio Mutual Funds**, the portion of those management fees that has been paid or may be paid to **Discount Brokers** as trailing commissions, and any taxes relating to those trailing commissions.

### **RELIEF SOUGHT**

3. The Plaintiff claims on his own behalf and on behalf of the other Class Members:
- (a) an order certifying this action as a class proceeding pursuant to the *CPA* and appointing the Plaintiff as the representative plaintiff for the Class;
  - (b) a declaration that the Defendants committed breaches of trust and/or breached their fiduciary duties to the Plaintiff and the other Class Members;
  - (c) a declaration that NBI is liable to the Plaintiff and the other Class Members for breach of contract;
  - (d) a declaration that the Defendants made one or more misrepresentations within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation), and that the Defendants are liable to the Plaintiff and the other Class Members pursuant to section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation);
  - (e) an order requiring the Defendants to account to the Plaintiff and the other Class Members for the Unearned Management Fees;
  - (f) damages and/or equitable compensation in the sum of \$150 million (or such other sum as this Court finds appropriate at the trial of the common issues or at a reference

or references) to restore the Plaintiff and the other Class Members to the position they would have been in had the Unearned Management Fees not been paid;

- (g) if necessary, an order compelling the Defendants to compensate the Plaintiff and the other Class Members in respect of the Unearned Management Fees by means of litigation trusts to be established pursuant to the *CPA*;
- (h) an order disallowing the payment of the Unearned Management Fees as expenses pursuant to section 23.1 of the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation) and requiring the Defendants to repay the expenses to the Plaintiff and the other Class Members or to the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds;
- (i) an interim and permanent order prohibiting the Defendants from seeking or obtaining indemnity or reimbursement from the assets of the National Bank Mutual Funds or NBI Private Portfolio Mutual Funds in respect of monetary relief paid or payable to the Plaintiff and the other Class Members in this action or their costs and expenses of this action;
- (j) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (k) an equitable rate of interest on all sums found due and owing to the Plaintiff and the other Class Members to compensate them for the diminution in the value of their units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds resulting from payment of the Unearned Management Fees;
- (l) pre-judgment and post-judgment interest pursuant to the *CJA*;

- (m) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity;
- (n) pursuant to section 26(9) of the *CPA*, the costs of notice and of administering the plan of distribution of the recovery in this action plus applicable taxes; and
- (o) such further and other relief as this Honourable Court may deem just.

## **OVERVIEW**

4. This class proceeding arises out of the payment of excessive, inflated and/or unearned management fees to NBI in respect of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds. The management fees are excessive, inflated and/or unearned because unearned trailing commissions are included in, or embedded into, those management fees.
5. NBI is the manager of all of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds. NBI was previously the trustee of certain National Bank Mutual Funds. Natcan Trust is the current trustee of the National Bank Mutual Funds.
6. The Class Members are persons who hold or held units of a National Bank Mutual Fund or NBI Private Portfolio Mutual Fund through a Discount Broker, as distinct from other distribution channels through which National Bank Mutual Funds and NBI Private Portfolio Mutual Funds are sold to investors. Discount Brokers are also commonly referred to as “order-execution only”, “DIY” and “online” brokers. Under the IIROC Rules, Discount Brokers are prohibited from providing investment advice to investors.
7. The National Bank Mutual Funds and NBI Private Portfolio Mutual Funds are trusts governed by the Trust Instruments. The assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds are trust property that the Defendants, as trustees



and/or fiduciaries, have undertaken to hold for the exclusive benefit of the beneficiaries, being the Class Members and the other unitholders of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds. The Defendants have a duty to preserve the trust property and maximize the value of units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds.

8. NBI, as manager, receives management fees out of the assets of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds. The management fees are excessive, inflated and/or unearned because a portion — described herein as the Unearned Management Fees — is collected by NBI for the purpose of paying trailing commissions to Discount Brokers. NBI has paid, and continues to pay, trailing commissions to Discount Brokers through which the Class Members held or hold the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds.
9. The purpose of a trailing commission on a mutual fund is to compensate the dealer (through whom the mutual fund is sold) for providing their client with ongoing investment advice about the client's investment in the mutual fund in respect of which the trailing commission is paid. As Discount Brokers do not and cannot provide investment advice to investors, the payment of trailing commissions to Discount Brokers in respect of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by NBI or Natcan Trust (in respect of the National Bank Mutual Funds) of the Unearned Management Fees on account of those trailing commissions, and their receipt by NBI (in respect of the National Bank Mutual Funds), is improper, unreasonable and unjustified. Similarly, the receipt of the Unearned Management Fees by NBI (in respect of the NBI Private Portfolio Mutual Funds) is improper, unreasonable and unjustified.

10. From 2011 until May 14, 2018, the Fund Facts Documents that the Defendants prepared and filed with securities regulators to permit the sale of units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds acknowledged the purpose of trailing commissions as compensation for advice. Those Fund Facts Documents stated that trailing commissions are paid to dealers for the “services and advice” provided by those dealers to their clients. As of May 14, 2018, the Fund Facts Documents for the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds were amended to refer to “services and/or advice”. By making that amendment to the Fund Facts Documents, the Defendants acknowledged that the reference to “services and advice” in the previous Fund Facts Documents was false, misleading and/or inaccurate.
11. The term “services and advice” refers to a dealer providing ongoing advice to a client with respect to the client’s investment in the National Bank Mutual Fund or NBI Private Portfolio Mutual Fund in respect of which the trailing commission is paid, and services that are specifically connected with that advice, namely determining the suitability for the client of the investment in that National Bank Mutual Fund or NBI Private Portfolio Mutual Fund in light of the personal circumstances of the client (including the client’s other investment holdings). However, Discount Brokers do not and cannot provide investment advice to clients and they do not provide suitability determinations for their clients. Accordingly, the payment of trailing commissions to Discount Brokers in respect of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by NBI or Natcan Trust (in respect of the National Bank Mutual Funds) of the Unearned Management Fees on account of those trailing commissions, and their receipt by NBI (in respect of the National Bank Mutual Funds), is improper, unreasonable and unjustified. Similarly, the receipt of the

Unearned Management Fees by NBI (in respect of the NBI Private Portfolio Mutual Funds) is improper, unreasonable and unjustified.

12. The reality is that trailing commissions function as sales commissions paid on an ongoing basis by the Defendant to Discount Brokers in consideration for services provided by the Discount Brokers to the Defendant, not services provided by the Discount Brokers to the Class Members. The trailing commissions incentivize the Discount Brokers to offer for sale, or provide “shelf space” for, National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, on their trading platforms. This is to the detriment of the Class Members (who suffer reduced investment returns), while accruing to the benefit of: NBI (which receives increased management fees as the assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds grow through new investment capital); the Defendants’ affiliate, National Bank Direct Brokerage (a division of National Bank Financial Inc.), and other Discount Brokers (which receive the trailing commissions); and the Defendants’ ultimate parent company, the National Bank of Canada (which enjoys the benefits flowing to NBI and National Bank Direct Brokerage). The Defendants misused trust property belonging to the Class Members for the purpose of benefiting themselves, their affiliates and others.
13. Further or in the alternative, the payment of trailing commissions to Discount Brokers cannot be justified on the basis of purported “services” because, among other things:
  - (a) the Defendants do not impose an obligation on Discount Brokers to provide particular services to Class Members in respect of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds in consideration for the trailing commissions;

(b) the Defendants do not conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers are providing particular services to Class Members in respect of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds; and

(c) the Defendants do not conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers use or apply the trailing commissions for the purpose of providing particular services to Class Members in respect of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds.

14. In fact, Discount Brokers do not provide Class Members with any services that are specific to the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds in respect of which the trailing commissions are paid and that are provided on an ongoing basis. The services provided by Discount Brokers to their clients (such as research and educational tools) are provided regardless of whether the clients hold National Bank Mutual Funds or NBI Private Portfolio Mutual Funds. Those general services available to all Discount Broker clients do not justify the payment of trailing commissions to Discount Brokers in respect of the National Bank Mutual Funds or NBI Private Portfolio Mutual Funds. Accordingly, the payment of trailing commissions to Discount Brokers on account of “services” is improper, unreasonable and unjustified. Consequently, the payment by NBI or Natcan Trust (in respect of the National Bank Mutual Funds) of the Unearned Management Fees on account of those trailing commissions, and their receipt by NBI (in respect of the National Bank Mutual Funds), is improper, unreasonable and unjustified. Similarly, the receipt of the Unearned Management Fees by NBI (in respect of the NBI Private Portfolio Mutual Funds) is improper, unreasonable and unjustified.

15. The Unearned Management Fees represent significant sums of money and are paid on a continuous basis. The wasting of the assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds by the payment of the Unearned Management Fees has decreased the value of the units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds held by the Class Members. The Class Members have suffered, and continue to suffer, significant loss and damage as a result of the Defendants' acts and omissions pleaded herein.

## **THE PARTIES**

### ***The Plaintiff***

16. The Plaintiff is an individual residing in Mississauga, Ontario.
17. The Plaintiff holds units of the following National Bank Mutual Funds in an account with TD Direct Investing, a Discount Broker:
  - (a) units of the NBI Bond Fund – Investor-2 Series (NBC6840);
  - (b) units of the NBI Canadian Equity Fund – Investor Series (NBC812);
  - (c) units of the NBI Canadian Equity Growth Fund – Investor Series (NBC887);
  - (d) units of the NBI Global Equity Fund – Investor Series (NBC867); and
  - (e) units of the NBI Science and Technology Fund – Investor Series (NBC879).

### ***The Class***

18. The proposed Class on whose behalf this proceeding is brought is comprised of all persons, wherever they may reside or be domiciled, who held or hold units of a National Bank Mutual Fund or NBI Private Portfolio Mutual Fund through a Discount Broker, except for the Excluded Persons, from December 28, 2003 to [Certification Order Date].

