Court File No. 06-CV-316213 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES RICHARD MACDONALD, JOHN A. ZOPPAS, LYNN D. ZOPPAS and **TAMAS VARGA**

Plaintiffs

and

BMO TRUST COMPANY, BMO NESBITT BURNS INC., BMO INVESTORLINE INC. and **BMO BANK OF MONTREAL**

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

PLAINTIFFS' FACTUM
(CERTIFICATION – Week of December 12, 2011)

PART I - OVERVIEW

1. The Plaintiffs' claim asserts that the Defendants engaged in two types of misconduct:

a) they charged unnecessary and unauthorized foreign exchange fees (the "Foreign Exchange Fees") in contravention of their contractual and fiduciary duties and their duties as trustees; and

b) they did so without meaningful disclosure to the Class, in contravention of their contractual and fiduciary duties and their duties as trustees.

2. Accordingly, the Plaintiffs seek certification of a class action against the Defendants for, *inter alia,* damages, disgorgement of profits earned by the Defendants on the Foreign Exchange Fees, and injunctive relief to prevent the Defendants from continuing this practice with respect to RESP accounts.[1]

3. Registered Retirement Savings Plans (RRSPs) are the primary means by which Canadians save for their retirement. Approximately 18 million Canadian residents, or 60% of the population, maintain RRSP accounts in which they hold almost $600 billion in assets.[2] For many, this is their sole means of retirement savings.

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[1] As described more fully below, commencing in September 2011, BMO NB and InvestorLine began to permit clients to hold US dollars in Trust Accounts (except for RESP accounts), thus ceasing the unnecessary foreign currency conversions and Foreign Exchange Fees. The Plaintiffs' claim for injunctive relief therefore relates only to the continuation of the impugned practice in the RESP accounts.

[2] Pyper, Wendy, *RRSP Investments.* Statistics Canada, Catalogue no. 75-001-X, Exhibit B to the Affidavit of James Richard MacDonald, sworn April 15, 2011 [the "MacDonald Affidavit"], Plaintiff's Motion Record, Tab 3B, page 72.

4. As a matter of public policy, RRSPs and similar registered retirement accounts are intended to encourage Canadians to save for their retirement from active employment or, in the case of Registered Education Savings Plans (RESPs), to encourage parents to save for their children's higher education.

5. In order to protect Canadians' retirement and education savings, Parliament has legislated that these registered accounts cannot be held directly by the beneficiary. Instead, the registered accounts must be held by specified entities, in trust, for individual Canadians. The defendant, BMO Trust Company is one such entity. BMO Trust Company is the trustee of each of the registered accounts at issue in this proceeding (the "Trust Accounts").

6. As trustee, BMO Trust owed and owes the Class Members (as defined below) all the duties of a fiduciary, including duties not to charge hidden, secret or unauthorized fees and to ensure that, as trustee, it transacts with the Class Members in a fair and transparent fashion. As agents of BMO Trust Company, the defendants BMO Nesbitt Burns Inc. and BMO InvestorLine Inc. owed the Class the same fiduciary duties.

7. Prior to June 14, 2001, Canadians could not hold foreign currency in registered accounts. Therefore, the Defendants converted all foreign currency that came into the accounts (for example, by way of a sale of a U.S. security or receipt of a dividend in U.S. dollars) into Canadian dollars to ensure that the account beneficiaries were in compliance with the Income Tax Act (*ITA)*.

8. Commencing June 14, 2001, however, the *ITA* was amended to allow foreign currency to be held in registered accounts without penalty. Nevertheless, the

Defendants continued to automatically convert foreign currency, and continued to exact fees and charges for doing so. These foreign currency conversions were unnecessary and their sole effect was to generate fees for the Defendants at the expense of the Class Members.

9. In addition, none of the automatic conversions are made at the account-holders' direction, and the Defendants did not properly disclose to the Class Members the circumstances in which they extract fees from these transactions.

10. This is an ideal case to be certified as a class proceeding. The Class Members are readily defined and identified. The Class Members have numerous common causes of action arising out of the common facts and raising common legal issues, and a class proceeding is undoubtedly the preferable procedure for the resolution of those common issues. In all, the primary policy objectives of the *Class Proceedings Act, 1992* will be well served through certification of this action.

PART II - FACTS

Parties

The Class

11. The Plaintiffs bring this action on behalf of a proposed class of all current and former clients of the Defendants resident in Canada who held one or more registered savings accounts administered by BMO Trust Company and/or BMO Nesbitt Burns Inc. (the "Trust Accounts") and who, between June 14, 2001 and the date of certification of this action as a Class Proceeding (the "Class Period"), purchased or sold investments denominated in foreign currency in their Trust Account(s) or were paid dividends or

interest in a foreign currency in their Trust Account(s), which was then converted to Canadian dollars, by the defendants.

12. The Defendants have estimated that there are approximately 70,000 Class Members.[3] Their respective damages vary depending on the foreign security trading activity which took place in their Trust Accounts. As of the date of this factum, the Defendants had not answered undertakings regarding the way in which it estimated the class size. Depending on the Defendants' answer, this figure may change.

The Defendants

13. The defendants, BMO Trust, BMO Nesbitt Burns ("BMO NB"), and BMO InvestorLine ("InvestorLine" or "BMO InvestorLine"), are companies forming part of the BMO Financial Group, a highly diversified financial services conglomerate.[4]

14. The defendant, BMO Trust Company ("BMO Trust") was incorporated or continued pursuant to the *Trust and Loan Companies Act*, S.C. 1991, c. 45 ("*TLCA*"). BMO Trust is and was the trustee of the Class Members' Trust Accounts throughout the Class Period.[5]

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[3] BMO NB estimates that 38,195 clients fall within the proposed class definition, Affidavit of Michele Goddard, sworn September 21, 2011 ["Goddard Affidavit"], Defendants' Motion Record, page 4, paragraph 13; BMO InvestorLine estimates 29,326 clients fall within the proposed class definition, Stefankiewicz Affidavit, Defendants' Motion Record, page 274, paragraph 5.

[4] BMO Nesbitt Burns Account Opening Booklet, Exhibit F to the MacDonald Affidavit, Plaintiffs' Motion Record, Tab 3F, page 109.

[5] Goddard Affidavit, Defendants' Motion Record, tab 1 page 2, paragraph 5.

BMO Nesbitt Burns Retirement Savings Plan Trust Agreement, Exhibit D to the MacDonald Affidavit, Plaintiffs' Motion Record, tab 3D, page 83.

Cross-Examination of Michele Goddard, conducted on November 18, 2011 ["Goddard Cross-Examination"], page 27, question 84.

15. BMO NB is a full service investment advisory firm which, among other things, administers Trust Accounts, acting both as principal and as agent for BMO Trust. BMO NB is a member of the Investment Industry Regulatory Organization of Canada and the Toronto Stock Exchange.[6]

16. InvestorLine is a "discount" brokerage, which, among other things, provides its customers with the ability to open and hold self-directed RRSPs, LIRA's, self-directed RRIFs, LIFs and LRIFs (defined below).[7]

17. BMO Bank of Montreal ("BMO") is a chartered Canadian bank carrying on business throughout Canada. BMO Trust, InvestorLine, and BMO NB are BMO subsidiaries, and BMO provides banking services for each of the Defendants, including provision of bank accounts into which currency held for the benefit of the Trust Accounts is deposited.[8]

The Class Members' Trust Accounts

18. In order to encourage Canadians to save for their retirement and for their children's education, the federal government has created a series of beneficial tax planning arrangements wherein a taxpayer's earnings on investments made for education and retirement savings within registered accounts are not taxable until the

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[6] Goddard Affidavit, Defendants' Motion Record, tab 1, page 2, paragraph 6 and page 3, paragraph 10.
Goddard Cross-Examination, pages 27-28, questions 85-88, and pages 76-77, question 249.

[7] MacDonald Affidavit, page 6, paragraph 23.

[8] Goddard Affidavit, Defendants' Motion Record, tab 1, page 2, paragraph 4.
BMO Nesbitt Burns Account Opening Booklet, Exhibit F to the MacDonald Affidavit, Plaintiffs' Motion Record, Tab 3F, page 109.

funds are withdrawn from those accounts.[9] These accounts are established by, and governed by, the *ITA.*[10]

19. Several types of registered accounts are available to Canadians:

a) Registered Retirement Savings Plans ("RRSP"):

b) Locked-in Retirement Accounts("LIRA"):

c) Locked-in Investment Funds ("LIF");

d) Locked-in Retirement Income Funds ("LRIF"); and

e) Registered Education Savings Plans ("RESP"). [11]

Management of the Class Members' Trust Accounts

20. In order to best protect Canadians' retirement and education savings, Parliament legislated that these accounts cannot be held directly by the beneficiary. Rather, the assets must be held by, *inter alia*, an individual or company licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada an annuities business, or to act as a trustee, or to issue investment contracts.[12]

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9 MacDonald Affidavit, Plaintiffs' Motion Record, page 48, paragraph 13.

10 *Income Tax Act,* R.S.C., 1985, c. 1 [*"ITA"*], s.146(1).

11 MacDonald Affidavit, Plaintiffs' Motion Record, page 48, paragraph 15.
RESPs are used to save for post-secondary education. The remaining types of accounts are retirement savings vehicles which are used at different stages in an individual's life, or are used to hold funds from different sources (LIRAs, for example, are used for locked-in pension funds that have been transferred out of a pension fund. They offer the same tax-sheltered growth as regular RRSPs, but are more restricted regarding when, and at what rate, the beneficiary may withdraw funds).

