

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-05-032455-972

DATE: JANUARY 15, 2008

IN THE PRESENCE OF:
THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.

GILLES DUSSAULT
Plaintiff

v.
LÉVESQUE BEAUBIEN GEOFFRION INC.
Defendant

-and-
FINANCIÈRE BANQUE NATIONALE INC.
Defendant In Continuance of Suit

JUDGMENT

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A- Introduction

[2] Medical doctor Gilles Dussault sold "short"¹ two (2) million dollars of Canada Savings Bonds² on the advice of his trusted investment counsellors, the father and daughter team of George Roy and France Roy, employees of the well-established firm of Lévesque Beaubien Geoffrion Inc.³

¹ For the purposes of this case, a "short" sale arises when an investor borrows a quantity of a particular marketable security e.g. Canada Savings Bonds from his brokerage firm so that it may be sold. The investor then sells these securities in the market at a certain price with the expectation that in the future, these securities can be repurchased in the market at a lesser price. Upon repurchasing the securities, the investor then makes the firm "whole" by returning the securities to it. The investor intends to make a capital gain on the difference between the higher original selling price and the lower subsequent repurchase price. In the period between the sale and the repurchase, the investor pays an agreed-to rate of interest to the brokerage firm on the total value of the securities that he has "borrowed" for the purposes of the original "short" sale.

² In this case, the "short" sale of the Canada Savings Bonds paying 8 percent and maturing on June 1, 2023 will be designated as the "8-23 Transaction".

³ For ease in reading, the Parties will be designated as: "Dr. Dussault", "Mr. Roy", "Ms. France Roy", and the "Firm". At trial, an Appearance in Continuance of Suit was filed by the Firm's attorneys so that Financière Banque Nationale Inc. was added as a Defendant in Continuance of Suit.

[3] Ms. France Roy had indicated to Dr. Dussault that one of their clients had made a \$76,000 capital gain in two weeks with such a "short" sale by repurchasing the bonds at a lower price than they had been sold "short". The objective of Dr. Dussault and the Roys was that he would replicate this success.

[4] Unfortunately, the price of the Bonds increased instead of the expected decrease. In the next two and a half years, Dr. Dussault did not give the instructions to the Firm necessary to repurchase the Bonds to "close his position" i.e. return the equivalent of the borrowed Bonds to the Firm.

[5] Thereafter, the Firm liquidated Dr. Dussault's personal portfolio to make the Firm whole. The Firm did this when Dr. Dussault's attorneys sent a demand letter that required the Firm to cancel guarantees the Firm was holding against any losses they incurred due to Dr. Dussault's investment activities.

[6] Dr. Dussault claims the liquidated value of his portfolio – \$505,661.98 – from the Firm on the grounds that:

- a) the 8-23 Transaction was contrary to Dr. Dussault's investment objectives and financial interests;
- b) the Firm failed to properly ensure that 8-23 Transaction complied with the applicable laws and regulations which governed such transactions; and
- c) that the Firm relied on an unenforceable "margin" agreement to do justice to itself.

[7] In its defence, the Firm responds that Dr. Dussault was fully advised of the speculative nature of the 8-23 Transaction and gave his informed consent and that:

- a) the 8-23 Transaction was appropriate since the risk was minimal if the position had been closed within a short timeframe;
- b) if the 8-23 Transaction was not appropriate and therefore was a relative nullity, it was subsequently ratified by Dr. Dussault or in the alternative, Dr. Dussault failed to mitigate his loss by closing his position earlier; and
- c) finally that should any damages be owing, judicial interest and indemnity should be reduced because of the unjustifiable delay in Dr. Dussault bringing this matter to trial.

[8] By way of a short procedural introduction, the 8-23 Transaction occurred in July, 1994, the liquidation of Dr. Dussault's portfolio by the Firm took place in December, 1996 and the action was instituted at the end of May, 1997.

[9] The action was not set down by Dr. Dussault until July, 2004 and was heard by this Court in May, 2007.

[10] Unfortunately, Mr. Roy died in 2002.

[11] The most contemporaneous evidence of events is contained, amongst others, in the filed transcripts of the Examinations on Discovery of Dr. Dussault and Mr. Roy.⁴ Both Dr. Dussault and Ms. France Roy testified at trial.

B- Analysis

i- What Were Dr. Dussault's Investment Objectives and What Was His Financial Situation at the Time of the 8-23 Transaction?

[12] It is instructive to begin with an outline of the general legal principles that apply to this case. The Court adopts as its own the succinct summary of such principles stated by Madam Justice Sylvie De Vito in *Saks v. Marleau, Lemire Securities Inc. et al.*⁵

"ANALYSIS

The law

[77] The following principles are relevant to this case and stem from the case law and legislation cited by both parties:

- **the relationship between a stockbroker and his client is governed by the rules of mandate as defined by the Civil Code of Quebec, and as regulated by securities legislation and regulations;**
- **in a "non discretionary account", a securities dealer is an intermediary: he buys and sells securities on behalf of his client, in accordance with the client's instructions;**
- **the content of the dealer's obligation will vary with the object of the mandate and the circumstances;**

⁴ The Transcript of the Examinations on Discovery of Dr. Dussault is dated August 27, 1997 and that for Mr. Roy is dated December 9, 1999.

⁵ 2006 QCCS 5593 (S.C.) at para 77. This case was cited by the Firm.

- *as a professional mandatary, a broker also has a duty to provide advice whose scope and nature will vary with the circumstances, for example, the client's personality and the client's knowledge of investment;*
- *the dealer's scope of obligations is inversely proportionate to the investor's degree of sophistication;*
- *the broker is bound to act with reasonable care, prudence, diligence and loyalty, and in the best interests of his client in the exercise of his professional services;*
- *he has the obligation to know his client, i.e. to identify his objectives and his limits, his knowledge of trading and his risk tolerance;*
- *a stockbroker has an obligation of means, not one of result, unless he has specifically committed to such;*
- *the whole portfolio must be considered, and not just certain specific investments, in order to decide if the broker was negligent in the handling of the account;*
- *it is of judicial knowledge that the stock market fluctuates from day to day, either by going up or down."*

[13] To understand whether the 8-23 Transaction was appropriate, it is necessary to review the history of Dr. Dussault's relationship with the Firm, his investment objectives and investment "personality", and his financial situation.

[14] Based on the evidence, the Court finds that Dr. Dussault was a cautious investor not prone to speculation. In 1994 at 52 years of age, his isolated objective for the 8-23 Transaction was to make a risk-free capital gain of \$76,000 in approximately two weeks, as had been recently achieved by another of the Roy's clients.

[15] Dr. Dussault first became a client of the Firm in 1983 when he was 41 years of age. His major source of income was his busy, full-time medical practice. He had never taken any courses in investment.