***The Defendant, NBI***

19. NBI is a corporation incorporated under the laws of Canada. Its registered offices and headquarters are located in Montreal, Québec. NBI was named “National Bank Securities Inc.” until on or around May 12, 2014.
20. NBI is a wholly-owned subsidiary of the National Bank of Canada.
21. NBI, by its predecessor amalgamating entity Altamira Investment Services Inc., was previously the trustee of certain National Bank Mutual Funds.
22. NBI is, and was at all material times, the manager of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds.
23. NBI is, and was at all material times, an “investment fund manager” as defined in the *OSA*. As an investment fund manager, NBI is, and was at all material times, subject to the duty under section 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 National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds, and (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

***The Defendant, Natcan Trust***

24. Natcan Trust is a corporation incorporated under the laws of Canada. Its registered offices and headquarters are located in Montreal, Québec.
25. Natcan Trust is an indirect subsidiary of the National Bank of Canada.
26. Natcan Trust is, and was at all material times (except for the period during which NBI was previously trustee of certain National Bank Mutual Funds), the trustee of the National Bank Mutual Funds.

27. Natcan Trust is, and was at all material times, an “investment fund manager” as defined in the *OSA*. As an investment fund manager, Natcan Trust is, and was at all material times, subject to the duty under section 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 National Bank Mutual Funds, and (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

## **THE FUNDS**

### ***The National Bank Mutual Funds***

28. Each of the National Bank Mutual Funds is or was a trust governed by the terms of one of the Trust Instruments.
29. Each of the National Bank Mutual Funds is or was an “investment fund” and a “mutual fund” as those terms are defined in the *OSA*.
30. Each of the National Bank Mutual Funds is or was a reporting issuer in Ontario and in all other provinces of Canada.
31. To the best of the Plaintiff’s knowledge, the National Bank Mutual Funds as of January 28, 2019 are listed in **Schedule “A”** hereto.

### ***The NBI Private Portfolio Mutual Funds***

32. Each of the NBI Private Portfolio Mutual Funds is or was a trust governed by the terms of one of the Trust Instruments.
33. Each of the NBI Private Portfolio Mutual Funds is or was an “investment fund” and a “mutual fund” as those terms are defined in the *OSA*.

34. Each of the NBI Private Portfolio Mutual Funds is or was a reporting issuer in Ontario and in all other provinces of Canada.
35. To the best of the Plaintiff's knowledge, the NBI Private Portfolio Mutual Funds as of January 28, 2019 are listed in **Schedule "B"** hereto.

#### **TRUST INSTRUMENTS AND MANAGEMENT AGREEMENTS**

36. The National Bank Mutual Funds are currently governed by the Current Group I DOTs, the Current Group II DOTs, the Current Meritage Portfolios DOT, the Current NBI Jarislowsky Fraser DOT and the Current NBI Income Fund DOT.
37. The NBI Private Portfolio Mutual Funds are currently governed by the Current NBI-F DOT.
38. The Class Members are or were unitholders of the National Bank Mutual Funds or the NBI Private Portfolio Mutual Funds. At all material times, the trustees under each applicable Trust Instrument held in trust all property of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds for the benefit of the unitholders.

#### ***Group I Funds***

39. The Current Group I DOTs are the Trust Instruments that currently govern the National Bank Mutual Funds described by the Defendants as the "NBI Funds", "NBI-A Funds", "NBI-B Funds" and "NBI-D Funds".
40. NBI is and was at all material times the manager of the National Bank Mutual Funds that are currently governed by the Current Group I DOTs.
41. NBI was previously the trustee of certain National Bank Mutual Funds, known as "Altamira Funds", that are currently governed by the Current Group I DOTs.



42. Natcan Trust is and was at all material times the trustee of the National Bank Mutual Funds that are currently governed by the Current Group I DOTs (except for the period during which NBI was previously trustee of certain National Bank Mutual Funds currently governed by the Current Group I DOTs).
43. Pursuant to section 9.1 of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times), the trustee is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent trustee would exercise in comparable circumstances. Section 9.3 of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) makes the trustee responsible to unitholders (such as the Class Members) for any loss that arises out of the breach of the standard of care found in section 9.1.
44. Pursuant to sections 7.1 and 7.3 of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and sections 1, 2 and 3 of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), the trustee has delegated to NBI, as manager, authority and responsibility for providing managerial, supervisory, distribution and investment advisory services to the applicable National Bank Mutual Funds.
45. Pursuant to section 7.2(1) of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 18 of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to exercise its powers and discharge its duties honestly, in good

faith and in the best interests of each applicable National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Under section 7.2(2) of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 18 of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times responsible for any loss that arises out of its failure, or the failure of any person or company retained by it, to meet the above standard of care.

46. Pursuant to section 7.1(1) of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 17 of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to comply with the *OSA*, the rules and regulations thereunder, with the equivalent legislation of all other provinces and territories applicable to the National Bank Mutual Funds, and the applicable securities instruments, which includes the obligations under section 116 of the *OSA* and/or section 2.1 of NI 81-107.
47. Pursuant to section 8.2 of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7(a) of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), in consideration for the management and administrative services, NBI, as manager, is entitled to receive a management fee from the property of the applicable National Bank Mutual Funds. Section 7(a) and the Schedules to the Current NBI-1 Management Agreement (and equivalent provisions of other

Management Agreements applicable at material times) set out the *maximum* management fee payable to NBI.

48. Section 13.4 of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7(b) of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) provide for NBI, as manager, to accept a lower management fee with respect to units of a series of an applicable National Bank Mutual Fund held by a unitholder, and the amount of any reimbursement must be distributed as a “Management Fee Distribution”.
49. Sections 3.1 and 3.2(k) of each of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) provide for the trustee, on the direction of NBI, as manager, to designate or re-designate units of one series of an applicable National Bank Mutual Fund into units of another series of the same National Bank Mutual Fund.
50. Section 3.1 of the Current Group I DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) provides that the trustee, upon the advice of NBI, as manager, may create new series for the applicable National Bank Mutual Funds.

***Group II Funds***

51. The Current Group II DOTs are the Trust Instruments that currently govern the National Bank Mutual Funds described by the Defendants as the “NBI-C Funds”, “NBI-E Funds” and “NBI-G Funds”.
52. Natcan Trust is and was at all material times the trustee of the National Bank Mutual Funds that are currently governed by the Current Group II DOTs.

53. NBI is and was at all material times the manager of the National Bank Mutual Funds that are currently governed by the Current Group II DOTs.
54. Pursuant to section 9.1 of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times), Natcan Trust, as trustee, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Section 9.3 of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) makes Natcan Trust, as trustee, responsible to unitholders (such as the Class Members) for any loss that arises out of the breach of the standard of care found in section 9.1.
55. Pursuant to sections 7.1 and 7.3 of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and sections 1, 2 and 3 of both the Current NBI-1 Management Agreement and the Current NBI-3 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), Natcan Trust, as trustee, has delegated to NBI, as manager, authority and responsibility for providing managerial, supervisory, distribution and investment advisory services to the applicable National Bank Mutual Funds.
56. Pursuant to section 7.2(1) of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 18 of both the Current NBI-1 Management Agreement and the Current NBI-3 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each

applicable National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Under section 7.2(2) of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 18 of both the Current NBI-1 Management Agreement and the Current NBI-3 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times responsible for any loss that arises out of its failure, or the failure of any person or company retained by it, to meet the above standard of care.

57. Pursuant to section 7.1(1) of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 17 of both the Current NBI-1 Management Agreement and the Current NBI-3 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to comply with the *OSA*, the rules and regulations thereunder, with the equivalent legislation of all other provinces and territories applicable to the National Bank Mutual Funds, and the applicable securities instruments, which includes the obligations under section 116 of the *OSA* and/or section 2.1 of NI 81-107.
58. Pursuant to section 8.2 of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7(a) of both the Current NBI-1 Management Agreement and the Current NBI-3 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), in consideration for the management and administrative services, NBI, as manager, is entitled to receive a management fee from the property of the applicable National Bank Mutual

Funds. Section 7(a) and the Schedules to both the Current NBI-1 Management Agreement and the Current NBI-3 Management Agreement (and equivalent provisions of other Management Agreements applicable at material times) set out the *maximum* management fee payable to NBI.

59. Section 13.4 of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7(b) of both the Current NBI-1 Management Agreement and the Current NBI-3 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) provide for NBI, as manager, to accept a lower management fee with respect to units of a series of an applicable National Bank Mutual Fund held by a unitholder, and the amount of any reimbursement must be distributed as a “Management Fee Distribution”.
60. Sections 3.1 and 3.2(k) of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) provide for Natcan Trust, as trustee, on the direction of NBI, as manager, to designate or re-designate units of one series of an applicable National Bank Mutual Fund into units of another series of the same National Bank Mutual Fund.
61. Section 3.1 of each of the Current Group II DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) provides that Natcan Trust, as trustee, upon the advice of NBI, as manager, may create new series for the applicable National Bank Mutual Funds.

### ***Meritage Portfolios***

62. The Current Meritage Portfolios DOT is the Trust Instrument that currently governs the National Bank Mutual Funds described by the Defendants as the “Meritage Portfolios”.

63. Natcan Trust is and was at all material times the trustee of the National Bank Mutual Funds that are currently governed by the Current Meritage Portfolios DOT.
64. NBI is and was at all material times the manager of the National Bank Mutual Funds that are currently governed by the Current Meritage Portfolios DOT.
65. Pursuant to section 9.1 of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times), Natcan Trust, as trustee, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Section 9.3 of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times) makes Natcan Trust responsible to unitholders (such as the Class Members) for any loss that arises out of the breach of the standard of care found in section 9.1.
66. Pursuant to sections 7.1 and 7.3 of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and sections 2 and 3 of the Current NBI-4 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), Natcan Trust, as trustee, has delegated to NBI, as manager, authority and responsibility for providing managerial, supervisory, distribution and investment advisory services to the applicable National Bank Mutual Funds.
67. Pursuant to section 7.2(1) of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7 of the Current NBI-4 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all

material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Under section 7.2(2) of the Current Meritage Portfolios DOTs (and the equivalent provisions of other Trust Instruments applicable at material times) and section 16 of the Current NBI-4 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI is and was at all material times responsible for any loss that arises out of its failure, or the failure of any person or company retained by it, to meet the above standard of care.