12 *ITA* s. 146(1).

21. BMO Trust is an entity authorized to act as trustee for registered accounts. BMO Trust acts as the trustee of each of the Class Members' registered savings accounts (collectively, the "Trust Accounts").[13]

22. In the course of carrying out its duties as trustee of the Trusts Accounts, BMO Trust delegates certain administrative duties to BMO NB, including execution and settlement of trades, custody of securities, and preparation of trade confirmation and account statements. BMO NB also carries out these services for BMO InvestorLine.[14] For accounting and regulatory purposes, BMO InvestorLine customers are treated as BMO NB customers.[15]

23. As trustee of the Trust Accounts, BMO Trust owes the Class fiduciary and other duties. As agents of BMO Trust, BMO NB and BMO InvestorLine owe the Class the same duties.

Foreign Currency in Trust Accounts

24. The *ITA* does not limit the kinds of investments that may be held in a Trust Account. However, only certain kinds of investments ("Qualified Investments") enjoy the tax benefits described above.[16]

25. Prior to June 14, 2001, foreign currency and deposits denominated in foreign currency were not Qualified Investments for Trust Accounts. Accordingly, the Defendants created a system whereby any time foreign currency came into a Trust

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13 Goddard Affidavit, Defendants' Motion Record, tab 1, page 2, paragraph 5.
14 MacDonald Affidavit, Plaintiffs' Motion Record, tab 3, page 50, paragraph 22.
15 MacDonald Affidavit, Plaintiffs' Motion Record, tab 3, page 50, paragraph 22.
16 *ITA,* s. 146(1).

Account (through, for example, the settlement of a stock trade in U.S. dollars or the payment of a dividend in U.S. dollars), it was automatically converted into Canadian currency. As a result, the Defendants assisted to ensure that all currency in the Class Members' Trust Accounts would be a Qualified Investment for tax purposes. For their part, the Defendants earned fees on all of these foreign currency transactions.

26. On June 14, 2001, however, the *ITA* was amended to remove the restriction on holding foreign currency in a registered account. The amendment was retroactively effective to June 27, 1999 when the intended change was first announced. Therefore, as foreign currency held in a Trust Account now enjoyed the same tax benefits as Canadian currency,[17] it was no longer necessary for foreign currency to be converted to Canadian dollars to avoid tax penalties.

Unauthorized and Unnecessary Fees

27. Notwithstanding that currency conversions were no longer required, the Defendants continued to systematically convert all foreign currency received in all of the Trust Accounts without reason or authorization, and, as described below, without meaningful disclosure to the Class.[18]

28. In so doing, the Defendants have generated significant profits for themselves, at the expense of the Class Members. Indeed, the Defendants acknowledge that they earn these profits by charging the Class Members an exchange rate which is more

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[17] *ITA Bulletin, §14,* Exhibit G to the MacDonald Affidavit, Plaintiffs' Motion Record, tab 3G, page 116.

[18] MacDonald Affidavit, Plaintiffs' Motion Record, tab 3, page 53, paragraph 30, pages 56-60, paragraphs 40-59.

Affidavit of Tamas Varga, sworn April 15, 2011 ["Varga Affidavit"], Plaintiffs' Motion Record, tab 5, page 223-225, paragraphs 8-16.

favourable to them than the rate at which they purchased the currency (the "Foreign Exchange Fees").[19]

29. The Defendants take the Foreign Exchange Fees on three types of transactions:

1. Authorized conversion of foreign currency, when Class Members direct or authorize purchase of a foreign (frequently U.S.) security using Canadian dollars held in a Trust Account;

2. Unauthorized conversion of foreign currency, when trades in securities on foreign (largely U.S.) stock exchanges settle in foreign currency; and

3. Unauthorized conversion of foreign currency, when Class Members receive cash dividends in foreign currency.

30. The most striking instance occurs when a Class Member sells, for example, one U.S. security in order to immediately purchase another U.S. security. In this case, when the first U.S. security is sold, the Defendants will convert the US dollars to Canadian dollars and charge a Foreign Exchange Fee. The Defendants will then instantaneously convert the Canadian currency back into US dollars for the purchase of the second US security, and exact another Foreign Exchange Fee. Neither conversion is necessary, and both serve only to enrich the Defendants at the expense of the Trust Account holder.

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[19] Affidavit of Bob Markovski, affirmed November 3, 2011 ["Markovski Affidavit"], page 2, paragraph 5.

31. A particularly telling example of this practice is described by the Plaintiff, Tamas Varga, in his affidavit at paragraphs 9 to 13.

32. On June 22, 2006, Mr. Varga sold shares of one U.S. stock, Dell Inc. ("Dell"), in order to immediately purchase a second U.S. stock, Parlux Fragrances Inc. ("Parlux"). Unbeknownst to him, the Defendants converted the U.S. dollar proceeds from the sale of the Dell shares into Canadian dollars, and then immediately converted those Canadian dollars back into U.S. dollars for the purchase of the Parlux shares. The Defendants charged and earned a Foreign Exchange Fee in connection with *each* of these two unnecessary transactions.[20]

33. Mr. Varga was understandably dismayed. He wrote to InvestorLine:

> "What kind of Idiot would sell US stocks to buy Cdn currency so they could sell the Canadian currency to buy US stocks?"[21]

34. Similarly, when a Class Member receives a dividend on foreign securities held in his or her Trust Account (or otherwise receives cash into his/her account), the Defendants convert the foreign currency into Canadian dollars without authorization. In every case, the Defendants earn a Foreign Exchange Fee in connection with the unnecessary transaction.[22]

35. The Defendants admit that, in respect of dividends, the account statements provided to the Class Members do not even reflect that *any* foreign exchange

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[20] Varga Affidavit, Plaintiffs' Motion Record, tab 5, pages 4-5, paragraphs 9-13.

[21] Email from T. Varga to Info@bmoinvestorline.com, Exhibit N to the Varga Affidavit, Plaintiffs' Motion Record, tab 5N, page 283.

[22] Affidavit of John Zoppas, sworn April 14, 2011 ["Zoppas Affidavit"], Plaintiffs' Motion Record, tab 6page 286, paragraph 9.

Varga Affidavit, Plaintiffs' Motion Record, tab 5, page 225, paragraphs 14-16.

transaction was undertaken.[23] Moreover, there was no other disclosure to inform the Class Members that foreign dividends or other foreign cash deposited into their Trust Accounts would be converted, much less converted in a manner that resulted in fees for the Defendants.

36. In the Fall of 2011, the Defendants began to permit their customers to settle trades in US dollars and hold US dollars in all Trust Accounts, save for RESPs.[24] The Defendants charge no fees for this service.

37. The Defendants have not given any evidence as to why they continue to charge Foreign Exchange Fees for RESPs. They have also refused to give any evidence about their rationale for their decision to cease charging foreign exchange fees for other Trust Accounts in 2011.[25]

The Account Agreements

38. The Defendants entered into contracts with the Plaintiffs and the Class Members which govern the administration of the Trust Accounts (collectively, the "Account Agreements"). These are standard form contracts of adhesion. The Class Members had and have no opportunity to modify or negotiate any of the Account Agreements.

39. In the case of BMO NB customers, the account agreements consist of:

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[23] Goddard Cross-Examination, pages 57-58, questions 185-188.
Exhibit A to the Zoppas Affidavit, Plaintiffs' Motion Record, tab 6A, page 291.
Exhibit F to the Varga Affidavit, Plaintiffs' Motion Record, tab 5F, page 265.

[24] Exhibit 1 to the Goddard Cross-Examination.
For InvestorLine, this change took effect on September 6, 2011. For BMO NB, it took effect in or around November 2, 2011.

[25] Cross-Examination of Connie Stefankiewicz, conducted on November 18, 2011 ["Stefankiewicz Cross-Examination"], page 13, question 39.

a) the BMO Nesbitt Burns Retirement Savings Plan Trust Agreement (the " BMO NB RSP Trust Agreement"); and

b) The BMO Nesbitt Burns Client Account Agreement, which incorporates by reference the Account Opening Booklet (together, the "BMO NB Client Account Agreement"). [26]

40. In the case of InvestorLine customers, the account agreements consist of:

a) The BMO InvestorLine Account Agreement;

b) The BMO Trust Company Account Agreement (the "InvestorLine RSP Trust Agreement"); and

c) The BMO Bank of Montreal Account Agreement.[27]

As of the date of this factum, the Defendants had not answered undertakings regarding whether there is an account opening booklet for InvestorLine. If there is, there may additional contractual obligations owed by InvestorLine.

Key Terms of the Account Agreements

41. The BMO NB RSP Trust Agreement provides, in relevant part, that:

a) BMO Trust is required to maintain an account showing all contributions and transfers made to each Trust Account, all investment transactions and investment earnings, gains, losses and all transfers and withdrawals made from each Trust Account (section 6); and

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[26] MacDonald Affidavit, Plaintiffs' Motion Record, tab 3, page 50, paragraph 24.