[16] Throughout the time that Dr. Dussault was a client of the Firm, his primary investment counsellor was Mr. Roy who in 1983, had already been active in the stock

brokerage business for 22 years. Dr. Dussault placed full reliance in Mr. Roy's recommendations.

[17] Ten years later, in March, 1993, Mr. Roy was beginning to wind-down his practice with a view to his own retirement. In this context, he sought to have his daughter, Ms. France Roy, gradually take over his clientele.

[18] Unlike her father, Ms. France Roy was new to the stock brokerage business. She started in 1992 with the Firm after successfully completing the requisite courses. She was at that time 33 years of age and had previously been in marketing in the ski equipment business.

[19] For her first six months, Ms. France Roy sat side by side with her father working with him at his home office in Piedmont to get to know the business and his clientele. After this, she would spend two days at her father's home office doing the same thing and the rest of the week at the Firm's downtown Montreal office.

[20] She was first introduced by her father to Dr. Dussault in 1993 and from then on, both she and her father gave investment advice to Dr. Dussault. Communications were by telephone.

[21] What does the history of Dr. Dussault's accounts with the Firm prove about his investment objectives and investment personality?

[22] The Firm opened a Quebec Stock Savings Plan account for Dr. Dussault in 1983.⁶

[23] The account opening documents are completely unhelpful to determine Dr. Dussault's investment objectives: such documents include a page of questions that are to be completed. Although signed both by Mr. Roy and the Firm's branch manager of the time, none of the pertinent information including investment objectives and client worth are noted.

[24] In 1985, the Firm opened a self-directed Registered Retirement Savings Plan account for Dr. Dussault.⁷ An identical absence of information on the account opening documents exists here. Nonetheless, the Court is satisfied from the evidence that this account had the objective of having secure stable investments to secure Dr. Dussault's retirement.

⁶ Exhibit P-20.

⁷ Exhibit P-21.

[25] On January 21, 1986, the Firm opened a margin account⁸ for Dr. Dussault into which his cash account was converted. A document called "*Convention de compte sur marge Lévesque Beaubien inc.*" ("*Margin Account Agreement*") is signed by Mr. Roy and there is a signature above the printed name "Gilles Dussault". The Court accepts Dr. Dussault's oral testimony that he never signed this document and was completely unaware of its existence until it was produced by the Firm at trial. The Court also accepts his testimony that he never asked to trade "on the margin" and that he never provided any power of attorney to Mr. Roy to sign this document on his behalf.

[26] The onus is on the Firm to show it knew and understood the client's objectives in opening this margin account.⁹ However, even Ms. France Roy did not know the objectives of this margin account.

[27] The Firm's policy was to undertake a "short" sale only where the client had both "margin" and "margin short" accounts. Since it was on the basis of the existence of this margin account that the Roys were able to undertake the "short" sale on behalf of Dr. Dussault, it is important to know whether this *Margin Account Agreement* was in force.

[28] The Firm alleges that even if Dr. Dussault did not sign the *Margin Account Agreement*, he ratified this agreement because:

- a) he borrowed once from the Firm in this account in 1988 for \$60,000 for a very short period; and
- b) he continually received monthly statements which under the heading "Type" noted "MGN" and "MRGE" and which the Firm says put Dr. Dussault on notice that he was operating an account with "margin" (borrowing) capability.¹⁰

[29] The *Margin Account Agreement* (Exhibit D-26) contains 12 paragraphs regarding the operation of the margin account and establishes an additional legal relationship to mandate: that of loan guaranteed by "gage" (guarantee) by way of the client's portfolio.

[30] The Court is satisfied for the following reasons that Dr. Dussault is not bound by the conditions of this agreement and that none of his actions constituted the clear and unequivocal confirmation that he knew and accepted those conditions.

⁸ Exhibits D-26 and D-26A.

⁹ See J.-L. Baudouin et P. Deslauriers, *La responsabilité civile*, 6e édition (Cowansville, Qc: Yvon Blais, 2003) at para. 1612.

¹⁰ Exhibit P-1A and Exhibit D-3.

[31] Firstly, the Bourse de Montreal (Montreal Stock Exchange) required a written agreement which did not exist here.¹¹

[32] Secondly, on April 26, 1988, Dr. Dussault was advanced \$60,000¹² by way of the margin account to pay taxes. However, all but approximately \$600 of this amount was repaid to the Firm by May 6, 1988 when Dr. Dussault cashed certain treasury bills on a maturity date known in advance by the Firm.

[33] The Court finds that while this transaction may have taken place in the margin account, this transaction by itself it does not confirm Dr. Dussault's knowledge that he had a specific margin account nor of the terms of Exhibit D-26. Furthermore, there is nothing speculative or risky whatsoever in receiving this amount since Dr. Dussault testified he thought the Firm had cashed treasury bills in his account to pay him the \$60,000.00.

[34] Finally, the cryptic mentions of "MGN" and "MRGE" on the monthly statements do not mean that Dr. Dussault knew or accepted the content of the 12 clauses of the *Margin Account Agreement* (Exhibit D-26).

[35] Mr. Roy testified in his Discovery that the Firm required that updated investment objectives be kept for clients. Dr. Dussault's expert Mr. Jean-Claude Dorval noted the importance of such updated documents to allow the Compliance Department to ensure the appropriateness of investment activities in individual client's accounts.¹³ However, the Firm has not filed any such documents from the original accounts opened in 1983 and 1985 until the opening of a corporate account for Dr. Dussault's company in 1993.¹⁴

[36] Since there was no completed "*Know Your Client*" documents on file with the Firm at the time of the opening of this margin account in October, 1987, the Court can only assume the margin account continued the conservative investment objectives previously mentioned.

[37] In 1992 over a period of 42 days, Dr. Dussault undertook two particular transactions on the recommendation of Mr. Roy that earned him a \$143,000 capital gain on the sale of Canada Savings Bonds that he owned and for which the price had risen.

[38] This was a conservative transaction for which there was no risk.

¹¹ Rules of the "Bourse de Montreal" Art. 7458.

¹² Transcript of Mr. Roy's Examination on Discovery at page 139 and following.

¹³ The Court qualified Mr. Dorval as an expert in the investment business including the work of investment counsellors and compliance on the basis of his 35 years experience in all aspects of the business (see his curriculum vitae filed with his expert's report).

¹⁴ Transcript of Discovery of Mr. Roy, December 9, 1999.

[39] The Court finds that these two transactions of Dr. Dussault show no proclivity to risk and on the contrary, demonstrate the caution with which he proceeded in making investment decisions.