68. Section 7 of the Current NBI-4 Management Agreement (and the equivalent provisions of other Trust Instruments applicable at material times) requires NBI, as manager, to be cognizant of the terms and conditions of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times).
69. Pursuant to section 7.1(1) of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 8 of the Current NBI-4 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to comply with the *OSA*, the rules and regulations thereunder, with equivalent legislation of all other provinces and territories applicable to the National Bank Mutual Funds, and the applicable securities instruments, which includes the obligations under section 116 of the *OSA* and/or section 2.1 of NI 81-107.
70. Pursuant to section 8.2 of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 9(a) of the Current NBI-4 Management Agreement (and the equivalent provisions of other



Management Agreements applicable at material times), in consideration for the management and administrative services, NBI, as manager, is entitled to receive a management fee from the property of the applicable National Bank Mutual Funds. The Simplified Prospectuses for the applicable National Bank Mutual Funds set out the *maximum* management fee payable for each fund in the “Fund Details” section.

71. Section 13.4 of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 9(c) of the Current NBI-4 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) provide for NBI to accept a lower management fee with respect to units of a series of an applicable National Bank Mutual Fund held by a unitholder, and the amount of any reimbursement must be distributed as a “Management Fee Distribution”.
72. Sections 3.1 and 3.2(k) of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provide for Natcan Trust, on the direction of NBI, to designate or re-designate units of one series of an applicable National Bank Mutual Fund into units of another series of the same National Bank Mutual Fund.
73. Section 3.1 of the Current Meritage Portfolios DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provides that Natcan Trust, upon the advice of NBI, may create new series for the applicable National Bank Mutual Funds.

***NBI Jarislowsky Funds***

74. The Current NBI Jarislowsky Fraser DOT is the Trust Instrument that currently governs the National Bank Mutual Funds described by the Defendants as the “NBI Jarislowsky Funds” or “Jarislowsky Funds”.
75. Natcan Trust is and was at all material times the trustee of the National Bank Mutual Funds that are currently governed by the Current NBI Jarislowsky Fraser DOT.
76. NBI is and was at all material times the manager of the National Bank Mutual Funds that are currently governed by the Current NBI Jarislowsky Fraser DOT.
77. Pursuant to section 9.1 of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times), Natcan Trust, as trustee, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Section 9.3 of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) makes Natcan Trust responsible to unitholders (such as the Class Members) for any loss that arises out of the breach of the standard of care found in section 9.1.
78. Pursuant to sections 7.1 and 7.3 of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and sections 1, 2 and 3 of the Current NBI-2 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), Natcan Trust, as trustee, has delegated to NBI, as manager, authority and responsibility for providing managerial,

supervisory, distribution and investment advisory services to the applicable National Bank Mutual Funds.

79. Pursuant to section 7.2(1) of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 16 of the Current NBI-2 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Under section 7.2(2) of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 16 of the Current NBI-2 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI is and was at all material times responsible for any loss that arises out of its failure, or the failure of any person or company retained by it, to meet the above standard of care.
80. Pursuant to section 7.1(1) of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 15 of the Current NBI-2 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to comply with the *OSA*, the rules and regulations thereunder, with equivalent legislation of all other provinces and territories applicable to the National Bank Mutual Funds, and the applicable securities instruments, which includes the obligations under section 116 of the *OSA* and/or section 2.1 of NI 81-107.

81. Pursuant to section 8.2 of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7(a) of the Current NBI-2 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), in consideration for the management and administrative services, NBI, as manager, is entitled to receive a management fee from the property of the applicable National Bank Mutual Funds. Section 7(a) and the Schedules to the Current NBI-2 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) set out the *maximum* management fee payable to NBI.
82. Section 13.4 of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7(b) of the Current NBI-2 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) provide for NBI to accept a lower management fee with respect to units of a series of an applicable National Bank Mutual Fund held by a unitholder, and the amount of any reimbursement must be distributed as a “Management Fee Distribution”.
83. Sections 3.1 and 3.2(k) of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provide for Natcan Trust, on the direction of NBI, to designate or re-designate units of one series of an applicable National Bank Mutual Fund into units of another series of the same National Bank Mutual Fund.
84. Section 3.1 of the Current NBI Jarislowsky Fraser DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provides that Natcan Trust, upon the advice of NBI, may create new series for the applicable National Bank Mutual Funds.

***NBI Private Portfolio Mutual Funds***

85. The Current NBI-F DOT currently governs the NBI Private Portfolio Mutual Funds.
86. NBI is and was at all material times the manager of the NBI Private Portfolio Mutual Funds currently governed by the Current NBI-F DOT.
87. National Bank Trust is and was at all material times the trustee of the NBI Private Portfolio Mutual Funds currently governed by the Current NBI-F DOT.
88. Pursuant to section 9.1 of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times), National Bank Trust, as trustee, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable NBI Private Portfolio Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. Section 9.3 of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) makes National Bank Trust responsible to unitholders (such as the Class Members) for any loss that arises out of the breach of the standard of care found in section 9.1.
89. Pursuant to sections 7.1 and 7.3 of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and sections 1, 2 and 3 of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), National Bank Trust, as trustee, has delegated to NBI, as manager, authority and responsibility for providing managerial, supervisory, distribution and investment advisory services to the NBI Private Portfolio Mutual Funds.

90. Pursuant to section 7.2(1) of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 18 of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each NBI Private Portfolio Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Under section 7.2(2) of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 18 of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI is and was at all material times responsible for any loss that arises out of its failure, or the failure of any person or company retained by it, to meet the standard of care set out in section 7.2(1).
91. Pursuant to section 7.1(1) of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 17 of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), NBI, as manager, is and was at all material times required to comply with the *OSA*, the rules and regulations thereunder, with equivalent legislation of all other provinces and territories applicable to the NBI Private Portfolio Mutual Funds, and the applicable securities instruments, which includes the obligations under section 116 of the *OSA* and/or section 2.1 of NI 81-107.
92. Pursuant to section 8.2 of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7(a) of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements

applicable at material times), in consideration for the management and administrative services, NBI, as manager, is entitled to receive a management fee from the property of the NBI Private Portfolio Mutual Funds. Section 7(a) and the Schedules to the Current NBI-1 Management Agreement (and equivalent provisions of other Management Agreements applicable at material times) set out the *maximum* management fee payable to NBI.

93. Section 13.4 of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) and section 7(b) of the Current NBI-1 Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times) provide for NBI to accept a lower management fee with respect to units of a series of an applicable National Bank Mutual Fund held by a unitholder, and the amount of any reimbursement must be distributed as a “Management Fee Distribution”.
94. Sections 3.1 and 3.2(k) of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provide for National Bank Trust, on the direction of NBI, to designate or re-designate units of one series of an applicable NBI Private Portfolio Mutual Fund into units of another series of the same NBI Private Portfolio Mutual Fund.
95. Section 3.1 of the Current NBI-F DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provides that National Bank Trust, upon the advice of NBI, may create new series for the NBI Private Portfolio Mutual Funds.

#### ***NBI Income Fund***

96. The Current NBI Income Fund DOT currently governs the National Bank Mutual Fund described by the Defendants as the “NBI Income Fund”.

97. Natcan Trust is and was at all material times the trustee of the National Bank Mutual Fund currently governed by the Current NBI Income Fund DOT.
98. NBI is and was at all material times the manager of the National Bank Mutual Fund that is currently governed by the Current NBI Income Fund DOT.
99. The Defendants have not posted the Current NBI Income Fund DOT on SEDAR. The Plaintiff will plead the material provisions of the Current NBI Income Fund DOT when that document is made available to the Plaintiff.
100. The Current NBI-1 Management Agreement applies to the relationship between Natcan Trust, as trustee, and NBI, as manager, for the NBI Income Fund. The material provisions of the Current NBI-1 Management Agreement are described under “Group I Funds” above.

**MANAGEMENT FEES ON THE NATIONAL BANK MUTUAL FUNDS AND NBI PRIVATE PORTFOLIO MUTUAL FUNDS**

101. NBI, as manager, receives management fees out of the assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds. The management fees are calculated as a percentage of the net asset value of each series of each National Bank Mutual Fund and NBI Private Portfolio Mutual Fund (which management fees accrue daily and are payable monthly).
102. The payment of management fees to NBI out of the assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds reduces the net asset value of those funds, which in turn reduces the value of the units held by Class Members in the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds. As stated in one or more Simplified Prospectuses disseminated by the Defendants in respect of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, management fees are among the fees and expenses that are paid by the funds, and, therefore, “reduce the value of your [the



investor's] investment in the funds.” As stated in one or more Fund Facts Documents disseminated by the Defendants in respect of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, fund expenses, including management fees, “affect you [the investor] because they reduce the fund’s returns.” As stated in one or more of the Simplified Prospectuses prepared by the Defendants, NBI’s “overall objective is to maximize the return on your [unitholders’] investments.” Maximization of unitholder return on investment requires that management fees, including the trailing commission portion thereof, be kept as low as possible.

103. As stated in the Simplified Prospectuses and Fund Facts Documents prepared by the Defendants to permit the issuance of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, NBI can waive all or a portion of the management fees. NBI waived portions of the management fees in respect of certain National Bank Mutual Funds and NBI Private Portfolio Mutual Funds during the material time.