[27] Varga Affidavit, Plaintiffs' Motion Record, tab 5, page 2, paragraph 6.

b) BMO Trust, BMO NB, or their affiliated companies are only entitled to charge administration or transaction fees to Class Members or to take such fees from the Trust Accounts to the extent that such fees have been disclosed to Class Members in advance, and BMO Trust, BMO NB and their affiliated companies are not entitled to take or to be paid secret, hidden or surprise fees and charges out of the Trust Accounts (section 15).[28]

42. The BMO NB Client Account Agreement provides, in relevant part, that:

a) BMO NB commits to putting the account holder's interests ahead of its own;[29]

b) BMO NB commits to ensuring that account holders are always fully informed about their investments through comprehensive account statements;[30]

c) BMO NB commits to notifying account holders of important business and regulatory changes through statement bulletins and inserts and special mailings;[31] and

d) BMO NB is prohibited from engaging in transactions without the approval of the account holders.[32]

43. The InvestorLine RSP Trust Agreement provides, in relevant part, that:

a) BMO Trust is the trustee of each Trust Account, with the right to delegate its duties in respect of the Trust Account to BMO InvestorLine;

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[28] BMO Nesbitt Burns Retirement Savings Plan Trust Agreement, Exhibit D to the MacDonald Affidavit, Plaintiffs' Motion Record tab 3D, page 83-84.
[29] BMO Nesbitt Burns Account Opening Booklet, Exhibit F to the MacDonald Affidavit, Plaintiffs' Motion Record, tab 3F, page 106.
[30] BMO Nesbitt Burns Account Opening Booklet, Exhibit F to the MacDonald Affidavit, Plaintiffs' Motion Record, tab 3F, page 107.
[31] BMO Nesbitt Burns Account Opening Booklet, Exhibit F to the MacDonald Affidavit, Plaintiffs' Motion Record, tab 3F, page 107.
[32] BMO Nesbitt Burns Account Opening Booklet, Exhibit F to the MacDonald Affidavit, Plaintiffs' Motion Record, tab 3F, page 91.

b) BMO Trust is required to maintain an account showing all contributions and transfers made to each Trust Account, all investment transactions and investment earnings, gains, losses and all transfers and withdrawals made from each Trust Account (section 6);

c) BMO Trust, BMO InvestorLine, or their affiliated companies are only entitled to charge administration or transaction fees to Class Members or to take such fees from the Trust Accounts to the extent that such fees have been disclosed to Class Members in advance, and BMO Trust, BMO InvestorLine and their affiliated companies are not entitled to take or to be paid secret, hidden or surprise fees and charges out of the Trust Accounts (section 15); and

d) BMO InvestorLine is prohibited from engaging in transactions without the approval of the account holders.[33]

44. In addition to these contractual duties, as trustees of the Trust Accounts, and as agents of the trustee, the Defendants owed the Class all the duties of a fiduciary.

45. The Defendants breached the Account Agreements by:

a) Charging hidden and undisclosed fees;

b) Charging unnecessary fees, thereby failing to put the clients' interests ahead of their own;

c) Failing to notify the Class of significant regulatory and legal changes; and

[33] BMO Trust Company Account Agreements: BMO InvestorLine Self-Directed Retirement Savings Plan Declaration of Trust, Exhibit A to the Varga Affidavit, Plaintiffs' Motion Record tab 5A, page 243.

d) Carrying out conversions and exacting the Foreign Exchange Fees without the Class Members' informed consent.

No Meaningful Disclosure

46. Mr. Zoppas and Mr. Varga's uncontroverted evidence is that they did not know that the Defendants would systematically convert foreign currency in this fashion, or that they earned a profit from doing so. Mr. MacDonald's uncontroverted evidence is that he was misled as to why the Defendants continued to automatically and systematically convert any foreign currency in the Trust Accounts back into Canadian currency after the June 14, 2001 changes to the ITA.

47. The Defendants attempt to dismiss this argument and take the position that amendments to the Account Agreements and other disclosure made in September 2002 (in the case of BMO NB) and May 2003 (in the case of InvestorLine) sufficiently disclosed the Foreign Exchange Fees.

48. The Defendants also assert baldly that clients "should have expected" that the Defendants would earn fees in these circumstances.[34].

49. However, these assertions are unpersuasive given that BMO NB and InvestorLine's disclosure was incomplete, misleading and inaccurate as it related to currency conversion transactions in the Trust Accounts.

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[34] Goddard Affidavit, Defendants' Motion Record, tab 1, page 9, para. 39.
Stefankeiwicz Affidavit, Defendants' Motion Record, tab 2, page 275, paragraph 11.

BMO NB Disclosure

50. The relevant BMO NB disclosure from September 2002 until March 2007 was contained in an updated Fee and Interest Rate Schedule sent to BMO NB's customers, including Class Members, which stated:

> Where a transaction *requires* the conversion of currency, BMO Nesbitt Burns Inc. may act *as principal or agent* in relation to such conversion and will convert the currency at rates established or determined by BMO Nesbitt Burns Inc. (or parties related to us) in our sole discretion. The rates are subject to change without notice to you and may vary according to the market, type of currency in which the trade is transacted, and the value of the gross amount of the trade. In addition to the commission or other fees applicable to the transaction, BMO Nesbitt Burns Inc. (or parties related to us) may earn revenue based on the difference between the applicable currency bid or ask rates and the rates at which the currency is offset. Please contact your Investment Advisor directly should you have any further questions about the rates or the difference between the bid and ask rates.[35] (Emphasis Added)

51. This disclosure is incomplete, misleading and inaccurate for a number of reasons.

52. The Fee and Interest Rate Schedule does not state when a foreign currency transaction is "required". More particularly, the disclosure fails to make clear that it was BMO NB's practice to carry out a conversion of currency every single time that foreign currency is deposited into a Trust Account. In other words, from BMO NB's perspective, conversions of currency in the Trust Accounts were *always* "required" (although, of course, they were not required by the *ITA*).

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[35] Goddard Affidavit, Defendants' Motion Record, tab 1, pages 9-10, para 41 and Exhibit M to the Goddard Affidavit, Defendants' Motion Record, tab 1M, page 266.

53. Part of the confusion surrounding this disclosure arises because BMO NB used the same language as boilerplate disclosure for *all* types of its accounts, not just the Trust Accounts.[36] In doing so, it failed to distinguish between those accounts where currency conversions were always "required" and those accounts where the conversion could be carried out at the instance of the account holder.

54. Indeed, for non-registered accounts, the Defendants have always provided sub-accounts in which US-denominated currency or securities can be held and traded without the in-and-out conversions that the Defendants effect in Trust Accounts. Nevertheless, the 2002 boilerplate disclosure does not make clear that BMO NB employs very different policies for the Trust Accounts than for other non-registered accounts.

55. The disclosure also fails to make clear that conversions of Canadian currency were not "required" at all by the *ITA* or any other applicable laws or regulations. The Defendants have admitted that disclosure of this significant change in the *ITA* was not provided at any other time.

56. Finally, the Defendants have offered no evidence that investment advisors provided their clients with an explanation of when Foreign Exchange Fees would be taken from their Trust Accounts.[37]

57. Mr. Zoppas' evidence was that during this time, he was entirely unaware that he would be charged a fee for conversions when buying and selling US securities.[38]

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[36] Stefankiewicz Cross-Examination, pages 27-28, questions 93-94.

[37] Stefankiewicz Cross-Examination, page 7-8, questions 17-19.

58. Mr. MacDonald, who was himself an investment advisor working with BMO NB at the time, made inquiries on behalf of his clients about the Foreign Exchange Fees. His uncontroverted evidence is that BMO NB's compliance officers told him, incorrectly, that Revenue Canada prohibited foreign currency in Trust Accounts.[39]

59. In the Spring of 2007, BMO NB disclosed for the first time to its clients that conversions of foreign currency would *always* be "required" in Trust Accounts:

> …As BMO Nesbitt Burns does not offer foreign denominated registered accounts, any foreign currency deposited into a registered account, including dividends, interest and proceeds from the sale of foreign securities, will be automatically converted into Canadian funds and BMO Nesbitt Burns (or parties related to us) may earn revenues from the foreign currency conversion…[40]

The Disclosure Inaccurately Describes the Capacity in which BMO NB Effects Foreign Exchange Transactions for its Clients

60. The 2002 disclosure states incorrectly that BMO NB may carry out foreign exchange transactions for its clients "as principal or agent". The Defendants now concede that this is inaccurate.[41]

61. In fact, contrary to BMO NB's own documentation, it always carries out foreign exchange transactions as "principal" – that is, BMO NB, as trustee or agent for the trustee, transacts *directly* with the Class Member in connection with the purchase and

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38 Cross-Examination of John Zoppas, conducted November 2, 2011 ["Zoppas Cross-Examination"], page 24, question 107.

39 Cross-Examination of James Richard MacDonald, conducted November 2, 2011 ["MacDonald Cross-Examination"], questions 38-39 and 48.
MacDonald Affidavit, Plaintiffs' Motion Record, tab 3, page 54, paragraph 33.

40 BMO NB Client Account Agreement at section 3(b), Exhibit 2 to the cross-examination of Michele Goddard.

41 Goddard Cross-Examination, pages 76-77, questions 249-250.

sale of currency. Clients therefore purchase (or sell) currency *directly* from (or to) BMO NB's (or related parties') foreign currency reserves.

62. The trade confirmations that BMO NB sends to its clients (to record the details of transactions) compound the confusion. These trade confirmation statements indicate that BMO NB carried out the trade "as agents".[42] However, BMO NB does not distinguish in these statements between: (i) the trade of the security (in which its acts agent); and (ii) the foreign currency trade (in which it acts as principal), leading clients to believe reasonably that the entire transaction was carried out by BMO NB as the client's "agent" and not as principal.