[40] As Mr. Roy said in his Examination on Discovery, it took Dr. Dussault 42 days to decide to complete a second sale of these Canada Savings Bonds – which he owned – after he had already made a risk-free capital gain on the first sale. What did this tell Mr. Roy about Dr. Dussault? Mr. Roy said:

"C'est pour montrer que toutes les décisions de M. Dussault sont extrêmement réfléchies."¹⁵

[41] Later on, Dr. Dussault's inability to make rapid investment decisions in the case of the 8-23 Transaction was an important element of his investment personality of which the Roys should have taken account before making the recommendation of the 8-23 Transaction and for which the failure to take account had disastrous consequences on all concerned.

[42] As mentioned above in November, 1993, a margin account was opened for Dr. Dussault's corporation "*Centre de traitement de varices Longueuil inc.*".¹⁶ The account-opening document was completed by Ms. France Roy and countersigned by her branch manager, Mr. Serge Paiement. Although he did not receive a copy of the document at the time, Dr. Dussault did acknowledge that its contents were correct wherein Ms. France Roy indicated that the objectives of the account were long-term growth, that the risk was to be limited, that the investment knowledge of Dr. Dussault was "*moyennes*", (which was only one category above the bottom choice being "*limitées ou nulles*") and where annual revenue was noted at \$300,000 and the total value of the investor corporation was noted between \$250,000 and \$500,000.¹⁷

[43] A "*Convention de compte sur marge*"¹⁸ and corporate resolution were signed by Dr. Dussault on behalf of his company on November 24, 1993.

[44] Up to the time of the 8-23 Transaction, the Court finds the account-opening statement for the corporation (Exhibit P-7) accurately summarizes both the investment objectives for his personal corporation but also for Dr. Dussault in his other accounts. He was a cautious investor, slow to act, but was prepared to take advantage of a capital gain where he had no exposure.

¹⁵ Transcript of Mr. Roy's Examination of Discovery at page 178, line 7.

¹⁶ Exhibit P-7.

¹⁷ Mr. Roy testified that he did not know Dr. Dussault's financial situation in 1994 (see his Transcript of the Examination on Discovery, pages 171-172.

¹⁸ Exhibit D-4.

[45] It is in this context and with these objectives, investment personality and Firm knowledge of his financial status that the impugned 8-23 Transaction must now be considered.

[46] The circumstances in which Dr. Dussault came to give the mandate for the 8-23 Transaction are critical. In the context of these circumstances and on the preponderance of the evidence, the Court finds that the Roys failed to recognize that the 8-23 Transaction was incompatible with Dr. Dussault's particular objectives for that transaction, failed to advise Dr. Dussault of the substantial risk related to the 8-23 Transaction and having gotten him into this incompatible transaction, failed to provide clear advice as to when to repurchase and close his position.

[47] The evidence that supports these findings on the balance of probabilities will now be discussed.

[48] In early 1994, Dr. Dussault asked Ms. France Roy whether he could make another capital gain of the risk-free type that he made in 1992.

[49] In the course of three telephone calls in April – May, 1994 – the Roys recommended that Dr. Dussault undertake an 8-23 type Transaction.

[50] They explained to Dr. Dussault by telephone that the market conditions had changed since 1992 regarding Canada Savings Bonds. Rather than the market price for these Bonds increasing, the economic conditions had changed such that interest rates were increasing with the inverse effect that the market price of such Bonds was decreasing. Accordingly, they explained that a capital gain could now be achieved by selling the Canada Savings Bonds "short" and making the capital gain on the difference when the Canada Savings Bonds were later purchased at a lower price.

[51] Since this type of "short" sale required borrowing the securities from the brokerage firm and essentially "selling what you do not own", Dr. Dussault, after these three calls, advised Ms. France Roy in May 1994 that he was not interested in such a transaction.

[52] What then caused him to completely reverse himself on July 13, 1994?

[53] The pivotal factor – a factor which should have put the Roys on high alert – was the telephone call that took place on July 13, 1994.

[54] In response to a question by Dr. Dussault as to whether anything had happened regarding any 8-23 transactions, Ms. France Roy responded, to the effect, that she did not wish to make him feel badly, but that one of their customers had made \$76,000 on just such a transaction in the space of two weeks.

[55] Dr. Dussault's immediate response was to the effect that he too wished to make \$76,000 in two weeks and asked that the identical transaction – the 8-23 Transaction – be undertaken for him as for the successful client.¹⁹ This response should have alerted the Roys that:

- a) Dr. Dussault had the objective of making this large amount of money rapidly; and
- b) he had no intention of running any risk, let alone any intention of putting his portfolio at risk.

[56] What did Mr. Roy know about Dr. Dussault's investment decision-making from his past experience? He knew that:

- a) the only losses Dr. Dussault had suffered were in his REA account where any loss on the speculative Quebec-based stocks could be reduced through the effect of the tax laws;
- b) Dr. Dussault was very slow to act even in circumstances where there was no risk to him and there was a clear opportunity for making a capital gain; and
- c) his previous pattern of investing showed him to be risk-adverse and to trust Mr. Roy's recommendations.

[57] For the specific reasons that follow, the Court finds that:

- a) the 8-23 Transaction should not have been recommended to Dr. Dussault as it was contrary to his objectives and he was risk-adverse; and
- b) if Dr. Dussault wanted to know more information about the 8-23 Transaction, the Roys should have explained all its intricacies and especially its risks and advised him that this transaction was meant for sophisticated institutional investors and not risk-adverse individuals like himself.

[58] Ms. France Roy testified that she explained to Dr. Dussault before the 8-23 Transaction that he had as much a risk of making a loss as making a gain.

¹⁹ The order for Dr. Dussault was placed the next day on July 14, 1994 and the short sale completed on July 19, 1994.

[59] Mr. Roy testified on discovery as to what he told Dr. Dussault in these terms:

"C'est évident que la transaction avait pour but de générer un gain de capital à court terme. Je spécifie le mot « court terme ». Tu ne prends pas une position spéculative, n'ayons pas peur des mots, de cette envergure-là sans te fixer des objectifs.

Ça ça avait été dit à monsieur Dussault : « Oublie pas là, ce n'est pas deux ans et demi (21/2), ce n'est pas un (1) an, c'est... » moi je me souviens d'avoir mentionné plus ou moins six (6) mois. Si le marché qu'on anticipait, c'est-à-dire la hausse des taux d'intérêt puis voir le prix baisser pour être capable de racheter la position à un prix inférieur.²⁰

[60] Dr. Dussault understood Mr. Roy to also mention this timeframe as closer to a month and a half to 2 months and that Mr. Roy would monitor the situation closely.²¹

[61] In fact, in a document prepared by them and sent to their clients – including Dr. Dussault – entitled: "*Investir en fonction des cycles économiques*", the Roys noted their "risk neutral" assessment of 8-23 type Transactions in this way:

"En conséquence, ni l'âge de l'investisseur ou le type de compte ne doit influencer les décisions prises en regard d'une telle politique de placement."²²

The Court agrees with Expert Jean-Claude Dorval's assessment that this was not correct in view of the risk and sophistication of the 8-23 Transaction.

ii- Did the Firm Breach its Mandate to Dr. Dussault?

a) Through Dr. Dussault's Investment Counsellors?