#### **TRAILING COMMISSIONS AND DISCOUNT BROKERS**

104. NBI has paid and continues to pay a portion of the management fees that it receives out of the assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds to dealers, including Discount Brokers, as trailing commissions.
105. The quantum of the trailing commission payable to a dealer is determined as a percentage of the value of the units of the National Bank Mutual Funds or the NBI Private Portfolio Mutual Funds held by the dealer’s clients (which trailing commission is calculated daily and paid monthly).
106. The payment of management fees, within which the trailing commissions payable to Discount Brokers are embedded, depletes the assets of the National Bank Mutual Funds

and NBI Private Portfolio Mutual Funds and reduces the value of the Class Members' units. They thereby diminish Class Members' return on investment in National Bank Mutual Funds and NBI Private Portfolio Mutual Funds.

107. Among other dealers, the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds are sold through Discount Brokers. Discount Brokers are entities that provide order-execution only services to investors. They are regulated by IIROC as "Dealer Members". Under the IIROC Rules, Discount Brokers apply to IIROC for approval to offer an "order-execution only service", which is defined as "the acceptance and execution of orders from customers for trades that the Dealer Member has not recommended and for which the Dealer Member takes no responsibility as to the appropriateness or suitability of orders accepted or account positions held." Such approval provides Discount Brokers with an exemption from compliance with IIROC Rules that impose requirements to assess the suitability of a client's orders and account positions. Accordingly, as a condition of the approval provided by IIROC to Discount Brokers to operate their discount brokerage businesses, Discount Brokers are prohibited from providing investment recommendations or advice to clients.
108. One of the Discount Brokers through which the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds are sold is National Bank Direct Brokerage, a division of National Bank Financial Inc., which is a subsidiary of the National Bank of Canada. Each of the Defendants is also a subsidiary of the National Bank of Canada. National Bank Financial Inc. and the Defendants are all affiliates of each other. Some of the Unearned Management Fees have been paid to National Bank Direct Brokerage, which is to the ultimate benefit of the National Bank of Canada.

109. The Defendants knew, or ought to have known, that the Unearned Management Fees were being paid to Discount Brokers as trailing commissions, thereby reducing the value of the Class Members' units, in circumstances where those trailing commissions were not earned by the Discount Brokers because they are not providing services and advice to the Class Members.
110. The Simplified Prospectuses and the Fund Facts Documents issued by the Defendants to permit the offering of units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds set out the maximum annual percentage rates for trailing commissions payable in respect of those funds. The Simplified Prospectuses and the Management Agreements for the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds set out the maximum annual percentage rates for management fees payable in respect of those funds. Class Members are entitled to expect that the Defendants will comply with their duties to the Class Members and will not pay the maximum rate of trailing commission both to dealers that provide full advisory services to their clients and to Discount Brokers who provide no services or advice to their clients. Yet, the trailing commissions paid by the Class Members on each series of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds are identical to the trailing commissions paid on those same series by investors who hold their units of the National Bank Mutual Funds or NBI Private Portfolio Mutual Funds through a full-service account.
111. The Defendants never disclosed to the Plaintiff the dollar amount of the trailing commissions paid to the Plaintiff's Discount Broker in respect of the units of the National Bank Mutual Funds held by the Plaintiff.

112. The Defendants continue the practice of paying trailing commissions to Discount Brokers in respect of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds despite criticism of the practice and the pending prohibition of the practice by regulators.
113. On January 10, 2017, the CSA released CSA Consultation Paper 81-408 – *Consultation on the Option of Discontinuing Embedded Commissions*, which addresses issues relating to mutual fund fees, including the payment of trailing commissions to dealers. In relation to the Canadian mutual fund industry generally, CSA Consultation Paper 81-408 states that, as at December 2015, “data suggests that \$25 billion of the total \$30 billion held in mutual funds in the [discount broker] channel (83%) remains in the full trailing commission paying fund series”. It concludes that “[t]he majority of DIY investors investing in mutual funds pay full trailing commission despite not receiving advice” and “many DIY mutual fund investors in the online/discount brokerage channel indirectly pay for services they do not receive.”
114. In a press release issued on May 8, 2017 entitled “Limit Series A Sales to Channels that Permit Advice: IFIC”, the Investment Funds Institute of Canada, which styles itself as the “voice of Canada’s investment funds industry”, called on regulators to ensure that mutual funds that carry a trailing commission are not sold through the Discount Broker channel.

The press release stated that:

The Investment Funds Institute of Canada (IFIC) is calling on regulators to establish rules to ensure that mutual funds carrying an embedded advisor fee are sold only in channels where advice is permitted.

“Investors who buy funds directly, for example through a discount broker, should be confident that they are not inadvertently overpaying by selecting a series that includes fees for services that are not available through that platform,” says Paul C. Bourque, Q.C., IFIC’s president and CEO.

Series A mutual funds bundle an advice fee within the product. Most companies already provide other series of funds with no or nominal trailer fees that investors can purchase if they are do-it-yourself investors or want to pay for advice separately. The industry’s

proposal would advance the goal of ensuring that low-trailer or no-trailer funds are available to these types of investors in a more uniform and transparent way.

“IFIC members believe that consumers should be able to choose for themselves the products, services and payment methods that best meet their needs and preferences,” Bourque stated. “Today’s proposal would help to achieve a goal that the industry shares with our regulators: to ensure that fees are aligned with the services that investors receive. It reflects the industry’s commitment to provide Canadian consumers with real and meaningful investment choices.”

115. On April 9, 2018, IIROC released its final guidance regarding order-execution only services offered by Discount Brokers. In Notice of Implementation 18-0075 dated April 9, 2018, IIROC stated that Discount Brokers face a conflict of interest by making available on their platforms mutual funds that pay a trailing commission for ongoing advice (e.g. Series A mutual funds). The Notice of Implementation stated:

We acknowledge that funds that pay an ongoing trailing commission to registrants (often described as a payment for advice and services provided to the investor by the registrant), and are made available by OEO firms (e.g., a Series A fund), raise a conflict of interest. Under our rules, a Dealer Member must address conflicts of interest considering the best interests of the client or clients.

In the Guidance, we indicate that OEO firms should consider how they will address any compensation-related conflicts when deciding which series (or series equivalent in the case of a PTF) of a fund to make (or not make) available on their platforms. We recognize that many OEO firms have already implemented practices to address this conflict.

We expect that OEO firms will make available, whenever possible, funds that do not pay a trailing commission for ongoing advice (often referred to as a Series D fund).

When a Series D fund is not available (e.g., because a fund family does not offer that type of series) and an OEO firm makes available another series that pays a trailing commission, we also expect the firm to address the conflict by rebating to the client the portion of the trailing commission for ongoing advice, or taking other similar steps.

A large majority of the publically available funds include a trailing commission. Management of the conflicts of interest relating to trailing commissions by OEO firms allows investors continued access to the widest possible range of investments.

116. On June 21, 2018, the CSA released CSA Staff Notice 81-330 – *Status Report on Consultation on Embedded Commissions and Next Steps*, in which the CSA announced its intention to publish rule changes that will prohibit the payment of trailing commissions to, and the solicitation and acceptance of trailing commissions by, dealers who do not make a

suitability determination (*e.g.* Discount Brokers) in connection with the distribution of prospectus qualified mutual fund securities. The CSA stated in Staff Notice 81-330 that:

In our view, the fees paid by a vast majority of DIY investors in this channel [i.e. the discount brokerage channel] do not appear to align with the execution-only nature of the services they receive. We also observe no justifiable rationale for the practice of paying discount brokerage dealers an ongoing trailing commission for the sale of a mutual fund. For example, other securities including most ETFs are commonly purchased and sold by way of an upfront transaction fee. This ongoing payment may therefore be viewed as one that incentivizes the distribution of mutual funds that pay such an ongoing fee over those that do not (*i.e.* a payment for shelf space), giving rise to a conflict of interest. This is especially the case when the discount brokerage receives the same trailing commission as that of full-service dealers (which rate is typically intended to compensate full service dealers for the costs associated with providing investment advice). Moreover, in our view this fee also limits investor awareness and understanding of the fees associated with the purchase of such products in the discount brokerage channel.

117. Further to the announcement by the CSA on June 21, 2018, on September 13, 2018 the CSA published proposed amendments to securities regulatory instruments that will, when the amendments come into force, prohibit the payment of trailing commissions by fund organizations (which includes mutual fund managers) to dealers who do not make a suitability determination, such as order-execution-only dealers (*i.e.* Discount Brokers). The proposed amendments will prohibit the payment of mutual fund trailing commissions to Discount Brokers in any amount. The CSA stated that fund organizations will need to make available to Discount Brokers a class or series of securities of a mutual fund that does not pay a trailing commission, which will result in a corresponding reduction in the rate of the management fee charged on that class or series. Existing holdings of mutual funds will also need to be switched to the class or series of securities of the mutual fund that does not pay a trailing commission. The CSA also commented that the prohibition on the payment of trailing commissions by fund organizations to Discount Brokers will eliminate “a longstanding conflict between IFMs [investment fund managers] (who have been reluctant to offer non trailing commission-paying fund series in this channel), online/discount

brokerages (who have been satisfied to accept full trailing commission-paying funds), and DIY investors.”