InvestorLine Disclosure

63. In March 2003, InvestorLine sent its clients an updated Commission and Fee Schedule describing the fees in effect as of May 2003. It stated in part:

> Conversion of any foreign currency *when necessary*, shall take place on the trade date using rates established by BMO InvestorLine. The rates are subject to change without notice and may vary depending on market, type of currency and the gross value of the trade. BMO InvestorLine may earn revenue from foreign currency exchange since we sell the applicable currency to you at the ask price and buy from you at the bid price. Please contact a BMO InvestorLine Representative for rates or for additional information.[43] (Emphasis added)

64. Here again, the Defendants have offered no explanation of when conversion of foreign currency would be "necessary". Nothing in the Commission and Fee Schedule explains that foreign currency transactions will be "necessary" every single time a purchase, sale, or dividend redemption takes place in a Trust Account, or whenever

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42 See, for example, Exhibits 2 and 3 to the MacDonald Cross-Examination.

43 Stefankiewicz Affidavit, Defendants' Motion Record, tab 2, page 276, paragraph 13. Exhibit A to the Stefankiewicz Affidavit, Defendants' Motion Record, Tab 2A, page 288.

dividends are paid on foreign-denominated securities. In fact, the conversions were not necessary at all.

65. Mr. Varga's evidence is that when he opened his InvestorLine Trust Account in 2006, he did not understand that he could not hold US funds in his account, and InvestorLine did not disclose to him that they would automatically effect foreign exchange conversions when he made trades.[44] Nor did they disclose to him that they would charge him an exchange rate on which they earned a profit.[45] As described above, Mr. Varga was particularly shocked to learn that InvestorLine routinely "earned Foreign Exchange Fees twice by converting currency back and forth unnecessarily in a matter of moments" when he sold one US stock to purchase another.[46]

66. Like Mr. MacDonald, Mr. Varga received incorrect information to the effect that the *ITA* prohibited him holding US dollars in his Trust Account. He expressly disclosed this belief to InvestorLine. At no time did InvestorLine or any of the Defendants advise him that this information was not correct.[47]

67. The Defendants suggest that InvestorLine's 2003 disclosure discharged their duties to the Class.[48] However, it is telling that in March 2007 (after this action was commenced) InvestorLine saw fit to further amend the InvestorLine Account Agreement to add, for the first time, the following disclosure:

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44 Varga Affidavit, Plaintiffs' Motion Record, tab 5, page 222, paragraph 5.
45 Varga Affidavit, Plaintiffs' Motion Record, tab 5, page 222, paragraph 5.
46 Varga Affidavit, Plaintiffs' Motion Record, tab 5, page 225, paragraph 13.
47 Varga Affidavit, Plaintiffs' Motion Record, page 227, paragraph 22.
Exhibit K to the Varga Affidavit, Plaintiffs' Motion Record, page 277.
48 Stefancieweiz Affidavit, Defendants' Motion Record, page 276, paragraph 13.

Foreign Currency Adjustments

> …(ii) As BMO InvestorLine does not offer foreign denominated registered accounts, any foreign currency deposited into a registered account, including dividends, interest and proceeds from the sale of foreign securities, will be automatically converted into Canadian funds. BMO InvestorLine (or parties related to us) may earn revenue from the currency conversion.[49]

Prior Class Proceedings

68. In addition to this proceeding, 9 proposed class actions have been brought in Canada against various banks with respect to the issue of undisclosed or otherwise improper fees charged on foreign securities trades. Of these, two were certified following contested certification motions, five were certified on consent as part of settlements, and two have not yet been certified.[50]

69. Each of the previous actions has focused, primarily, on the defendants' disclosure obligations in respect of foreign exchange fees on securities trades.

70. The present action is unique in that it focuses on Trust Accounts and pleads that the Defendants have breached their duties as trustees and as fiduciaries.

Skopit v. BMO Nesbitt Burns Inc.

71. In December 2001, a proposed class action was commenced against BMO NB (the "*Skopit*" Action). It alleged that BMO NB breached its contracts with class members by inadequately disclosing fees, charges or commissions in respect of trades in securities involving a conversion to or from a foreign currency.

72. The *Skopit* Action:

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[49] Exhibit P to MacDonald Affidavit, BMO InvestorLine Account Agreements.

[50] Exhibits A through I to the Goddard Affidavit, Defendants' Motion Record, tabs 1A – 1I.

a) did not name BMO Trust as a defendant;

b) did not name BMO InvestorLine as a defendant;

c) did not include BMO InvestorLine customers as class members at all;

d) covered a class period from December 16, 1996 to September 30, 2002; and

e) did not address whether BMO NB breached its obligations as trustees of the Trust Accounts[51]

73. Because there was a small period of overlap with respect to some of the defendants, on March 15, 2007, Justice Hoy ordered the present action held in abeyance, on consent of the parties, pending the resolution of the *Skopit* Action.

74. The *Skopit* Action was certified and a settlement was approved by the court on October 29, 2010.[52] As part of the settlement, BMO NB obtained a release which states, in part, that the defendants are released:

> from amounts charged to the Class Member in respect of undisclosed, inadequately disclosed or unauthorized charges, commissions and fees incurred as a result of the conversion of currency in conjunction with securities trades (the "Released Matters") in the Class Period, provided however, this release does not bar a Class Member from asserting a claim and/or participating in the MacDonald Action for transactions which occurred on or after October 1, 2002, which are the subject of the MacDonald Action, and which are not released pursuant to this order.[53] [emphasis added]

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51 Exhibit I to the Goddard Affidavit, Defendants' Motion Record, tab 1I, page 182.
52 Exhibit I to the Goddard Affidavit, Defendants' Motion Record, tab 1I, page 182.
53 Exhibit I to the Goddard Affidavit, Defendants' Motion Record, tab 1I, page 189, paragraph 21.

The release expressly excludes this action with respect to claims arising from October 1, 2002 and onwards. It also does not address the defendants' duties as trustees, nor does it address conversions other than for securities "trades", such as receipt of dividends.

75. Following the settlement of the *Skopit* Action, the stay of this action was lifted by Order of Justice Perell, made February 7, 2011.[54]

PART III - ISSUES AND THE LAW

Overview of the test for certification

76. The *Class Proceedings Act*, *1992 ("CPA")*[55] is remedial legislation and should be given a large and liberal interpretation to meet its three primary objectives:

a) the promotion of access to justice;

b) judicial economy; and

c) modification of the behaviour of actual or potential wrongdoers.[56]

77. The *CPA* provides a statutory framework for the prosecution of class proceedings. If the five-part test set out in s. 5(1) of the *CPA* is met, then the action must be certified as a class proceeding. Section 5(1) provides:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3, or 4 if,

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[54] A timeline of this action, including the relevant dates for the *Skopit* action, is attached to this factum at Appendix A.

[55] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ["*CPA"*].

[56] *Hollick v. Toronto*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 14 to16 ["*Hollick*"].

(a) the pleadings or notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who

(i) would fairly and adequately represent the interest of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

(iii) does not have, on the common issues for the class, an interest in conflict with the interest of the other class members.[57]

78. These requirements are linked:

> There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceedings and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers.[58]

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57 *CPA*, s. 5(1).

58 *Sauer v. Canada (A.G.)* (2008), 169 A.C.W.S. (3d) 27 (S.C.J.) at para. 14
Fresco v. Canadian Imperial Bank of Commerce, [2009] O.J. No 2531 (S.C.J.), aff'd. (2010), 323 D.L.R. (4th) 376 (Div. Ct.) at para 21 ["*Fresco*"].

79. Section 6 of the *CPA* provides further direction to the court hearing a certification motion. It directs that the "court shall not refuse to certify a proceeding as a class proceeding solely on any the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members."[59]

80. Hence, it is not a bar to certification if the Class Members' damages will require individualized quantification, or if it is necessary to create subclasses in respect of different Account Agreements.

81. The question at the certification stage is whether the lawsuit is appropriately prosecuted as a class action. As stated by Strathy J. in *Ramdath v. George Brown College of Applied Arts and Technology:*

> Certification is decidedly not a test of the merits of the action. The question for a judge on a certification motion is not "will it succeed as a class action?", but rather "can it *work* as a class action?"[60]

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59 *CPA*, s. 6.

60 [2010] O.J. No. 1411 (S.C.J.) at para. 40 ["*Ramdath*"].

82. This claim is ideally suited to proceed as a class action, as evidenced by the 8 similar actions which have been certified in Canada and which are described in the Defendants' own motion record.[61]

83. Moreover, the prosecution of this claim as a class proceeding will achieve each of the policy objectives of the *CPA*.

84. In all, this is an appropriate case to certify as a class proceeding.

A. THE CLAIM DISCLOSES A CAUSE OF ACTION

85. The test under s. 5(1)(a) of the *CPA* is the same as the test under Rule 21.01(1)(b) of the *Rules of Civil Procedure*:[62]

> The following principles apply to the determination of the issue of whether the pleadings disclose a cause of action under s. 5(1)(a):
>
> - no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;
> - all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true;
> - the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
> - matters of law not fully settled in the jurisprudence must be permitted to proceed; and,

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61 Goddard Affidavit, Defendants' Motion Record, Tab 1, pages 5-7, paragraphs 14-26.