[62] Based on the evidence and particularly that of Expert Jean-Claude Dorval, the Court finds that the 8-23 Transaction was inappropriate for Dr. Dussault and contrary to his investment objectives.

[63] Through the actions and omissions of their employees, the Roys, the Firm breached its mandate to Dr. Dussault regarding the 8-23 Transaction in these ways:

²⁰ Transcript of Mr. Roy on Examination of Discovery at page 188, line 12.

²¹ Transcript of the Examination on Discovery of Dr. Dussault at pages 51-52.

²² Exhibit P-17

- a) the Firm failed to explain the substantial risks inherent in the 8-23 Transaction including the inter-relationship between the margin account and "margin short" account that it required for Dr. Dussault to undertake this Transaction;
- b) the level of sophistication required to understand this Transaction was beyond Dr. Dussault's investment understanding and the Firm and its employees failed to monitor this transaction in such a way as to protect Dr. Dussault's interests; and
- c) the Firm failed to advise Dr. Dussault that his objective: a rapid risk-free capital gain of \$76,000 was unrealistic and that he should not undertake the 8-23 Transaction.

[64] The Court will now analyze each of these breaches.

[65] Firstly, to undertake such a "short" sale of \$2,000,000 of these Canada Savings Bonds, the Firm required that Dr. Dussault have both a margin account and a "margin short" account in which his own portfolio would be used to guarantee the cost of borrowing the securities to undertake that "short" sale and to guarantee any shortfall incurred to repurchase the Bonds. Hence, the first thing that Dr. Dussault had to understand clearly was that he was putting at risk his entire portfolio as a guarantee given the large value of the Bonds being borrowed.

[66] Secondly, Dr. Dussault needed to be advised clearly and needed to understand clearly that – unless he fixed a price at the outset (known as a "stop loss") at which he mandated the Firm to undertake the repurchase – his potential exposure was great if the Bonds' market price went up instead of down.²³

[67] On the contrary, the Court is satisfied that before the start of the 8-23 Transaction, Dr. Dussault understood it was without risk. What he understood from Ms. France Roy was not that he was exposed to a risk of losing money but rather that instead of earning the money to purchase a new Mercedes – which is what he told her was his reason for seeking a capital gain – he understood he might in fact make only enough money to purchase a "Lada" – the economy Russian sub-compact vehicle available at the time. Ms. France Roy confirmed she used this automobile analogy with Dr. Dussault.

²³ See *Lafamme v. Prudential-Bache Commodities Canada Ltd.*, [2000] 1 S.C.R. 638 at para. 28 and 34.

[68] Dr. Dussault was vulnerable and needed to be put on high alert to repurchase rapidly in changing market conditions to avoid any loss. Instead, as Dr. Dussault testified at trial, Mr. Roy told him "*On va avoir du fun*".

[69] Also, the Firm required that Dr. Dussault have a margin account for this short sale.

[70] The evidence on behalf of the Firm is to the effect that it was relying on the original *Margin Account Agreement* signed in 1986. As noted, there is no evidence that the objective of this agreement could relate to the 8-23 Transaction either in terms of size, risk or sophistication.

[71] If the Firm required Dr. Dussault to use this margin account for the purpose of the 8-23 Transaction, a full and complete explanation as just mentioned should have been given to Dr. Dussault and the agreement signed by Dr. Dussault. The Court is satisfied this was not done.

[72] The Firm submits that it is vulnerable itself because much of its business is done orally, often by telephone, between its investment counsellors and their customers.

[73] Where the risk to an investor was of the potential severity and magnitude as in this case, the Firm should have ensured that the risks and mechanisms involved were clearly understood: even to the extent of written advice and signed confirmation in the appropriate case, such as here.

[74] The Court accepts the evidence of Expert Jean-Claude Dorval that the level of sophistication required to understand the 8-23 Transaction was far in excess of Dr. Dussault's investment knowledge because of the sophistication required to understand the market factors.

[75] Mr. Dorval's expert opinion – not contradicted by the Firms' expert – was to the effect that understanding whether the price of the Canada Savings Bonds would go up or down was dependant on a knowledge of the world economy, its effect on interest rates and particularly how the American Federal Reserve Bank would react in changing its interest rate, all of which would have an impact on the market price for these Canada Savings Bonds.

[76] Moreover, even the Firm's in-house expert, Mr. Rodriguez, confirmed that such types of transactions are normally the domain of the institutional investor. Such trading for an individual investor was exceptional, according to him.

[77] Mr. Roy recognized his own limitations in analyzing 8-23 type Transactions:

"O.K., ça c'est les experts sur la rue, Merrill Lynch, Lévesque Beaubien, le consensus là qu'il y avait. Il faut quand même penser comme moi je n'ai pas une boule de cristal, puis si je me réfère à des écrits comme ça où à des analyses où des études bien je les prends en quelque part, tu sais, je ne peux pas inventer ça."²⁴

[78] In addition to the need for such sophisticated and specialized knowledge, Mr. Rodriguez also explained the importance of following the price of the Canada Savings Bonds on an hour-to-hour basis since the price constantly fluctuated throughout the day. He testified that the price changes for the 8-23 Bonds were "volatile". It was part of Mr. Rodriguez's job to keep the Firm's investment counsellors apprised of these price changes. According to their own evidence, Mr. and Ms. France Roy did this daily.

[79] It was Dr. Dussault's understanding that the Roys, and not he, would be following the prices while he kept a general watch, which he started to do in September 1994.²⁵

[80] At some time in the Fall of 1994, Mr. Roy advised Dr. Dussault that in fact he himself had undertaken the same transaction as Dr. Dussault. The evidence shows he sold "short" the identical amount of Canada Savings Bonds except one day later than Dr. Dussault.²⁶

[81] In the circumstances of the 8-23 Transaction, where fluctuations in the price were hourly and where quick decisions might make the difference between a profit and a loss, the Firm breached its obligation to Dr. Dussault by not clarifying as part of its prior explanation to Dr. Dussault the mechanism whereby:

- a) the Firm would advise him of the changing market price on a very regular (at least daily or if not several times weekly basis) and if not, that he would be left on his own to monitor the prices (not a realistic alternative based upon Mr. Rodriguez's evidence); and
- b) an understanding at what price the position was to be closed.²⁷

[82] Quebec jurisprudence makes it clear that investment counsellors have an ongoing obligation not only to advise but to dissuade a client from an unsuitable transaction.²⁸ Dr. Dussault should have been dissuaded.