118. On September 17, 2020, the CSA published for adoption final amendments to applicable securities regulatory instruments to prohibit the payment of trailing commissions (of any amount) by fund managers, including the Defendants, to dealers who do not make a suitability determination, including Discount Brokers. The prohibition on the payment of trailing commissions to Discount Brokers will come into force on June 1, 2022.
119. As alluded to in the above-noted press release of the Investment Funds Institute of Canada, some mutual fund families offer a series of their funds, typically called Series D, that is sold only through Discount Brokers. Series D (or similar discount series) pay a lower management fee than traditional retail series (*e.g.* Series A) because they include a reduced trailing commission to partially reflect the fact that “services and advice” are not being provided to investors through a Discount Broker. The Defendants do not offer Series D units for the National Bank Mutual Funds or the NBI Private Portfolio Mutual Funds.
120. The Defendants offer Series E units for three of the National Bank Mutual Funds. Series E units are not available for the other National Bank Mutual Funds or the NBI Private Portfolio Mutual Funds. Series E units are only available through Discount Brokers. The current Fund Facts Documents that the Defendants have prepared and filed to permit the sale of the Series E units on those funds acknowledge that no advice or services are provided to investors in the relevant National Bank Mutual Funds through Discount Brokers. The Series E Fund Facts Documents state that trailing commissions are “for the services and/or advice that your representative or their firm provide to you” but, in recognition of the lack of services and advice provided by Discount Brokers, state that “NBI does not pay any trailing commission to your representative’s firm with respect to

Series E securities.” For those National Bank Mutual Funds for which Series E units are offered, other series of those funds that carry a trailing commission have been held, and continue to be held, by Class Members through Discount Brokers. When the Defendants introduced Series E units of the relevant National Bank Mutual Funds, they failed to advise, permit and/or cause the Class Members to switch their existing units into Series E units.

## **RIGHTS OF ACTION**

### ***Breach of Fiduciary Duty***

121. As trustees of the National Bank Mutual Funds, NBI and Natcan Trust are and were at all material times in a fiduciary relationship with the Class Members who hold or held National Bank Mutual Funds and owes, or owed at the material times, fiduciary duties to those Class Members.
122. As manager of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds, NBI is, and was at all material times, a trustee *de son tort* of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds. Pursuant to the Management Agreements and the Trust Instruments applicable to the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds, NBI at all material times undertook full responsibility for the administration of the day-to-day business and affairs of each National Bank Mutual Fund and NBI Private Portfolio Mutual Fund. To carry out that responsibility as manager, NBI has and had at all material times possession and/or control of the property of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds. As trustee *de son tort* of each of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, NBI is, and was at all material times, in a fiduciary relationship with the Class Members and owes, or owed at the material times, fiduciary duties to the Class Members. As a trustee *de son tort* of the National Bank Mutual Funds and NBI Private Portfolio



Mutual Funds, NBI also has or had at all material times an obligation to abide by the duties and obligations of the trustee set out in the Trust Instruments.

123. Further or in the alternative, as manager of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, NBI has and had at all material times significant discretion, power or control in relation to the business and affairs of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds and the assets of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds. NBI can unilaterally exercise that discretion, power or control so as to affect the Class Members' legal or substantial practical interests, including the Class Members' financial interests arising from their ownership of units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, the value of which are tied to the value of the assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds. The Class Members are particularly vulnerable to NBI holding that discretion, power or control as manager of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds.
124. NBI as manager has expressly or impliedly undertaken to act in the best interests of the Class Members, including as follows:
  - (a) by virtue of the standard of care imposed on NBI under the Trust Instruments, the Management Agreements and under section 116 of the *OSA* and/or section 2.1 of NI 81-107; and
  - (b) NBI is a signatory to the United Nations-supported Principles for Responsible Investment, pursuant to which NBI, in the signatory category of investment manager, signed a declaration in which it acknowledges its "duty to act in the best long-term interests of our beneficiaries" and affirmed its "fiduciary role" and "fiduciary responsibilities".

125. Accordingly, as manager of each of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, NBI is, and was at all material times, in a fiduciary relationship with the Class Members and owes, or owed at the material times, fiduciary duties to the Class Members.
126. By their acts and omissions, Natcan Trust and NBI (as trustee and manager) have breached their fiduciary duty to the Class Members. The breaches include (without limitation):
- (a) paying and/or receiving the Unearned Management Fees out of the assets of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds;
  - (b) failing to preserve the property of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds;
  - (c) failing to maximize the value of the units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds;
  - (d) paying the Unearned Management Fees to the Discount Brokers for no purpose;
  - (e) failing to ascertain the nature of any services being provided by Discount Brokers to the Class Members and to ascribe a reasonable value to those services, to ensure that the assets of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds are being used for proper purposes and in a reasonable amount;
  - (f) failing to impose an obligation on Discount Brokers to provide particular services to Class Members in consideration for the trailing commissions;
  - (g) failing to conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers are providing particular services to Class Members in respect of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds;

- (h) failing to conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers use or apply the trailing commissions for the purpose of providing particular services to Class Members in respect of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds;
- (i) permitting series of units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds carrying a trailing commission to be acquired and/or held through Discount Brokers;
- (j) failing to create and make available to Class Members through Discount Brokers a series of units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds that carries no trailing commission;
- (k) failing to advise, permit and/or cause Class Members to re-designate, reclassify or switch their units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds into a series of units that carries no trailing commission;
- (l) in the alternative to paragraphs 126(i) to 126(k):
  - (i) permitting non-Series D (or similar discount series) units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds to be acquired and/or held through Discount Brokers;
  - (ii) failing to create and make available to Class Members through Discount Brokers Series D (or similar discount series) units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds; and
  - (iii) failing to advise, permit and/or cause Class Members to re-designate, reclassify or switch their non-Series D units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds into Series D (or similar

discount series) units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds;

- (m) during the period when NBI was trustee of certain of the National Bank Mutual Funds, NBI acting in a conflict of interest by simultaneously acting as both the trustee and the manager of those National Bank Mutual Funds, and thus paying the Unearned Management Fees to itself and negotiating the Management Agreements for those National Bank Mutual Funds and management fees with itself;
- (n) Natcan Trust acting in a conflict of interest by paying the Unearned Management Fees to an affiliated corporation, NBI, and negotiating non-arm's length Management Agreements for payment of those fees with its affiliate, NBI;
- (o) NBI acting in a conflict of interest by paying trailing commissions to Discount Brokers for its own benefit, effectively as a marketing expense to secure access to the Discount Brokers' clients, resulting in increased management fees for NBI as the assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds grow through new investment capital from the Discount Broker platforms;
- (p) NBI acting in a conflict of interest by failing to make available to Class Members holding National Bank Mutual Funds and NBI Private Portfolio Mutual Funds through Discount Brokers a series of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds that pays no trailing commission, or alternatively a reduced trailing commission, because of a concern that it would adversely affect the distribution of National Bank Mutual Funds and NBI Private Portfolio Mutual Funds through the full-service or advisory distribution channels and thereby reduce NBI's management fees;

- (q) NBI acting in a conflict of interest by receiving a portion of the Unearned Management Fees for the purpose of paying such amount to National Bank Direct Brokerage (a division of National Bank Financial Inc., a corporation affiliated with NBI), for the ultimate benefit of National Bank of Canada, when such amount could have been retained in the National Bank Mutual Funds or the NBI Private Portfolio Mutual Funds for the benefit of Class Members;
- (r) failing to pay and/or accept a management fee reduced by the amount of the Unearned Management Fees and distributing (rebating) that amount to the Class Members as a “Management Fee Distribution”;
- (s) failing to waive payment of the Unearned Management Fees;
- (t) Natcan Trust failing to adequately supervise NBI, as manager of the National Bank Mutual Funds, and failing to prevent and/or rectify the misconduct of NBI, as manager of the National Bank Mutual Funds, as particularized herein, in breach of the manager’s standard of care set out in the Trust Instruments, the Management Agreements and section 116 of the *OSA* and/or section 2.1 of NI 81-107; and
- (u) NBI, as trustee, failing to adequately supervise itself, as manager of the National Bank Mutual Funds, and failing to prevent and/or rectify its misconduct, as manager of the National Bank Mutual Funds, as particularized herein, in breach of the manager’s standard of care set out in the Trust Instruments, the Management Agreements and section 116 of the *OSA* and/or section 2.1 of NI 81-107.

127. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendants’ breach of fiduciary duty as particularized herein.

### ***Breach of Trust***

128. Under the Trust Instruments governing the National Bank Mutual Funds, NBI and Natcan Trust, as trustees, have and had at all material times a duty to exercise their powers and discharge their duties honestly, in good faith and in the best interests of each National Bank Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent trustee would exercise in comparable circumstances.
129. The duty under the Trust Instruments governing the National Bank Mutual Funds is a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the National Bank Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent trustee would exercise in comparable circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.
130. Alternatively, the duty under the Trust Instruments governing the National Bank Mutual Funds includes a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the National Bank Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent trustee would exercise in comparable circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.
131. Alternatively, the duty under the Trust Instruments governing the National Bank Mutual Funds is a duty to act honestly, in good faith and in the best interests of the National Bank Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent trustee would exercise in comparable circumstances. The National Bank Mutual Funds are trust relationships between Natcan Trust or NBI (as applicable) and the unitholders in respect of property held for the benefit of the unitholders. Any breach of the

duty to the National Bank Mutual Funds causes direct loss and damage to the Class Members and the other unitholders of the National Bank Mutual Funds. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.

132. By their acts and omissions, including (without limitation) their acts and omissions set out in paragraph 126 hereof, Natcan Trust and NBI, as trustees of the National Bank Mutual Funds, have breached their duty under the Trust Instruments and committed breaches of trust.
133. The National Bank Mutual Funds, the Plaintiff and the other Class Members have suffered loss and damage as a result of the breaches of trust particularized herein.

***Breach of Contract – Management Agreements***

134. Under the Management Agreements, NBI, as manager of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, has and had at all material times a duty to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each National Bank Mutual Fund and NBI Private Portfolio Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent manager would exercise in comparable circumstances (“**Manager’s Standard of Care**”). The Management Agreements make NBI responsible for any loss that arises out of its failure to act in accordance with the Manager’s Standard of Care.
135. Under the Management Agreements, NBI, as manager of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, is and was at all material times required to comply with the *OSA*, the rules and regulations thereunder, with equivalent legislation of all other provinces and territories where the securities are registered or qualified for sale, which

includes the obligations under section 116 of the *OSA* and/or section 2.1 of NI 81-107 (“**Manager’s Compliance with Law Duty**”).