62 This is the "plain and obvious" test from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 ["*Hunt v. Carey*"]

- the pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information.[63]

86. The question of whether or not this action meets the s. 5(1)(a) test is determined based on the pleadings, and without reference to the evidence advanced on the certification motion. However, the motions judge may consider documents incorporated by reference into the pleadings to assess the substantive adequacy of the claim.[64]

87. The statement of claim in this case discloses the following causes of action against each of the defendants:

a) Breach of fiduciary duty and duties as trustees;

b) Breach of contract; and

c) Unjust enrichment. [65]

i. Breach of Fiduciary Duties and Duties as Trustees

88. The Defendants acknowledge that BMO Trust is the trustee of the Trust Accounts and that BMO NB and InvestorLine, as the case may be, acted as the trustee's agents in respect of the Trust Accounts.

89. As a trustee, BMO Trust is a fiduciary and owes the Class Members all the duties of a fiduciary.[66] As agents for BMO Trust, BMO NB and InvestorLine owed the

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63 *Fresco, supra*, at para 22, quoted with approval by Strathy J. in *Ramdath, supra,* at para 39. *Robinson v. Rochester Financial Limited et al.* 2010 ONSC 463 (S.C.J.) (CanLII) ["*Banyan Tree*"] at para. 15.

64 *Banyan Tree, supra,* para. 19

65 Fresh Further Fresh as Amended Statement of Claim ["Claim"], para. 1(i), Plaintiff's Second Supplementary Motion Record, Vol. 2, Tab 4, pp. 295 - 298

same fiduciary duties to the Class Members. In addition, BMO Trust is legally responsible for the conduct of its agents.

90. In general, fiduciaries are held to "the highest burdens of fair dealing beyond those that apply to all persons engaging in contractual dealings." These duties include:

a) an overarching duty to act with the utmost good faith and fidelity;

b) a duty to be transparent and make complete disclosure of any material information;

c) a duty to adhere to the strict instructions of the client; and

d) a duty to refrain from using the fiduciary position for personal gain.[67]

91. The Plaintiffs plead that by profiting from unauthorized, unnecessary and undisclosed or inadequately disclosed Foreign Exchange Fees, the Defendants breached these duties.

92. The Defendants take the position that this cause of action ought not to be certified for two reasons, both of which go directly to the merits of the claim.

93. First, the Defendants assert that the management of Trust Accounts is an arm's-length, commercial transaction like any other, and that they were and are entitled to earn a profit for trustee services rendered.

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66 Oosterhoff, et al,*Oosterhoff on Trusts*, Thomson Reuters: Toronto, 2009, p. 78. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 31

67 Ellis, *Fiduciary Duties in Canada*, looseleaf, Carswell: Toronto, 2011, § 1-3 – 1-8.02.

94. While the Plaintiffs do not dispute that the Defendants are entitled to charge agreed upon fees for services rendered, (i) the Foreign Exchange Fees were not agreed to by the parties, nor could they have been since they were not properly disclosed to or authorized by the Class, and (ii) as trustees and fiduciaries, the Defendants are obliged to put the Class Members' interests before their own and are not entitled to earn profits by imposing entirely unnecessary services whose sole purpose and effect was to generate profit for the Defendants.

95. Second, the Defendants take the position that they are free to choose which services they offer in the marketplace and that they do not have a duty to provide the Class Members with foreign currency denominated RRSP accounts.

96. The Plaintiffs again agree that the Defendants are free to choose which types of services to offer, or not offer, their clients.

97. However, the Plaintiffs assert that, having willingly adopted the role of trustees and fiduciaries, the Defendants have a positive duty not to penalize the Class for, or generate a profit from, engaging in trading activities which are permitted by the *ITA* simply because the Defendants' internal systems were not set up (until September 2011) to hold US currency in the Trust Accounts.

98. In other words, while the Defendants may not have a duty to offer US-denominated (or other foreign currency) Trust Accounts, they do have a duty, as trustee, not to profit unfairly and needlessly at the expense of the beneficiaries. Indeed, it is not disputed that, throughout the Class Period, it was open and available to the

Defendants to effect the conversions without earning a profit to the extent their internal systems may not have allowed for holding foreign currency in the Trust Accounts [68]

99. In any event, the scope of the Defendants' duties to the class is a question for the trial of the merits of the action, and not for certification. At this stage, the cause of action is properly pleaded and is sufficient to meet the test under s. 5 of the *CPA.*

This Cause of Action Has Been Certified Readily by the Courts

100. This court has held that breach of fiduciary duty on the part of trustees of RRSPs is an appropriate cause of action to be certified in class proceedings. It has certified class actions against trustees of both managed RRSP accounts, like those offered by BMO NB, and self-directed accounts, like those offered by InvestorLine.

101. For example, in *Millard v. North George Capital Management Ltd.,* Farley J. certified a class proceeding arising from a fraudulent investment scheme wherein the Plaintiffs alleged breach of fiduciary duty against a defendant trust company that provided basic custodian trustee services for self-directed RRSPs.[69]

102. Likewise, in *Elms v. Laurentian Bank,* the British Columbia Supreme Court (and, on appeal, the British Columbia Court of Appeal) found it appropriate to certify a class proceeding alleging breach of fiduciary duty against a bank acting "as bare trustee" of RRSPs where a real estate investment failed.[70]

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68 Stefankiewicz Cross-Examination, pages 8-9, questions 22-24.

69 [2000] OJ No. 1535.

70 *Elms v. Laurentian Bank,* 2000 BCSC 379, 2000 CarswellBC 453 [*"Elms*"].

103. In so doing, the court expressly found that questions of individual reliance and varying individual circumstances are not a bar to certifying allegations of breach of fiduciary duty: "[t]he duty owed may be the same to each investor regardless of individual circumstances".[71] The court further found that, in the case of RRSP trustees, certification should be granted where:

> "the documents by which each of [the Class Members] opened the R.R.S.P.'s with the Bank were identical. The resolution of the question of whether the Bank breached a duty of care or a fiduciary duty in these circumstances would be capable of extrapolation to each member of the class and would clearly move the litigation along significantly."[72]

104. It is clear from the established case law that a claim for breach of fiduciary duty against the trustee (and its agents) of a Trust Account is certifiable.

ii. Breach of Contract

105. The Plaintiffs claim damages for breach of the Account Agreements.[73] They have pleaded:

a) that they, and the Class Members entered into contracts with the Defendants;

b) the terms of the relevant contracts; and

c) the conduct which they allege breaches the terms in question.

Accordingly, this cause of action is properly pleaded.

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71 *Elms,* at para 21, aff'd BCCA: 2001 BCCA 429, 2001 CarswellBC 1326.

72 *Elms v. Laurentian Bank of Canada,* 2001 BCCA 429, 2001 CarswellBC 1326*,* at para 44.

73 Claim, paragraphs 1(b) 39-45 and 76-77, Plaintiffs' Motion Record, tab 2, pages 18, 27-31, and 40-41.

106. The Plaintiffs have met the requirements of section 5(1)(a) of the *CPA* with respect to their claim for breach of contract. It is not plain, obvious and beyond doubt that the breach of contract claim will fail. In any event, the pleading must be read generously to allow for inadequacies due to drafting frailties and the Plaintiffs' lack of access to key documents and discovery information.[74]

107. The Defendants argue the Account Agreements make sufficient disclosure with respect to the Foreign Exchange Fees so that the class period should be truncated to the dates of that disclosure (in particular, September 30, 2002 with respect to BMO and May 2003 with respect to InvestorLine). However, the question of the adequacy of the disclosure goes to the merits of the action and is not properly part of the s. 5(1)(a) test.

iii. Unjust Enrichment

108. The Supreme Court of Canada set out the essential elements to establish a claim for unjust enrichment in *Garland v. Consumers' Gas Company*. The plaintiff must show that:

a) the defendant was enriched;

b) there was a corresponding deprivation to the plaintiff; and

c) there was no juristic reason for the enrichment.[75]

109. The Plaintiffs allege that the Defendants have been unjustly enriched by unnecessary, undisclosed or inadequately disclosed fees on foreign exchange

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74 *Fresco, supra*, at para 22, quoted with approval by Strathy J. in *Ramdath* at para 39.

75 *Garland v. Consumers' Gas Company* (2004), 1 S.C.R. 629, at para 30.

transactions. The Plaintiffs assert that they, and the Class Members, suffered a corresponding deprivation.[76]

110. Given that the Foreign Exchange Fees were unnecessary, undisclosed or inadequately disclosed and unauthorized, and given the Defendants' breach of contractual duties, fiduciary duties, and duties as trustees in taking the Foreign Exchange Fees, there is no juristic reason for the Defendants' enrichment.

111. Accordingly, all the requisite elements of a claim for unjust enrichment have been adequately pleaded.

112. The Plaintiffs claim restitution and a constructive trust over the profits the Defendants received from the Class Members' Trust Accounts as a result of the FX Transactions.[77]

113. In summary, the Plaintiffs have delivered a detailed and lengthy claim. They have asserted numerous causes of action, all of which are well established in law and have been pleaded with particularity. The claim articulates all the necessary ingredients to make out each cause of action, and is more than sufficient to meet the low threshold required to comply with s. 5(1)(a) *CPA.*

B. IDENTIFIABLE CLASS

114. The CPA requires that there be an identifiable class of two or more persons.[78]

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76 Claim, paras 1(c) and 78-80, Plaintiffs' Motion Record, tab 2, pages 18 and 41.
77 Claim, para 1(d) and (e), Plaintiffs' Motion Record, tab 2, page 19.
78 *CPA,* s. 5(1)(b).