²⁴ Transcript of Mr. Roy's Examination on Discovery at page 89, line 3.

²⁵ See in particular his handwritten notes in Exhibit P-11, which shows Dr. Dussault obtained the prices either through irregular calls to Ms. France Roy or by reviewing the Saturday, *La Presse*.

²⁶ Exhibit P-12.

²⁷ *Thérien v. David*, 2002 R.J.Q. 2515 (C.Q.) at para. 83.

[83] As the Roys' employers, the Firm is legally responsible for these breaches that they committed.²⁹

b) Through Other Members of the Firm?

[84] Expert Jean-Claude Dorval confirmed in evidence the opinions in his report:

- a) "*Aucun membre du personnel de chez Lévesque Beaubien n'a aidé M. Dussault à résoudre adéquatement la situation avant qu'elle ne prenne une ampleur considérable.*"; and
- b) "*Nous croyons que les représentants ont manqué à leur responsabilité professionnelle, ont manqué à leur devoir de bien conseiller. Lévesque Beaubien a endossé toutes ces lacunes, se faisant complice de l'opération.*"³⁰

[85] From the time of the original "short" sale (July 19th, 1994) at the price of 86.5 to the time when Dr. Dussault's position was closed and the damages crystallized on December 17, 1996 at a price of 107.85, there was a period of some two years and five months.³¹

[86] Dr. Dussault's own handwritten contemporaneous notes - with few exceptions - show the rising price of Canada Savings Bonds from the very moment that the "short" sale took place. Similarly, in a much clearer and more precise fashion, the Firm's detailed *Table*³² shows day-by-day from July 19, 1994 to December 17, 1996 the increase in the price, the daily interest rate incurred by Dr. Dussault and his profit or loss (in the main, his loss) on a day-by-day basis.

[87] If the Firm had provided anything resembling such a clear and graphic table to Dr. Dussault at any of the relevant times, it would have allowed him to better understand his situation. But they did not.

[88] Under the present heading, the Court will determine whether the Firm bears any legal liability for the actions or omissions of other of its employees, essentially management and its Compliance Department, for the fact that the loss claimed by Dr. Dussault did not occur overnight but was a long, gradual accumulation over this period.

²⁸ *Markarian v. Marchés mondiaux CIBC inc.*, 2006 QCCS 3314 (S.C.) at para. 342.

²⁹ Art. 1463, *Civil Code of Quebec*.

³⁰ Conclusion, Expert's Report of Mr. Jean-Claude Dorval, November 13, 2003 and see Baudouin, *infra* note 9 at para. 1607.

³¹ Exhibit D-24.

³² Exhibit D-24.

[89] For ease of understanding, the Court's assessment of the actions of these other employees of the Firm will follow chronologically in relation to particular exhibits.

[90] Based on this evidence and the expert opinion of Mr. Jean-Claude Dorval, the Court concludes that while the recommendation of the Roys was the "*sine qua non*", absent which there would have been no transaction, the fact remains that failure to take appropriate actions at other relevant times within the two year five month period produced greater losses than otherwise and were the fault of the Firm.

**a. Irregularity of 8-23 Transaction Flagged on July 19, 1994
by the Firm's Compliance Department (Exhibit P-11)**

[91] Mr. Guy Roby was in charge of the Firm's Compliance Department. Mr. Roby did not testify at trial but his Examination on Discovery was filed in its entirety by Dr. Dussault.³³

[92] As early as July 19, 1994 – the month of the original "short" sale – the Compliance Department flagged the exceptional nature of this transaction for the Roys' supervisor, Mr. Serge Paiement. They required that three questions be answered:

- a) was the transaction solicited?
- b) did the transaction meet Dr. Dussault's investment objectives; and
- c) the client's file information was outdated and an updated document was required for the margin account.³⁴

[93] Mr. Roby noted that one of the purposes of his department was to uncover any inappropriate transactions that had taken place in the Firm's offices across Canada.³⁵

[94] Mr. Roby indicated that the 8-23 Transaction was of interest to his department since:

- a) the amount of the transaction was high;
- b) the long date to maturity of these Canada Savings Bonds (2023) increased the risk; and
- c) the transaction was "aggressive".

³³ Transcript of the Examination on Discovery of Mr. Guy Roby, May 11, 2000.

³⁴ Exhibit P-11.

³⁵ Transcript of the Examination on Discovery of Mr. Guy Roby at pages 6, 9 and 10.

b. Response to Compliance Department by Ms. France Roy

[95] Sometime after the short sale in July, 1994 and in response to the Compliance Department, Ms. France Roy completed the updated form for Dr. Dussault's margin account (originally) opened in 1986.³⁶

[96] She testified that she completed this update without ever seeing the original client file for the margin account.

[97] She did not confirm the updated document once completed with Dr. Dussault but noted on that document that the investment objectives were: (a) "short" term; (b) with high risk; (c) Dr. Dussault's investment knowledge was "excellent"; and (d) that she had known him for 20 years.

[98] Despite having a place to do so, this document was not countersigned by her immediate supervisor, Mr. Serge Paiement.

[99] Had this form been carefully considered either by Mr. Paiement or by the Compliance Department, the following critical "red flags" should have been noted:

- a) some nine months earlier on November 23, 1992 (Exhibit P-8), Ms. France Roy had considered Dr. Dussault's investment knowledge as "*moyennes*", the second lowest category, and not "*excellent*" the highest category that she noted on Exhibit P-11; and
- b) moreover, in 1994, Dr. Dussault had only been with the Firm for eleven years not twenty and was only known to Ms. France Roy herself for one year.

[100] Ms. France Roy confirmed that she did not check any of this information with her father.

[101] Also Ms. France Roy signed a new client information form for the "margin short" account, which was countersigned by Mr. Serge Paiement on July 13, 1994.³⁷ However, this form had nothing filled-in concerning the client's objectives, risk factors, nor knowledge of investment despite the fact that, as mentioned by Mr. Roby, this

³⁶ Exhibit P-11.

³⁷ Exhibit P-8.

"short" sale was an aggressive speculation for which the Firm had no prior similar history for Dr. Dussault.

[102] The Firm's fault in not ensuring that these client records were properly completed and reviewed prevented proper compliance according to Expert Jean-Claude Dorval. The Court agrees.

c. Telephone Discussion on March 3, 1995 between Dr. Dussault and Mr. Serge Paiement

[103] Since Mr. Paiement did not testify at trial, the Court has only Dr. Dussault's version of this telephone call.