136. The Plaintiff and the other Class Members are third party beneficiaries of the Management Agreements and, in particular, the Manager’s Standard of Care and the Manager’s Compliance with Law Duty contained therein.
137. The Management Agreements, and the Manager’s Standard of Care and the Manager’s Compliance with Law Duty contained therein, explicitly or implicitly evidence an intention to extend the benefit of those provisions to the Class Members.
138. The Manager’s Standard of Care and the Manager’s Compliance with Law Duty in the Management Agreements are for the protection and benefit of the unitholders of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds. They are intended to ensure that the manager acts in accordance with a minimum standard of care and complies with the law in administering the business and affairs of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds and dealing with the property of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds that is held for the benefit of the unitholders of those funds, and that the manager is accountable for any loss that arises from non-compliance.
139. Further, the unitholders of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds are the intended beneficiaries of the Manager’s Standard of Care and the Manager’s Compliance with Law Duty in the Management Agreements as they have the only realistic interest in enforcing those provisions against the manager. NBI is affiliated with, or is the same entity as, the trustees of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds. Natcan Trust and National Bank Trust will not realistically seek recovery against an affiliated corporate entity for breaches of the Management



Agreements. NBI, as trustee, will not seek recovery against itself for breaches of the Management Agreements for the relevant National Bank Mutual Funds.

140. By its acts and omissions, including (without limitation) the acts and omissions set out in paragraph 126 hereof, NBI, as manager, has breached the Manager's Standard of Care in the Management Agreements and is responsible for the losses arising from the breach. NBI's acts and omissions fall within the scope of the Manager's Standard of Care and provisions dealing with liability for loss in the Management Agreements.
141. By its acts and omissions, including (without limitation) the acts and omissions set out in paragraph 126 hereof, NBI, as manager, has breached section 116 of the *OSA* and/or section 2.1 of NI 81-107 and therefore breached the Manager's Compliance with Law Duty in the Management Agreements. NBI's acts and omissions fall within the scope of the Manager's Compliance with Law Duty.
142. Alternatively, the Plaintiff and other Class Members seek recovery from NBI, as manager of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds, for breach of contract on the basis of the cause of action accruing to Natcan Trust, NBI and/or National Bank Trust as the trustees of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds.
143. NBI (as trustee), Natcan Trust and National Bank Trust have failed and/or refused to take steps to enforce NBI's compliance with the Management Agreements for the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds and/or seek compensation for breaches thereof.

144. There are special circumstances justifying the Plaintiff and other Class Members making a claim against NBI, including, among other things, that:
- (a) NBI is affiliated with Natcan Trust and National Bank Trust. Natcan Trust and National Bank Trust will not realistically seek recovery against an affiliated corporate entity for breaches of the Management Agreements. It is, therefore, impossible or difficult for Natcan Trust and National Bank Trust to seek recovery from NBI;
  - (b) NBI was previously trustee and manager of certain National Bank Mutual Funds. NBI, as trustee, will not realistically seek recovery against itself for breaches of the Management Agreements. It is, therefore, impossible or difficult for NBI (as trustee) to seek recovery from NBI (as manager);
  - (c) NBI, as manager, colluded with Natcan Trust to pay and receive the Unearned Management Fees from the National Bank Mutual Funds;
  - (d) NBI, as manager, colluded with NBI, as trustee, to pay and receive the Unearned Management Fees from the National Bank Mutual Funds;
  - (e) NBI, as manager, colluded with National Bank Trust to pay and receive the Unearned Management Fees from the NBI Private Portfolio Mutual Funds;
  - (f) the Plaintiff and Class Members seek recovery of trust property in the form of the Unearned Management Fees; and
  - (g) NBI (as trustee), Natcan Trust and National Bank Trust have failed to protect the beneficiaries in that they paid the Unearned Management Fees to NBI and failed to take steps to recover compensation from NBI.

145. The Plaintiff and the other Class Members have suffered loss and damage as a result of NBI's acts or omissions.

***Disallowance of Improper Expenses under Section 23.1 of the Trustee Act***

146. The Unearned Management Fees are expenses paid by NBI or Natcan Trust (as applicable) from the trust property of the National Bank Mutual Funds. The expenses are not properly incurred in carrying out the trust because they are on account of trailing commissions paid or payable to Discount Brokers, and such trailing commissions are not properly paid or payable to Discount Brokers because the Discount Brokers do not provide services or advice to the Class Members.

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

***Prospectus Misrepresentation***

148. The Plaintiff asserts the right of action for prospectus misrepresentation in section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation) on his own behalf and on behalf of the Class Members.

149. The Defendants have prepared, filed and disseminated Simplified Prospectuses and, since January 1, 2011, Fund Facts Documents, to permit the continuous offering to the public of units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds.

150. The Fund Facts Documents are incorporated by reference into the relevant Simplified Prospectuses and form part of those Simplified Prospectuses.

151. Pursuant to section 56(1) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation), the Simplified Prospectuses are and were required

to provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed under the Simplified Prospectuses.

152. The Simplified Prospectuses are prospectuses for the purposes of section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
153. The Fund Facts Documents prepared, filed and disseminated by the Defendants in respect of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds prior to May 14, 2018 contained a common statement that trailing commissions are paid to dealers for the “services and advice” provided by those dealers to their clients.
154. That common statement is a misrepresentation within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation). It falsely represents that trailing commissions are only paid to dealers that provide services and advice to investors, whereas in fact trailing commissions are also paid to Discount Brokers even though they do not provide services or advice to their clients. The statement is, and was at all material times, material to the Class Members.
155. As of May 14, 2018, the Fund Facts Documents for the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds were amended to refer to “services and/or advice”. By making that amendment to the Fund Facts Documents, the Defendants acknowledged that the reference to “services and advice” in the previous Fund Facts Documents was false, misleading and/or inaccurate.
156. The Defendants certified and signed the Simplified Prospectuses as required by NI 81-101 and Form 81-101F2, and are liable pursuant to section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).

157. The offering of units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds to which the Simplified Prospectuses and Fund Facts Documents related constituted distributions of the units in Ontario and/or distributions of units from Ontario to persons outside of Ontario. The offering was governed by the *OSA* and its subsidiary instruments and regulations, and was carried out under Ontario securities laws.
158. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendants' acts and omissions as particularized herein.

#### **DAMAGE SUFFERED BY THE CLASS MEMBERS**

159. The National Bank Mutual Funds, the NBI Private Portfolio Mutual Funds, the Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendants' acts and omissions particularized herein.
160. As a result of the payment of the Unearned Management Fees out of the assets of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds, the value of the assets of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds has been significantly reduced.
161. As a result of the payment of the Unearned Management Fees out of the assets of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds, there has been a significant reduction in the value of the units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds held by the Class Members and/or the value of the distributions received by the Class Members on their units of National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds (whether received in cash or reinvested in additional units).

162. The Plaintiff and the other Class Members have also suffered loss and damage as a result of the loss of opportunity to earn a reasonable return on investment if the Unearned Management Fees had not been paid out of the assets of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds.
163. The Plaintiff and the other Class Members who continue to hold units of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds are suffering ongoing loss and damage as a result of the Defendants' acts and omissions particularized herein.
164. The Defendants knew, or ought to have known, that as a result of their acts and omissions particularized herein, the Class Members would suffer loss and damage.

#### **REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO**

165. The Plaintiff pleads that this action has a real and substantial connection with Ontario because, among other things:
- (a) the Plaintiff is resident in Ontario;
  - (b) the Defendants carry on business in Ontario;
  - (c) each of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds is, or was at material times, a reporting issuer in Ontario;
  - (d) the Simplified Prospectuses and Fund Facts Documents referred to herein were disseminated in Ontario;
  - (e) a substantial portion of the Class Members reside in Ontario; and
  - (f) a substantial portion of the damages sustained by the Class were sustained by persons and entities domiciled in Ontario.

## RELEVANT LEGISLATION

166. The Plaintiff pleads and relies on the *CJA*, the *CPA*, the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation), the *Civil Code of Québec*, CQLR c CCQ-1991 and the *OSA* (and, if necessary, the Other Canadian Securities Legislation).