115. In *Hollick*, the Supreme Court of Canada confirmed the test for determining if there is an "identifiable class". The plaintiff must define the class by reference to objective criteria, so that a given person can be determined to be a member of the class without reference to the merits of the action. The class must be "bounded" in the sense that it is not unlimited.[79]

116. There must also be a rational relationship between the class and the causes of action. The class must not be unnecessarily broad or over-inclusive. Class members are not required to have identical claims, and it need not be shown that each class member would be successful in establishing a claim for one or more remedies.[80]

117. The purpose of the class definition is three-fold:

a) it identifies those persons who have a potential claim for relief as against the defendant;

b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and

c) it describes who is entitled to notice pursuant to the *CPA*.[81]

118. The proposed class definition in this case is:

"All current and former clients of the defendants resident in Canada, who held one or more registered savings accounts administered by BMO Trust and/or

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79 *Hollick*, *supra* at para 17.

80 *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (ON Div. Ct.), at para 11 ["*Bywater"*].
Ramdath, supra, at para. 47.

81 *Bywater, supra,* at para. 10.

> BMO Nesbitt Burns Inc. (the “Trust Accounts”) and who, between June 14, 2001 and the date of certification of this action as a Class Proceeding (the “Class Period”), purchased or sold investments denominated in foreign currency in their Trust Account(s) or were paid dividends or interest in a foreign currency in their Trust Account(s), which was then converted to Canadian dollars by the defendants.”

119. This proposed definition meets the requirements of s. 5(1)(b) *CPA*. It clearly identifies those individuals who have a potential claim for relief and notice. It is bounded in scope to include only those individuals who held registered accounts during the Class Period and who were subjected to the Foreign Exchange Fees.

120. The *CPA* permits the creation of subclasses when necessary, including where class members were subject to materially different contractual terms. Here, there are some slight differences between the InvestorLine and BMO Account Agreements and, as described above, the disclosure changed over time.

121. The Plaintiffs take the position that the Account Agreements are substantially similar enough that subclasses are not necessary to resolve the common issues. Indeed, the fact that the Account Agreements were amended from time to time, or differed as between InvestorLine and BMO NB, is not a bar to certification. Nevertheless, if necessary, it is open to the court to certify subclasses in respect of different Account Agreements.

C. COMMON ISSUES

122. The core of a class proceeding is the resolution of issues on a common basis to avoid duplication of fact finding or legal analysis.[82]

123. Section 1 of the *CPA* defines "common issues" as:

a) common, but not necessarily identical issues of fact, or

b) common, but not necessarily identical issues of law that arise from common, but not necessarily identical facts.[83]

124. The Plaintiffs ask the court to certify the following common issues:

a) As trustees of the class's registered trust accounts, what duties do the Defendants owe to the class?

b) Did the Defendants breach their fiduciary duties and duties as trustees owed to the Class by making unauthorized, systematic exchanges of foreign currency held or paid into the Class Members' registered trust accounts, including registered retirement savings plan accounts ("RRSPs"), registered retirement investment funds ("RRIFs"), locked-in retirement accounts ("LIRAs"), locked-in investment funds ("LIFs"), locked-in retirement income funds ("LRIFs"), and registered education savings plans ("RESPs"), (collectively, the "Trust Accounts")?

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82 *Hollick, supra,* at para. 18
McKenna v. Gammon Gold Inc., 2010 ONSC 1591, [2010] O.J. No. 1057 (S.C.J.), at para. 124.

83 *CPA,* s.1.

c) Did the Defendants act in breach of their fiduciary duties and duties as trustees of the Trust Accounts by charging undisclosed and unauthorized fees in connection with the unauthorized systematic exchanges of foreign currency held in the Trust Accounts to Canadian dollars)?

d) Did the Defendants act in breach of their fiduciary duties and duties as trustees of the Trust Accounts by charging undisclosed and unauthorized fees to the Class Members in connection with the authorized exchange of foreign currency in the Trust Accounts in furtherance of an authorized purchase of foreign investments?

e) Did the Defendants breach their contracts with the Class Members?

f) What damages are the Class Members entitled to in respect of the Unauthorized Foreign Exchange Transactions and the Foreign Exchange Transactions (together, the “FX Transactions”)? Specifically:

- Are the defendants obliged to disgorge all profits they made during the class period with respect to the Unauthorized Foreign Exchange Transactions, or the Foreign Exchange Transactions?
- Are the defendants obliged to disgorge all the foreign exchange fees they charged to the Class during the class period with respect to the Unauthorized Foreign Exchange Transactions, or the Foreign Exchange Transactions?

g) Have the Defendants have been unjustly enriched at the expense of the Class by their receipt of undisclosed fees on all FX Transactions?

h) Do the Defendants hold the profits they received from the Class members' Trust Accounts as a result of the FX Transactions in a constructive trust for the benefit of the Class?

i) Is the Class entitled to an accounting and disgorgement of all profits earned by the defendants from the FX Transactions?

j) Should the Defendants be permanently enjoined from conducting Unauthorized Foreign Exchange Transactions and charging undisclosed and unauthorized fees on any FX Transactions?

k) Does the Defendants' conduct warrant an award of punitive damages, and, if so, in what amount?

l) Are the Plaintiffs entitled to pre-judgment and post-judgment interest on the damages claimed at the amount of the average rate of return earned on the Trust Accounts, collectively, during the class period compounded monthly or the rate of return that would have been achieved in another reasonably prudent alternative investment, or, alternatively pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43?

125. In *Gammon Gold*, this court set out the principles applicable to the common issues analysis, as identified in the authorities, as follows[84]:

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[84] *Gammon Gold, supra,* at para. 125, 126;
Singer v. Schering-Plough Canada Inc., 2010 ONSC 42, [2010] O.J. No. 113 (S.C.J.), at para. 140
Ramdath, supra, at para. 98.

A: The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 39.[85]

B: The common issue criterion is not a high legal hurdle, and an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)*, above, at para. 53.[86]

C: There must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce,* above, at para. 21. As Cullity J. stated in *Dumoulin v. Ontario*, at para. 27, the plaintiff is required to establish "a sufficient evidential basis for the existence of the common issues" in the sense that there is some factual basis for the claims made by the plaintiff and to which the common issues relate.[87]

D: In considering whether there are common issues, the court must have in mind the proposed identifiable class. There must be a rational relationship between the class identified by the Plaintiff and the proposed common issues: *Cloud v. Canada (Attorney General)*, above at para. 48.[88]

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[85] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 39.

[86] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (C.A.), at para. 53.

[87] *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25, 27; *Fresco, supra,* at para. 21.

[88] *Cloud, supra,* at para. 48, 53.

E: The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim: *Hollick v. Toronto (City),* above, at para. 18.[89]

F: A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (S.C.), aff'd 2000 BCCA 605 (CanLII), 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.[90]

G: With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, above, at para. 40, *Ernewein v. General Motors of Canada Ltd.*, above, at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 (CanLII), 2009 SKCA 43, [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.[91]

H: A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Williams v. Mutual Life Assurance Co. of Canada* 2000 CanLII 22704 (ON S.C.), (2000), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd [2003] O.J. No. 1160 and 1161 (C.A.); *Fehringer v. Sun Media Corp*., [2002] O.J. No.

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89 *Hollick, supra,* at para. 18.

90 *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (B.C.S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal ref.'d [2001] S.C.C.A. No. 21.

91 *Western Canadian, supra,* at para. 40;
Ernewein v. General Motors of Canada Ltd., 2005 BCCA 540, at para. 32;
Merck Frosst Canada Ltd. v. Wuttunee, 2009 SKCA 43 (CanLII), [2009] S.J. No. 179 (C.A.), at paras. 145-146 and 160.

4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).[92]

I: Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Chadha v. Bayer Inc.*, 2003 CanLII 35843 (ON C.A.), [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106, and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575 (CanLII), 2008 BCSC 575, [2008] B.C.J. No. 831 (S.C.) at para. 139.[93]

J: Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient": *Rumley v. British Columbia,* 2001 SCC 69 (CanLII), [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.[94]

K. An issue is not “common” simply because the same question arises in connection with the claim of each class member, if that issue can only be resolved by inquiry into the circumstances of each individual claim: *Nadolny v. Peel (Region),* [2009] O.J. No. 4006 (S.C.J.) at para. 50;

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92 *Williams v. Mutual Life Assurance Co. of Canada,* 2000 CanLII 22704 (ON S.C.), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.) at para. 39, aff'd, [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd, [2003] O.J. No. 1160 and 1161 (C.A.);
Fehringer v. Sun Media Corp., [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.)

93 *Chadha v. Bayer Inc.*, 2003 CanLII 35843 (ON C.A.), [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.) at para. 52, leave to appeal dismissed [2003] S.C.C.A. No. 106;
Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2008 BCSC 575 (CanLII), [2008] B.C.J. No. 831 (B.C.S.C.) at para. 139.

94 *Rumley v. British Columbia,* 2001 SCC 69 (CanLII), [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39 at para. 29.

Fresco v. Canadian Imperial Bank of Commerce, [2009] O.J. No. 2531 at para. 51.[95]

126. In this case, the proposed common issues:

a) represent the entirety of each Class Member's claim, save for quantification of damages, and the answer to each question is necessary to the resolution of their claims;

b) will avoid duplication of fact finding and legal analysis;

c) are appropriately narrow and specific, and there is ample basis in evidence to establish the existence of each of the common issues – in fact, the Plaintiffs' evidence is almost entirely uncontroverted;

d) are clearly and rationally connected to the Class;

e) do not require or necessitate individual inquiry for their resolution; and

f) will mean that 'success for one Class Member constitutes success for all.'