[104] The significance of this telephone call is two-fold. Dr. Dussault put Mr. Paiement on notice that:

- a) he was totally dissatisfied with the recommendation that he had received from the Roys to the point of discussing whether he had a legal action against the Roys; and
- b) he was very upset that Ms. France Roy did not, on January 20, 1994, take the initiative to close his position. For a very short period, the price of the Canada Savings Bonds was lower than the original purchase price and Dr. Dussault would have made a small profit.³⁸

[105] Mr. Paiement knew or should have known that Mr. Roy – who had undertaken the identical transaction to Dr. Dussault but one day later – had in fact closed-out his position in mid-January, 1995 when the price was \$85.4. Despite this, there is no evidence that:

- a) Mr. Paiement brought this important fact to Dr. Dussault's attention; and
- b) in response to Dr. Dussault's direct request for Mr. Serge Paiement at what price he would recommend Dr. Dussault closing out his position, his sole response was to indicate the 8-23 Transaction was risky and to recommend a "stop loss price" (i.e. a price which Dr. Dussault would mandate the Roys to close his position). Dr. Dussault's recollection of the conversation of what Mr. Serge Paiement said is instructive:

³⁸ The Court finds that Ms. France Roy made sufficient attempts to contact Dr. Dussault and that the fact that she did not have the number of the "clinic" where he was working on Fridays in Sherbrooke was not her fault.

"Bien écoutez, je veux pas discuter de ce que le marché va faire, il va – tu montes, il va – tu baisses, c'est juste que c'est une opération risquée dans laquelle vous vous êtes embarqué et puis ce que je vous conseille, c'est mettez un prix auquel vous voulez que la transaction se termine."³⁹

[106] The Court accepts Mr. Jean-Claude Dorval expert's opinion that this was another example of the Firm failing to give Dr. Dussault "*l'heure juste*".

d. Compliance Department "Sondage" to Dr. Dussault dated March 7, 1995

[107] This document was sent by Mr. Roby to Dr. Dussault by regular mail and not by registered mail and in the covering letter, Dr. Dussault is asked to confirm the information that appears on monthly statements concerning the "margin" and the "margin short" account which show the 8-23 Transaction. Attached was a "sondage" (translation: "a survey") with the most general of questions that could apply to any account and without any reference specifically to the 8-23 Transaction. It is called a "sondage" in the document.

[108] The Court is very perplexed by this letter. Expert Jean-Claude Dorval was of the opinion that in the circumstances known to the Firm and Mr. Paiement, he (or another independent person from the Firm other than the actual investment counsellors) should have met Dr. Dussault directly to determine whether the impugned transaction was appropriate.

[109] After the Compliance Department raised the concerns in relation to the 8-23 Transaction, the Firm should have resolved the concerns immediately to protect the interests of their client, Dr. Dussault.

[110] Not only did the general questions not do this but the fact is that Mr. Roby never received a completed "sondage" back again from Dr. Dussault.

[111] Dr. Dussault testified that he never received the "sondage". This fact cannot be contradicted since the letter was not sent by registered mail or courier with proof of receipt.

[112] The Court is at a loss to understand why, given the importance of such an inquiry, Mr. Roby testified that he was satisfied that a lack of response from Dr.

³⁹ Transcript of the Examination on Discovery of Dr. Dussault at page 91, line 2.

Dussault was presumed to mean there was no problem, without checking further.⁴⁰ This is unacceptable in these circumstances.

[113] The Court accepts the expert opinion of Mr. Dorval that, after taking the trouble to send the "sondage" and not receiving it back, this should have sounded some alarm.

e. On-going Highlighting of Problems by Compliance Department (Exhibit P-13 to Exhibit P-16 inclusive)

[114] Covering essentially two-month periods at a time, the Compliance Department prepared reports. These reports were given to the Chief Executive Officer of the Firm and amongst others, copies were also sent to the head of the Legal Department.

[115] The Court can only conclude from these reports that the Compliance Department and the Firm's senior management were fully aware of the problems with the 8-23 Transaction.

[116] In Exhibit P-13, the Compliance Report for October and November, 1994 said:

"En novembre, nous avons analysé 6 clients du conseiller en placements George Roy, incluant son compte personnel. Ce conseiller et ses clients ont vendu à découvert (en juillet) 14 000 000\$ Canada 8 % 1 June 23rd, ce qui représente un risque très élevé compte tenu des fluctuations des taux d'intérêt.

Deux de ses clients sont retraités et âgés respectivement de 60 et 76 ans. Selon nous, ce genre de placements ne rencontre pas leurs objectifs de placement quoiqu'en dise le C. P. [Ed. note: Mr. George Roy]."

[117] That report goes on to note that including Mr. Roy's personal account, the losses for these 8-23 Transactions for the Firm's clients, including Dr. Dussault, totalled \$297,735 as of November 23, 1994.

[118] Despite noting the increasing losses over the months, a principal preoccupation of these reports was a perceived loss of economic benefit to the Firm because of the lower interest rate being charged to their clients for the borrowings.

[119] The interests of Dr. Dussault and the continuing losses he was suffering should have been a preoccupation for the Firm. Instead, the Firm showed a singular interest in its own bottom line.⁴¹

⁴⁰ Transcript of the Examination on Discovery of Mr. Roby at page 30-32.

[120] In fact, in Exhibit P-16, for the months of May and June 1995, the Compliance Report said (in understatement): "*La situation s'est détérioré depuis la fin de janvier 1995*". The report shows a loss for Dr. Dussault in the amount of \$249,287 under the heading "*Perte potentielle*".

f. Telephone Discussion Between Dr. Dussault and the Firm Vice-President, Mr. Luc Papineau, July 13, 1995

[121] Mr. Luc Papineau was a Vice-President of the Firm at the relevant time and was the direct superior for Mr. Paiement.

[122] The transcript of his discovery was filed by Dr. Dussault and he also testified at trial on behalf of the Firm.

[123] In January or February of 1995, Mr. Papineau contacted the Compliance Department because of his concerns regarding the "short" sale⁴² and asked Mr. Roby to check with Dr. Dussault regarding the suitability of the 8-23 Transaction.⁴³ Mr. Papineau had a particular concern because of the higher concentration that the 8-23 Transaction represented for Dr. Dussault's portfolio.⁴⁴

[124] Mr. Papineau received a telephone call from Dr. Dussault in or about July 13, 1994. Dr. Dussault told Mr. Papineau that his investment counsellor Mr. Roy felt that interest rates were going up and Dr. Dussault asked for Mr. Papineau's opinion.

[125] Mr. Papineau was fully aware of Dr. Dussault's situation. This was an appropriate time to advise Dr. Dussault of the Firm's corporate recommendation to him as to what he should do. This position should have been confirmed in writing so that there could be no doubt in Dr. Dussault's mind as to what the Firm was telling him. This was not done.

[126] Instead, Mr. Papineau said on discovery that his response to Dr. Dussault was the following:

"Je lui ai répondu que les taux d'intérêt, à tous les jours il y a les gens qui pensent que les taux d'intérêt vont monter et à tous les jours il y a des gens qui pensent que les taux d'intérêt vont descendre, c'est ce qui fait qu'il y a un marché. Autrement, il y aurait juste des

⁴¹ Exhibits P-14 and P-15.