## PLACE OF TRIAL

167. The Plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario, as a proceeding under the *CPA*.

January 28, 2019

**SISKINDS LLP**  
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*Lawyers for the Plaintiff*

**SCHEDULE "A"**  
**NATIONAL BANK MUTUAL FUNDS**

1. NBI Money Market Fund
2. NBI Floating Rate Income Fund
3. NBI Tactical Mortgage & Income Fund
4. NBI Bond Fund
5. NBI Income Fund
6. NBI Dividend Fund
7. NBI Global Bond Fund
8. NBI Global Tactical Bond Fund
9. NBI Unconstrained Fixed Income Fund
10. NBI Corporate Bond Fund
11. NBI High Yield Bond Fund
12. NBI Preferred Equity Income Fund
13. NBI Preferred Equity Fund
14. National Bank Secure Diversified Fund
15. National Bank Conservative Diversified Fund
16. National Bank Moderate Diversified Fund
17. National Bank Balanced Diversified Fund
18. National Bank Growth Diversified Fund
19. NBI Jarislowsky Fraser Select Balanced Fund
20. NBI Strategic U.S. Income and Growth Fund
21. NBI Jarislowsky Fraser Select Canadian Equity Fund
22. NBI *SmartBeta* Canadian Equity Fund
23. NBI Canadian Equity Fund
24. NBI Canadian All Cap Equity Fund
25. NBI Canadian Equity Growth Fund
26. NBI Small Cap Fund
27. NBI Quebec Growth Fund



28. NBI *SmartBeta* Global Equity Fund
29. NBI Global Equity Fund
30. NBI Global Diversified Equity Fund
31. NBI Global Real Assets Income Fund
32. NBI U.S. Dividend Fund
33. NBI *SmartData* U.S. Equity Fund
34. NBI U.S. Equity Fund
35. NBI *SmartData* International Equity Fund
36. NBI Diversified Emerging Markets Equity Fund
37. NBI Westwood Emerging Markets Fund
38. NBI Resource Fund
39. NBI Precious Metals Funds
40. NBI Science and Technology Fund
41. NBI Canadian Bond Index Fund
42. NBI Canadian Index Fund
43. NBI Canadian Equity Index Fund
44. NBI U.S. Index Fund
45. NBI U.S. Equity Index Fund
46. NBI U.S. Currency Neutral Index Fund
47. NBI International Index Fund
48. NBI International Equity Index Fund
49. NBI International Currency Neutral Index Fund
50. Meritage Tactical ETF-Fixed Income Portfolio
51. Meritage Tactical ETF Moderate Portfolio
52. Meritage Tactical ETF Balanced Portfolio
53. Meritage Tactical ETF Growth Portfolio
54. Meritage Tactical ETF Equity Portfolio
55. Meritage Global Conservative Portfolio
56. Meritage Global Moderate Portfolio

57. Meritage Global Balanced Portfolio
58. Meritage Global Growth Portfolio
59. Meritage Global Dynamic Growth Portfolio
60. Meritage Diversified Fixed Income Portfolio
61. Meritage Conservative Income Portfolio
62. Meritage Moderate Income Portfolio
63. Meritage Balanced Income Portfolio
64. Meritage Growth Income Portfolio
65. Meritage Dynamic Growth Income Portfolio
66. Meritage Conservative Portfolio
67. Meritage Moderate Portfolio
68. Meritage Balanced Portfolio
69. Meritage Growth Portfolio
70. Meritage Dynamic Growth Portfolio
71. Meritage Canadian Equity Portfolio
72. Meritage Global Equity Portfolio
73. Meritage International Equity Portfolio
74. Meritage American Equity Portfolio

**SCHEDULE "B"**  
**NBI PRIVATE PORTFOLIO MUTUAL FUNDS**

1. NBI Municipal Bond Plus Private Portfolio
2. NBI Canadian Bond Private Portfolio
3. NBI Canadian Diversified Bond Private Portfolio
4. NBI U.S. Bond Private Portfolio
5. NBI Corporate Bond Private Portfolio
6. NBI Non-Traditional Fixed Income Private Portfolio
7. NBI High Yield Bond Private Portfolio
8. NBI Canadian Preferred Equity Private Portfolio
9. NBI Tactical Fixed Income Private Portfolio
10. NBI Multiple Asset Class Private Portfolio
11. NBI Equity Income Private Portfolio
12. NBI Canadian Equity Private Portfolio
13. NBI Canadian High Conviction Equity Private Portfolio
14. NBI Canadian Small Cap Equity Private Portfolio
15. NBI North American Dividend Private Portfolio
16. NBI U.S. Equity Private Portfolio
17. NBI U.S. High Conviction Equity Private Portfolio
18. NBI International Equity Private Portfolio
19. NBI International High Conviction Equity Private Portfolio
20. NBI Tactical Equity Private Portfolio
21. NBI Non-Traditional Capital Appreciation Private Portfolio
22. NBI Diversified Emerging Markets Equity Fund
23. NBI Real Asset Private Portfolio

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**SECOND FRESH AS AMENDED  
STATEMENT OF CLAIM**

**Siskinds LLP**

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London, ON N6B 3L1

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*Lawyers for the Plaintiff*

**SCHEDULE "B"**  
**LITIGATION PLAN**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

STEPHEN POZGAJ

Plaintiff

- and -

NATIONAL BANK INVESTMENTS INC.  
and NATCAN TRUST COMPANY

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**LITIGATION PLAN**

Pursuant to section 5(1)(e)(ii) of the *Class Proceedings Act, 1992* (“CPA”), the Plaintiff proposes that this Litigation Plan be followed with respect to these proceedings, subject to the Court’s approval.

**DEFINED TERMS**

1. Capitalized terms that are not defined in this litigation plan (“**Plan**”) have the meanings attributed to them in the Fresh as Amended Statement of Claim.

**REPORTING AND COMMUNICATION**

2. Siskinds LLP (“**Class Counsel**”) has posted information about the nature and status of this action on its website, <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/> (“**Website**”). That information will be updated regularly. Copies of important, publicly available court documents, court decisions, notices, documentation, and other information relating to the action are or will be accessible on the Website.

3. The Website also contains a communication webpage, a feature that permits putative Class Members to submit inquiries to Class Counsel, which are sent directly to a designated member of the Class Counsel team, who will promptly respond.

#### **DOCUMENT MANAGEMENT**

4. Class Counsel will use data management systems to organize, code, and manage the documents produced by the Defendants and all relevant documents in the Plaintiff's possession. The agreement of the Defendants' counsel will be sought to facilitate the electronic exchange of documents. Once the volume of documents to be produced in this action is determined, Class Counsel may retain the services of a third-party document management firm for assistance.

#### **LITIGATION SCHEDULE**

5. The Plaintiff has brought a motion seeking certification of the action as a class proceeding pursuant to the *CPA* ("**Certification Motion**").
6. The Plaintiff may ask the Court to order the Defendants to deliver their statement of defence in advance of the hearing of the Certification Motion.
7. Following disposition of the Certification Motion, absent agreement among counsel, the Plaintiff will ask the Court to set a litigation schedule for the remaining steps in the action.
8. From time to time, the Plaintiff or Defendant may ask that the litigation schedule be amended.

#### **RESOURCES AND EXPERTISE**

9. The Plaintiff has retained Class Counsel as his counsel in this action. Class Counsel has the experience, resources and expertise to prosecute this action on behalf of the Class.

## **MEDIATION**

10. The Plaintiff will participate in a mediation if the Defendants are prepared to do so. If the parties reach a proposed settlement of the action and the court approves the settlement, this Plan will require amendment.

## **NOTICE OF CERTIFICATION AND OPT OUT PROCEDURE**

11. If this action is certified as a class proceeding, the Plaintiff proposes that a notice of certification (“**Certification Notice**”) be circulated to advise Class Members, among other things, that:
  - a. the Court certified the action as a class proceeding;
  - b. a person may only opt out of the class proceeding by sending a written opt out election to the recipient designated by the Court, before a date and time fixed by the Court;
  - c. a person may not opt out of the class proceeding after the date fixed by the Court; and
  - d. if the common issues are resolved in favour of the Class, claimants may be required to register, file a claim and submit documentation to a designated person in order to be entitled to any compensation.
12. The Certification Notice, in a form approved by the Court, will be distributed and published in the following manner:
  - a. posted by Class Counsel on the Website, in English and French;
  - b. provided by Class Counsel to any person who requests it;



- c. posted by the Defendants on SEDAR;
  - d. disseminated as a press release in Canada across Canada Newswire (in English and French);
  - e. published once in the business section of the national edition of *The Globe and Mail*, in English;
  - f. published once in the business section of *La Presse*, in French;
  - g. published as an internet Google banner ad for approximately 700,000 impressions/views across Canada to an investor focused audience, in English and French, over 30 days; and
  - h. sent electronically and/or in paper form to appropriate broker/dealers in Canada, with a cover letter requesting that they bring the Certification Notice to the attention of their clients who may be Class Members.
13. The Plaintiff proposes to appoint an independent person to receive the opt out notices and report to the court the names and addresses of the persons who opt out by the date fixed by the court.
14. The Plaintiff will pay the costs in the first instance, reserving the right to seek recovery of these costs from the Defendants by order of the judge presiding at the common issues trial.

#### **REFINEMENT OF COMMON ISSUES**

15. Following the completion of discovery, the parties may seek an amendment of the order certifying this action to deal with any necessary refinements to the common issues.

## **TRIAL OR SUMMARY JUDGMENT ON THE COMMON ISSUES**

16. If appropriate, the Plaintiff or Defendant may seek summary judgment on one or more of the common issues.
17. If the Plaintiff or Defendant does not seek summary judgment on common issues, or if any common issues remain following a motion for summary judgment, the Plaintiff will seek the early appointment of the common issues trial judge. The Plaintiff and Defendant will address issues of trial management in advance of the trial to ensure the orderly and efficient determination of any remaining common issues.
18. The Plaintiff will ask the Court to hold the hearing on the merits (whether a motion for summary judgment or common issues trial) no later than one (1) year after the completion of the examinations for discovery and the production of information required by undertakings and any motions.

## **INDIVIDUAL CLASS MEMBER PARTICIPATION AFTER JUDGMENT ON THE COMMON ISSUES**

19. Once the common issues have been determined, the parties will bring a motion to the Court for directions as to the process to be employed to determine any individual issues that remain.

## **MOTION FOR DIRECTIONS**

20. Class Counsel and the Defendants may apply at any time to the court for directions.

## **CLASS COUNSEL'S FEES AND THE COSTS OF ADMINISTRATION**

21. After the trial of the common issues or summary judgment, the Plaintiff will ask the court to approve an agreement respecting fees and disbursements between him and Class

Counsel. To the extent that the approved Class Counsel's fees, disbursements and applicable taxes are not completely paid by the costs recovered from the Defendants, the Plaintiff will ask the court to order that the unpaid balance be a first charge on any recovery either by way of aggregate or individual assessment.

22. If the court awards damages in the aggregate, Class Counsel will ask the court to order payment of their fees, disbursements and applicable taxes as a first charge on the aggregate amount.
23. If the court does not award damages in the aggregate and requires the Class Members to prove their damages through individual assessments, Class Counsel will ask the court to order payment of their fees, disbursements and applicable taxes as a first charge on the awards made at individual assessments.