The common issues set out in this case are, therefore, appropriate for certification.

D. PREFERABLE PROCEDURE

127. In *Markson v. MBNA*, Rosenberg J.A. summarized the applicable principles for determining whether a class proceeding is the preferable procedure:

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95 *Nadolny v. Peel (Region),* [2009] O.J. No. 4006 (S.C.J.) at para. 50; *Fresco, supra,* at para. 51

a) The preferable procedure inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification;

b) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether a class proceeding would be a fair, efficient and manageable method of advancing the claim and whether the class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and

c) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.[96]

128. According to Justice Rosenberg, the principles do not require separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures, and whether a class proceeding is a fair, efficient and manageable method of advancing the claim.[97]

129. As stated by the Supreme Court of Canada:

> The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the <u>common issues</u> (emphasis added),

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96 *Markson v. MBNA Canada Bank*, (2007) 85 O.R. (3d) 321 (C.A.) at para 69 ["*Markson"*];
Carom v. Bre-X Minerals Ltd. et al. (1999), 44 O.R. (3d) 173, 46 B.L.R. (2d) 247 (S.C.J*,* at para. 264.
Banyan Tree, supra, para. 62, 63.

97 *Markson, supra*, at para 70.

> and not that a class action be the preferable procedure for the resolution of the class members' claims. …
>
> [T]he preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings."

This analysis includes reviewing all other reasonably available means of resolving the claims, and considering to what extent the resolution of the common issues will advance the litigation.[98]

130. This proceeding will be a fair, efficient and manageable method of advancing the Class Members' claims. The Plaintiff's litigation plan sets out a reasonable and workable plan that includes comprehensive notice to the Class, documentation management systems, discovery protocols, and the retainer of experts as required. The plan will be revised and revisited as circumstances dictate as the case progresses.

131. The goal of judicial economy will be achieved if this action is certified as a class proceeding. This is a case where the resolution of the common issues is determinative of the liability of the Defendants and will substantially determine the damages, as well, which are fees obtained by the Defendants and can be readily ascertained from their records. There is no purpose served by requiring each Class Member to advance a separate challenge to the Defendants' conduct, which would result in a multiplicity of proceedings addressing all the same issues, and result in excessive expense and delay for the Class Members and the judicial system.

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[98] *Hollick, supra*, para. 28–32

132. As an access to justice consideration, for many Class Members, particularly those of modest means, the cost of litigating individual claims against the Defendants would be prohibitive.

133. It is therefore respectfully submitted that a class proceeding is not only the preferable procedure for the prosecution of the common issues; it is the only reasonable and meaningful method of adjudicating these claims for the benefit of the Class.

E. REPRESENTATIVE PLAINTIFF

134. Section 5(1)(e) of the CPA requires that the judge be satisfied that there is a representative plaintiff who:

a) would fairly and adequately represent the interests of the class;

b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

c) does not have, on the common issues for the class, an interest in conflict with the interests of other Class Members.

135. In *Western Canadian*, Chief Justice McLachlin described the qualities of a class representative as follows:

> ... the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be

> satisfied however, that the proposed representative will vigorously and capably prosecute the interests of the class. [99]

136. Mr. MacDonald, Mr. Varga, and Mr. Zoppas are ideal representative plaintiffs. All three are seasoned investors. Mr. MacDonald and Mr. Zoppas have had careers in the financial services industry.[100] Mr. Varga has a background in personal banking.[101] They understand the claim, and the procedure to be followed in a class proceeding.[102] They have engaged competent counsel and the claim is being vigorously and capably prosecuted. They have remained actively involved in the litigation, gathering evidence, instructing counsel, and seeking updates. Finally, the Defendants have not put forth any evidence whatsoever to question or challenge any of the proposed representative's suitability.

Conclusion on the Certification Test

137. The suitability of this claim for certification is evinced by the many similar proceedings that have already been certified across Canada, and all of the facts set out above.

138. The Defendants have not adduced any evidence that there is any alternative procedure for the resolution of the common issues raised in the Plaintiffs' claim.

139. Moreover, the only evidence the Defendants have adduced to suggest that a class proceeding is *not* the preferable procedure is a brief statement that damages in

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99 *Western Canadian, supra,* at para 41.

100 Zoppas Cross-Examination, page 5-6, questions 9-25.

101 Varga Affidavit, Plaintiffs' Motion Record, page 221, paragraph 2.

102 Varga Affidavit, Plaintiffs' Motion Record, page 229, paragraph 28;
Zoppas Affidavit, Plaintiffs' Motion Record, page 287-288, paragraph 15;
MacDonald Affidavit, Plaintiffs' Motion Record, page 63, paragraph 73.

this case are *de minimis* enough that they would be overwhelmed by the expense of prosecuting the action.[103]

140. However, the Defendants acknowledge that this assessment is based on the assumption that the disclosure made in September 2002 with respect to the (BMO NB Account Agreements) and May 2003 (with respect to the InvestorLine Account Agreements) is adequate and therefore there are no valid claims after that date. The Defendants further acknowledge that this analysis falls apart if damages continue, as pleaded, beyond September 30, 2002 (in the case of BM0 NB) and May 2003 (in the case of InvestorLine)..

141. If the class size and period is as alleged by the Plaintiffs, the damages will be in the millions of dollars. In any event, this issue is properly determined via a trial on the merits, and is not a question for certification. The claim should not be denied certification, nor the class period truncated, based on the Defendants' best-case assessment of the outcome of a trial of the merits.

142. This is an ideal case for certification as a class action. It meets all the requisite criteria under s. 5 of the *CPA*, and a class action will undoubtedly meet the policy objectives of the Act. Aggregating the 70,000 or more claims into one proceeding will be more efficient and cost effective than pursuing individual claims, and will achieve access to justice for the Class. The claim can be efficiently and effectively prosecuted as a class action, as has already been demonstrated by the actions taken to date, and the numerous similar actions which have preceded this one.

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[103] Goddard Affidavit, Defendants' Motion Record, page 7, paragraph 30.

PART IV - RELIEF REQUESTED

143. The Plaintiffs therefore request an order certifying this action as a class proceeding, certifying the common issues and class definition as set out herein, and appointing them as the representative plaintiffs, with costs of the motion to be fixed and payable forthwith.

All of which is respectfully submitted this 29th day of November, 2011.

_____

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Hollick v. Toronto*, [2001] 3 S.C.R. 158 (S.C.C.).
2. *Sauer v. Canada (A.G.)* (2008), 169 A.C.W.S. (3d) 27 (S.C.J.).
3. *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No 2531 (S.C.J.), aff'd. (2010), 323 D.L.R. (4th) 376 (Div. Ct.).
4. *Ramdath v. George Brown College of Applied Arts & Technology,* [2010] O.J. No. 1411 (S.C.J.).
5. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
6. *Robinson v. Rochester Financial Limited et al.*, 2010 ONSC 463 (S.C.J.) (CanLII).
7. Oosterhoff, et al, *Oosterhoff on Trusts*, (Thomson Reuters: Toronto, 2009).
8. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.
9. Ellis, *Fiduciary Duties in Canada*, looseleaf, (Carswell: Toronto, 2011).
10. *Millard v. North George Capital Management Ltd.,* [2000] OJ No. 1535.
11. *Elms v. Laurentian Bank of Canada*, 2000 BCSC 379, 2000 CarswellBC 453.
12. *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429, 2001 CarswellBC 1326.
13. *Garland v. Consumers' Gas Company*, (2004), 1 S.C.R. 629.
14. *Bywater v. Toronto Transit Commission*, (1998), 27 C.P.C. (4th) 172 (ON Div. Ct.).
15. *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, [2010] O.J. No. 1057 (S.C.J.).

16. *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (S.C.J.).
17. *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534.
18. *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (C.A.).
19. *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.).
20. *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 48 C.P.C. (3d) 28 (B.C.S.C.), aff'd 2000 BCCA 605, [2000] B.C.J. No. 2237, leave to appeal ref.'d [2001] S.C.C.A. No. 21.
21. *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540.
22. *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 (CanLII), [2009] S.J. No. 179 (C.A.).
23. *Williams v. Mutual Life Assurance Co. of Canada*, 2000 CanLII 22704 (ON S.C.), 51 O.R. (3d) 54, [2000] O.J. No. 3821 (S.C.J.), aff'd, [2001] O.J. No. 4952, 17 C.P.C. (5th) 103 (Div. Ct.), aff'd, [2003] O.J. No. 1160 and 1161 (C.A.).
24. *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155, (S.C.J.), aff'd [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).
25. *Chadha v. Bayer Inc.*, 2003 CanLII 35843 (ON C.A.), [2003] O.J. No. 27, 2003 CanLII 35843 (C.A.), leave to appeal dismissed [2003] S.C.C.A. No. 106.
26. *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575 (CanLII), [2008] B.C.J. No. 831 (B.C.S.C.).

27. *Rumley v. British Columbia*, 2001 SCC 69 (CanLII), [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39.

28. *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.).

29. *Markson v. MBNA Canada Bank*, (2007) 85 O.R. (3d) 321 (C.A.).