⁴² Transcript of the Examination on Discovery of Mr. Papineau of May 17, 2000 at page 13.

⁴³ Transcript of the Examination on Discovery of Mr. Papineau at page 14.

⁴⁴ Transcript of the Examination on Discovery of Mr. Roby at page 11-12.

*acheteurs ou il y aurait juste des vendeurs. Donc, il n'y a personne qui sait exactement qu'est-ce que les taux d'intérêt vont faire dans les prochains mois.*⁴⁵

[127] Mr. Papineau was or should have been aware as a result of this conversation with Dr. Dussault that Dr. Dussault was getting contradictory advice from Mr. Roy who was telling him that interest rates would rise (and hence the price of the Canada Savings Bonds would fall) and Ms. France Roy who was telling him to close his position.

[128] Dr. Dussault was like a man alone in a rowboat in a storm in the mid-Atlantic. The Firm had always been his guiding light in the past and now that the waves were towering over him, the beacon was gone. The Court is at a loss to understand why the Firm did not put Dr. Dussault's interests first.

[129] Since the Firm felt that it had a proper "margin" agreement in place and that the value of Dr. Dussault's portfolio was guaranteeing any losses, clearly there was no risk for the Firm. However, Mr. Papineau must be taken to be keenly aware that Dr. Dussault was at extreme risk.

[130] Unless and until Dr. Dussault closed his position, the loss that he would suffer was "only on paper" but it was a loss that was continually increasing and with which, one day, he and the Firm would have to come to terms.

[131] In conclusion, these other employees of the Firm had ample opportunity to stop, if not avoid, all the damages which the original breach by the Roys had caused. Not only did management and compliance not come to the assistance of Dr. Dussault, they did not come to the assistance early on of their own employees, Mr. Roy and Ms. France Roy who each made \$2,500 from the 8-23 Transaction while the Firm made \$5,000 in commissions.

[132] Furthermore, if neither Mr. Roy nor Ms. France Roy could convince Dr. Dussault to accept their recommendation to close his position as the Firm alleges, then after speaking with their superior, a Firm recommendation endorsed by management should have been put to Dr. Dussault.

[133] For evidential purposes and to avoid misinterpretation, this should have been done in writing. Put simply, the Firm did not seek to protect Dr. Dussault's interests where the risk being run was all his. A clear unequivocal recommendation as to when he should close his position was required. The Firm is not held to a standard of the perfect recommendation through hindsight. This was not an obligation of result but one

⁴⁵ Transcript of the Examination on Discovery of Mr. Papineau at page 42.

of means. Its recommendation need only be reasonable but it must be given and given clearly.

[134] As the Firm was well aware, the longer Dr. Dussault took to close his position – and the Firm could not close it for him since this was a non-discretionary account and since they had not required from him a stop loss price – any undue delay played against him.

iii- Did Dr. Dussault Ratify the 8-23 Transaction and Did Dr. Dussault Have Any Duty to Mitigate Any Damages and If So, What Are the Consequences?

[135] The next section will discuss the Defendants' allegations that Dr. Dussault either ratified the 8-23 Transaction or failed to mitigate his losses.

[136] The Firm submitted that Dr. Dussault had ratified the 8-23 Transaction, irrespective of any other considerations.

[137] After reviewing the evidence, the Court finds that the Firm has not met its burden of proof in this regard.

[138] To ratify the 8-23 Transaction, the Firm would need to show that Dr. Dussault had been fully informed of the risk but was also fully informed and able to make his own intelligent decision as to the time to close his position and that he understood this advice.⁴⁶

[139] These requirements are not satisfied even though the Court accepts that Dr. Dussault's own notes (Exhibit D-11) show that he was aware of the continually increasing price of the Bonds, was able to calculate roughly what loss he was suffering, and was told by a respected friend that the 8-23 Transaction was risky.

[140] The Court is satisfied that Ms. France Roy sought to explain her position that Dr. Dussault should close his position.

[141] However, as she herself testified, her father was a man with strong opinions and stood up for his views. Given Mr. Roy's experience in the business, long prior relationship with Dr. Dussault and this personality trait, it is understandable why Dr. Dussault relied first and foremost on Mr. Roy's advice.

[142] The Court accepts Dr. Dussault's evidence - given in a clear, straightforward and articulate manner - that up until December 6, 1995, it was always Mr. Roy's advice to

⁴⁶ See Baudouin, *infra* note 9 at para. 1611.

him that interest rates would increase at some point in the future and the price of the Canada Savings Bonds would fall: hence, not to close Dr. Dussault's position yet.

[143] Even on March 8, 1994, when Dr. Dussault suggested in a conference call with Mr. Roy and Ms. France Roy to discuss a stop loss (as originally suggested by Mr. Paiement to Dr. Dussault) at \$93, Mr. Roy's own evidence under oath is equivocal as to what he said to Dr. Dussault.⁴⁷

[144] On the other hand, in the same transcript of the Discovery, Mr. Roy says: "*C'est sûr que notre recommandation était à l'effet fermement, mets-la tout de suite ta commande à \$91, puis oublie ça.*"⁴⁸

[145] Dr. Dussault's evidence was to the contrary. Although Ms. France Roy advised him to close his position, he understood the recommendation of Mr. Roy was to "hang on".

[146] What is the Court to make of this contradictory evidence? Regrettably, because he predeceased the hearing of this case, the Court did not have the benefit of seeing Mr. Roy testifying in Court.

[147] However, the Court has come to the conclusion that whether or not Mr. Roy said what he says he said, the fact of the matter was that it was not so understood by Dr. Dussault.

[148] Dr. Dussault's evidence that Mr. Roy was still maintaining that interest rates would increase is supported by the fact that he received from Mr. Roy on March 27, 1994 an advice document from Merrill Lynch, American investment experts upon whom Mr. Roy relied.⁴⁹ That document advances the theory that interest rates would rise. If what Mr. Roy was trying to do was convince Dr. Dussault to take his recommendation and close his position, why would he have confused the matter further by sending Dr. Dussault this document from Merrill Lynch?

[149] As for Dr. Dussault's understanding of the recommendations he was receiving from Mr. Roy, the Court accepts the evidence of Mr. Papineau referred to earlier hereof in which he confirms that Dr. Dussault told him in July, 1995 (three months after the March 8, 1995 telephone call between Dr. Dussault and the Roys) that Mr. Roy continued to advise him that interest rates were going up.