#### **FURTHER ORDERS CONCERNING THIS PLAN**

24. This Plan may be amended from time to time by directions given at case conferences or by further order of the Court.

#### **EFFECT OF THIS PLAN**

25. This Plan shall be binding on all Class Members who do not opt out in accordance with the procedure directed by the Court whether or not they make a claim under the Plan.

**SCHEDULE "C"**  
**LONG-FORM NOTICE**

**NATIONAL BANK MUTUAL FUNDS CLASS ACTION  
REGARDING TRAILING COMMISSIONS PAID TO DISCOUNT BROKERS**

**NOTICE OF CERTIFICATION AND OPT-OUT DEADLINE**

**Read this notice carefully as it may affect your legal rights**

This notice is to certain investors in the units of National Bank Mutual Funds and NBI Private Portfolio Mutual Funds other than certain persons and entities associated with the defendants, further described below.

**THE CERTIFICATION ORDER**

By Order dated [date], the Ontario Superior Court of Justice ("**Court**") has certified *Stephen Pozgaj v National Bank Investments Inc. and Natcan Trust Company*, File No. CV-18-611745-00CP ("**Class Action**") as a class proceeding pursuant to the Ontario *Class Proceedings Act, 1992*. The Court has appointed Stephen Pozgaj as the representative plaintiff for the class defined as follows ("**Class**" and "**Class Members**"):

All persons, wherever they may reside or be domiciled, who held or hold units of a National Bank Mutual Fund or NBI Private Portfolio Mutual Fund through a Discount Broker, except for the Excluded Persons, from December 28, 2003 to [Certification Order Date].

The Class Action pertains to National Bank Mutual Funds and NBI Private Portfolio Mutual Funds organized as trusts. National Bank Mutual Funds are defined as:

All mutual fund trusts (including, without limitation, all series of units thereof) of which either National Bank Investments Inc. ("**NBI**") or Natcan Trust Company ("**Natcan Trust**") is trustee, was trustee or may be trustee from December 28, 2003 to [Certification Order Date] (but only in respect of the period during which either NBI or Natcan Trust is trustee, was trustee or may be trustee, as applicable), 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.

NBI Private Portfolio Mutual Funds are defined as:

All mutual fund trusts (including, without limitation, all series of units thereof) of which National Bank Trust Inc. is trustee, was trustee or may be trustee from December 28, 2003 to [Certification Order Date] (but only in respect of the period during which either National Bank Trust Inc. is trustee, was trustee or may be trustee, as applicable), 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.

Excluded from the Class are NBI and Natcan Trust ("**Defendants**"); the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of NBI or Natcan Trust; the past and present members of the independent review committee of each National Bank Mutual Fund or NBI Private Portfolio Mutual Fund; the past and present members of a board of any National Bank Mutual Fund or NBI Private Portfolio Mutual Fund; and the past governors of any National Bank Mutual Fund or NBI Private Portfolio Mutual Fund.

Certification is a procedural matter that defines the form of the class action. The merits of the claims in the action, and the allegations of fact on which the claims are based, have not been finally determined by the Court. The Defendants dispute the claims asserted against them.

The Class Action will now proceed to trial as a class action. The Court has identified the issues that will be dealt with collectively. The Class Action will proceed in Toronto, Ontario.

### **THE NATURE OF THE CLAIMS ASSERTED**

It is alleged that the Defendants paid trailing commissions, out of the National Bank Mutual Fund assets or NBI Private Portfolio Mutual Fund assets, to Discount Brokers. The National Bank Mutual Funds and NBI Private Portfolio Mutual Funds are trusts governed by trust instruments. The Defendants are the trustee or manager of the National Bank Mutual Funds and the NBI Private Portfolio Mutual Funds. It is alleged that the Defendants breached their trust, fiduciary and contractual duties because the trailing commissions paid to Discount Brokers are excessive, inflated and/or unearned.

It is further alleged that the Defendants made misrepresentations about the nature of the trailing commission payments in the fund facts documents they have prepared and filed with securities regulators to permit the sale of units of the National Bank Mutual Funds and NBI Private Portfolio Mutual Funds.

On behalf of the Class, the Class Action asserts claims under section 130 of the Ontario *Securities Act* and, if necessary, the equivalent provisions of the securities legislation of the other Canadian provinces and territories. Additionally, the Class Action advances claims under section 23.1 of the *Trustee Act*, and for breach of trust, breach of fiduciary duty and breach of contract.

If you wish to pursue other claims against the Defendants relating to the matters at issue in the Class Action, you should immediately seek independent legal advice.

### **DO NOTHING IF YOU WANT TO PARTICIPATE IN THE CLASS ACTION**

Class Members who want to participate in the Class Action are automatically included and do not have to do anything at this time.

### **YOU MUST OPT OUT IF YOU DO NOT WANT TO BE BOUND BY THE CLASS ACTION**

Each Class Member who does not validly opt out of the Class Action will be bound by the terms of any judgment or settlement, whether favourable or not, and will not be allowed to prosecute an independent action.

Class Members who do not want to be bound by the outcome of the Class Action must “opt out,” meaning that they must exclude themselves from the Class Action in accordance with the following procedure.

**If you wish to opt out of the Class Action, you must complete, sign and return (by mail or courier) the opt-out form provided at Appendix “A” hereto to RicePoint Administration Inc.**

**In order for your opt-out to be valid, your complete and signed opt-out form must be postmarked by no later than [DATE].**

A Class Member who opts out will not be entitled to participate in the Class Action.

### **CLASS COUNSEL AND LEGAL FEES**

The representative plaintiff and the Class are represented by Siskinds LLP (“**Class Counsel**”). Class Counsel are conducting the Class Action on a contingent fee basis.

In the event of success, Class Counsel will make a motion to the Court for approval of their fees and disbursements to be paid from the funds recovered in the Class Action.

A Class Member will not be required to pay any costs in the event that the Class Action is unsuccessful.

Class Members have the right to seek intervenor status in the Class Action. A Class Member who intervenes in the Class Action may be required to pay legal costs arising from the Class Action.

#### **ADDITIONAL INFORMATION**

This notice has been approved by the Ontario Superior Court of Justice. The Court offices cannot answer any questions about the matters in this notice. The Orders of the Court and other information are available on Class Counsel's website at <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions>.

Questions relating to the Class Action may be directed to Class Counsel:

Aylin Manduric  
Siskinds LLP  
Suite 302, 100 Lombard Street  
Toronto, ON, Canada M5C 1M3  
Tel: 416-594-4399  
Email: [aylin.manduric@siskinds.com](mailto:aylin.manduric@siskinds.com)

If you require assistance in the French language, please contact Class Counsel using the contact details above and we will direct your inquiry to an appropriate person.

***The publication of this notice was authorized by the Ontario Superior Court of Justice***





(PLEASE CIRCLE THE APPROPRIATE LANGUAGE)

I believe that **I am / the organization that I represent is** a member of the Class in the Class Action.

I believe that **I am not / the organization that I represent is not** amongst the persons and entities excluded from the Class Action.

I understand that by opting out of the Class Action, **I will not be eligible / the organization that I represent will not be eligible** for any benefit that may be available to the Class upon resolution of this matter, if and when such resolution may occur.

I, \_\_\_\_\_ (print your full name), **OPT OUT FROM THE CLASS ACTION** and wish to be excluded from this class action.

I wish to opt out from this class action for the following reason(s) (optional):

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I, \_\_\_\_\_ (print your full name), **CERTIFY** that the information provided herein is complete and true.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

**In order to validly opt out, you must complete and send this Opt-Out Form by no later than [DATE] to:**

[Administrator contact details, including mail and courier details]

**SCHEDULE "D"**  
**SHORT-FORM NOTICE**

DRAFT TEXT (subject to design)

**NATIONAL BANK MUTUAL FUNDS CLASS ACTION  
REGARDING TRAILING COMMISSIONS PAID TO DISCOUNT BROKERS  
NOTICE OF CERTIFICATION AND OPT-OUT DEADLINE**

**HAVE YOU HELD UNITS OF  
A NATIONAL BANK OR NBI PRIVATE PORTFOLIO MUTUAL FUND  
THROUGH A DISCOUNT BROKER?**

The Superior Court of Justice of Ontario has certified a class action which permits a defined group of investors (the "Class") to pursue claims against National Bank Investments Inc. and Natcan Trust Company ("Defendants"). It is alleged that the Defendants paid excessive, inflated, and/or unearned trailing commissions to Discount Brokers out of the assets of the National Bank and NBI Private Portfolio Mutual Fund trusts. The class action claims monetary damages on behalf of the Class. The allegations made in the class action have not been proven and are contested by the Defendants.

If you wish to participate in the class action, DO NOTHING.

If you do not wish to participate in the class action, be bound by or receive any benefits from it, you must opt out by sending the opt-out form to RicePoint Administration Inc. by [DATE].

To obtain a copy of the opt-out form or for other important information regarding the class action:

- Visit <https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/>
- Call toll-free 1 800 461 6166 ext 4399 (North America)
- Call 416 594 4399 (Outside North America)

***The publication of this notice was authorized by  
the Superior Court of Justice of the Province of Ontario***

**SCHEDULE "E"**  
**INTERNET BANNER**

Have you held units of a National Bank or NBI  
Private Portfolio mutual fund through a  
discount brokerage?

You may be included in a class action  
certified by the Ontario Superior Court of  
Justice.

Click to learn your legal rights, including how  
to opt-out of the class action.

[https://www.siskinds.com/class-action/mutual-  
fund-trailing-commissions/](https://www.siskinds.com/class-action/mutual-fund-trailing-commissions/)

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto  
Proceeding under the *Class Proceedings Act, 1992*

**ORDER  
(CERTIFICATION, NOTICE AND OPT-OUT)**

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