⁴⁷ For example at page 216, line 15 of the Transcript of the Examination on Discovery of Mr. Roy, he said to Dr. Dussault: "*S'il y a lieu de le faire [the stop loss], fais-le tout de suite, mais encore une fois, c'est ta décision. Si tu veux le mettre le stop loss à quatre-vingts treize (93), mets-le mais on a eu ni l'un ni l'autre.*"

⁴⁸ Transcript of the Examination on Discovery of Mr. Roy at pages 216 and 217.

⁴⁹ Exhibit D-4.

[150] How simple it would have been in the circumstances for the Roys to have put their recommendation unequivocally and clearly in writing to Dr. Dussault to confirm the advice they were giving.

[151] A further explanation for this contradiction arises from a phenomenon known as investor paralysis. Ms. France Roy herself admitted that she felt Dr. Dussault was paralyzed: unable to take a loss and yet unable as well even to take a gain (which would have been the case, albeit small (\$14,490.15), had he closed his position on January 23, 1994 when Ms. France Roy advised him by telephone that the price of the Canada Savings Bonds was at \$84.089).⁵⁰

[152] Expert, Jean-Claude Dorval, indicated that such investor paralysis is a known phenomenon in the investment industry in circumstances such as this. Given the experience of Mr. Roy at the time that he recommended the 8-23 Transaction, the danger that this would occur with Dr. Dussault should have been apparent to Mr. Roy given his own analysis of Dr. Dussault's investment decision-making capacity as "*extrêmement réfléchi*".

[153] In such circumstances and given the risk and speculative nature of the 8-23 Transaction which has been proven, the Roys could have suggested a stop loss at the outset or suggested and obtained the necessary mandate for the Firm to manage this aspect of the account so that, based on instructions at the outset from Dr. Dussault, the final decision to close the position would be in the hands of the Firm and not left to the potential paralysis (and loss of opportunity seeing as how the price of the Canada Savings Bonds changed hourly and daily) of Dr. Dussault.

[154] This said, Dr. Dussault did have a legal obligation to mitigate his damages.⁵¹

[155] In the case of *Laflamme*⁵², the Supreme Court of Canada had to rule on the obligation to mitigate in matters related to investment. Contrary to a more rigid approach taken in the earlier Court of Appeal case of *Bazinet v. Wood Gundy*⁵³, the Supreme Court of Canada instructs⁵⁴ that the investor faced with a breach of mandate must be given certain leeway as to when they must mitigate where the right manner as to how to mitigate damages may be unclear.

[156] In the present case, as long as Dr. Dussault was receiving counsel from his trusted investment counsellor, Mr. Roy, that the interest rate would continue to rise (and

⁵⁰ Exhibit D-24.

⁵¹ Art. 1479, *Civil Code of Québec*.

⁵² *Supra* note 17 at para. 56.

⁵³ [1997] R.R.A. 273.

⁵⁴ Although *Laflamme* was a case of a managed account, the principle still applies.

there was no Firm recommendation to the contrary), then he cannot be faulted for failing to close his position.

[157] However, Dr. Dussault can no longer rely on this rationale after December 6, 1995 when he had a conversation with Mr. Roy.

[158] On Dr. Dussault's own evidence in his transcript for discovery, he testifies that Mr. Roy admitted to him that he should have advised Dr. Dussault to close his position with the stop loss that Dr. Dussault had suggested in March, 1995. Dr. Dussault confirmed that after hearing this, he knew that he was no longer going to be able to make a gain on the 8-23 Transaction. It was at this time that his obligation to mitigate arose and Dr. Dussault should have exercised reasonable prudence by closing his position at that time.⁵⁵

[159] The chart filed by the Firm (Exhibit D-24) shows the loss as of various dates, including December 6, 1995 where the amount shown is \$382,785.19.

iv- Did Dr. Dussault Suffer Any Damages?

[160] The Court has found that the Firm did not have the legal right to rely on the original margin account to do justice to itself as it did.⁵⁶ Accordingly, Dr. Dussault would be entitled to the return of the full amount as of the date when the Firm closed-out his position i.e. as of December 17, 1996.

[161] However, while this would make Dr. Dussault whole, it would not account for the fact that he should have closed the position when the loss was \$382,785.19 (on December 6, 1995), as previously noted.

[162] Whether the matter is considered under Art. 1478, *Civil Code of Quebec* ("C.C.Q.") (apportionment of liability for fault caused) or by way of Art. 1479, C.C.Q. (the obligation to mitigate), the fact remains that Dr. Dussault is only entitled to receive as damages the amount of \$382,785.19 and the Court so orders.

[163] Dr. Dussault has asked for indemnification for the expert's fees for Mr. Dorval incurred for his preparation and his attendance at trial wherein he was in court to hear the evidence of Dr. Dussault and gave his own evidence. The Court finds that these attendances were necessary and useful. Accordingly the Court will accord the full amount of \$13,758.43 (taxes included) on his first bill and \$17,377.38 (the amount allowed for Mr. Dorval of \$15,250 with taxes added) for the second bill, for a total of: \$31,135.81.

⁵⁵ Transcript of the Examination on Discovery of Dr. Dussault at page 133.

⁵⁶ The Firm only used Dr. Dussault's own margin account to make itself whole (see Exhibit P-4) and did not rely on any other guarantees.

[164] In addition, Dr. Dussault claims the fees for one of Mr. Dorval's employees who took notes at trial and assisted Dr. Dussault's counsel.

[165] Without any evidence to support this expense, the Court is not satisfied that these expenses were necessary for the presentation of Mr. Dorval's expert evidence and they will not be granted.

[166] What of the calculation of judicial interest and indemnity?

[167] There is no reason why judicial interest and indemnity should not be calculated normally.

[168] The Court understands there was a 7-year hiatus between the filing of the Dr. Dussault's Rule 15 and setting the action down for trial. However, there is equally no evidence of any attempts by the Firm to move the matter forward.

[169] Why the Firm would not have done so is open to speculation. Was it that the Firm was following the maxim "*let sleeping dogs lie*"? The Court is in no position to decide. That said, the Firm has not convinced the Court that the normal starting point for calculation should be changed.

[170] For these reasons, Dr. Dussault will be entitled to judicial interest and indemnity calculated normally without reduction.

[171] The Court expresses its thanks to counsel for both parties for their professional and useful representations to the Court.

C- Conclusions

[172] **FOR THESE REASONS, THE COURT:**

[173] **ORDERS** the Defendant in Continuance of Suit to pay to the Plaintiff the amount of \$382,785.19, with interest and indemnity from the date of service in accordance with Art. 1619, C.C.Q.;

[174] **ORDERS** the Defendant in Continuance of Suit to pay to the Plaintiff the expenses of the Plaintiff's expert fixed in the amount of \$31,135.81;

[175] **WITH COSTS** to the Plaintiff.

MARK G. PEACOCK, J.S.C.

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Dates of hearing: May 15, 16, 17, 18, 22, 23, 24, 25, 28, 29 and 30, 2007