30. *Carom v. Bre-X Minerals Ltd. et al.*, (1999), 44 O.R. (3d) 173, 46 B.L.R. (2d) 247 (S.C.J).

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Income Tax Act

R.S.C., 1985, c. 1 (5th Supp.)

An act respecting income taxes

146. (1) In this section,

- “annuitant”

  « rentier »

  “annuitant” means

  (*a*) until such time after maturity of the plan as an individual’s spouse or common-law partner becomes entitled, as a consequence of the individual’s death, to receive benefits to be paid out of or under the plan, the individual referred to in paragraph (*a*) or (*b*) of the definition *“retirement savings plan”* in this subsection for whom, under a retirement savings plan, a retirement income is to be provided, and

  (*b*) thereafter, the spouse or common-law partner referred to in paragraph (*a*);

- “benefit”

  « prestation »

  “benefit” includes any amount received out of or under a retirement savings plan other than

  (*a*) the portion thereof received by a person other than the annuitant that can reasonably be regarded as part of the amount included in computing the income of an annuitant by virtue of subsections 146(8.8) and 146(8.9),

  (*b*) an amount received by the person with whom the annuitant has the contract or arrangement described in the definition *“retirement savings plan”* in this subsection as a premium under the plan,

  (*c*) an amount, or part thereof, received in respect of the income of the trust under the plan for a taxation year for which the trust was not exempt from tax by virtue of paragraph 146(4)(*c*), and

  (*c.1*) a tax-paid amount described in paragraph (*b*) of the definition *“tax-paid amount”* in this subsection that relates to interest or another amount included in computing income otherwise than because of this section

  and without restricting the generality of the foregoing includes any amount paid to an annuitant under the plan

  (*d*) in accordance with the terms of the plan,

(*e*) resulting from an amendment to or modification of the plan, or

(*f*) resulting from the termination of the plan;

- "earned income"

  « revenu gagné »

  "earned income" of a taxpayer for a taxation year means the amount, if any, by which the total of all amounts each of which is

  (*a*) the taxpayer's income for a period in the year throughout which the taxpayer was resident in Canada from

  (i) an office or employment, determined without reference to paragraphs 8(1)(*c*), 8(1)(*m*) and 8(1)(*m.2*),

  (ii) a business carried on by the taxpayer either alone or as a partner actively engaged in the business, or

  (iii) property, where the income is derived from the rental of real property or from royalties in respect of a work or invention of which the taxpayer was the author or inventor,

  (*b*) an amount included under paragraph 56(1)(*b*), (*c.2*), (*g*) or (*o*) or subparagraph 56(1)(*r*)(v) in computing the taxpayer's income for a period in the year throughout which the taxpayer was resident in Canada,

  (*b.1*) an amount received by the taxpayer in the year and at a time when the taxpayer is resident in Canada as, on account of, in lieu of payment of or in satisfaction of, a disability pension under the *Canada Pension Plan* or a provincial pension plan as defined in section 3 of that Act,

  (*c*) the taxpayer's income for a period in the year throughout which the taxpayer was not resident in Canada from

  (i) the duties of an office or employment performed by the taxpayer in Canada, determined without reference to paragraphs 8(1)(*c*), 8(1)(*m*) and 8(1)(*m.2*), or

  (ii) a business carried on by the taxpayer in Canada, either alone or as a partner actively engaged in the business

  except to the extent that the income is exempt from income tax in Canada by reason of a provision contained in a tax convention or agreement with another country that has the force of law in Canada, or

  (*d*) in the case of a taxpayer described in subsection 115(2), the total that would be determined under paragraph 115(2)(*e*) in respect of the taxpayer for the year if

  (i) that paragraph were read without reference to subparagraphs 115(2)(*e*)(iii) and 115(2) earned income (*e*)(iv), and

  (ii) subparagraph 115(2)(*e*)(ii) were read without any reference therein to paragraph 56(1)(*n*),

  except any part thereof included in the total determined under this definition by reason of paragraph (*c*) or exempt from income tax in Canada by reason of a provision contained in a tax convention or agreement with another country that has the force of law in Canada,

exceeds the total of all amounts each of which is

(*e*) the taxpayer's loss for a period in the year throughout which the taxpayer was resident in Canada from

(i) a business carried on by the taxpayer, either alone or as a partner actively engaged in the business, or

(ii) property, where the loss is sustained from the rental of real property,

(*f*) an amount deductible under paragraph 60(*b*), 60(*c*) or 60(*c.1*), or deducted under paragraph 60(*c.2*), in computing the taxpayer's income for the year,

(*g*) the taxpayer's loss for a period in the year throughout which the taxpayer was not resident in Canada from a business carried on by the taxpayer in Canada, either alone or as a partner actively engaged in the business, or

(*h*) the portion of an amount included under subparagraph (*a*)(ii) or (*c*)(ii) in determining the taxpayer's earned income for the year because of subparagraph 14(1)(*a*)(v)

and, for the purposes of this definition, the income or loss of a taxpayer for any period in a taxation year is the taxpayer's income or loss computed as though that period were the whole taxation year;

- "issuer"

  « émetteur »

  "issuer" means the person referred to in the definition *"retirement savings plan"* in this subsection with whom an annuitant has a contract or arrangement that is a retirement savings plan;

- "maturity"

  « échéance »

  "maturity" means the date fixed under a retirement savings plan for the commencement of any retirement income the payment of which is provided for by the plan;

- "net past service pension adjustment"

  « facteur d'équivalence pour services passés net »

  "net past service pension adjustment" of a taxpayer for a taxation year means the positive or negative amount determined by the formula

  P + Q - G

  where

  P

  is the total of all amounts each of which is the taxpayer's past service pension adjustment for the year in respect of an employer,

Q

is the total of all amounts each of which is a prescribed amount in respect of the taxpayer for the year, and

G

is the amount of the taxpayer's PSPA withdrawals for the year, determined as of the end of the year in accordance with prescribed rules;

- "non-qualified investment"

  « placement non admissible »

  "non-qualified investment", in relation to a trust governed by a registered retirement savings plan, means property acquired by the trust after 1971 that is not a qualified investment for the trust;

- "premium"

  « prime »

  "premium" means any periodic or other amount paid or payable under a retirement savings plan

  (*a*) as consideration for any contract referred to in paragraph (*a*) of the definition *"retirement savings plan"* to pay a retirement income, or

  (*b*) as a contribution or deposit referred to in paragraph (*b*) of that definition for the purpose stated in that paragraph

  but except for the purposes of paragraph (*b*) of the definition *"benefit"* in this subsection, paragraph (2)(*b.3*), subsection (22) and the definition *"excluded premium"* in subsection 146.02(1), does not include a repayment to which paragraph (*b*) of the definition *"excluded withdrawal"* in either subsection 146.01(1) or 146.02(1) applies or an amount that is designated under subsection 146.01(3) or 146.02(3);

- "qualified investment"

  « placement admissible »

  "qualified investment" for a trust governed by a registered retirement savings plan means

  (*a*) an investment that would be described by any of paragraphs (*a*) to (*d*), (*f*) and (*g*) of the definition *"qualified investment"* in section 204 if the reference in that definition to "a trust governed by a deferred profit sharing plan or revoked plan" were read as a reference to "a trust governed by a registered retirement savings plan" and if that definition were read without reference to the words "with the exception of excluded property in relation to the trust",

  (*b*) [Repealed, 2007, c. 29, s. 17]

  (*c*) an annuity described in the definition *"retirement income"* in respect of the annuitant under the plan, if purchased from a licensed annuities provider,

  (*c.1*) a contract for an annuity issued by a licensed annuities provider where

(i) the trust is the only person who, disregarding any subsequent transfer of the contract by the trust, is or may become entitled to any annuity payments under the contract, and

(ii) the holder of the contract has a right to surrender the contract at any time for an amount that would, if reasonable sales and administration charges were ignored, approximate the value of funds that could otherwise be applied to fund future periodic payments under the contract,

(*c.2*) a contract for an annuity issued by a licensed annuities provider where

(i) annual or more frequent periodic payments are or may be made under the contract to the holder of the contract,

(ii) the trust is the only person who, disregarding any subsequent transfer of the contract by the trust, is or may become entitled to any annuity payments under the contract,

(iii) neither the time nor the amount of any payment under the contract may vary because of the length of any life, other than the life of the annuitant under the plan (in this definition referred to as the "RRSP annuitant"),

(iv) the day on which the periodic payments began or are to begin (in this paragraph referred to as the "start date") is not later than the end of the year in which the RRSP annuitant attains 72 years of age,

(v) either

(A) the periodic payments are payable for the life of the RRSP annuitant and either there is no guaranteed period under the contract or there is a guaranteed period that begins at the start date and does not exceed a term equal to 90 years minus the lesser of

(I) the age in whole years at the start date of the RRSP annuitant (determined on the assumption that the RRSP annuitant is alive at the start date), and

(II) the age in whole years at the start date of a spouse or common-law partner of the RRSP annuitant (determined on the assumption that a spouse or common-law partner of the RRSP annuitant at the time the contract was acquired is a spouse or common-law partner of the RRSP annuitant at the start date), or

(B) the periodic payments are payable for a term equal to

(I) 90 years minus the age described in subclause (I), or

(II) 90 years minus the age described in subclause (II), and

(vi) the periodic payments

(A) are equal, or

(B) are not equal solely because of one or more adjustments that would, if the contract were an annuity under a retirement savings plan, be in accordance with subparagraphs 146(3)(*b*)(iii) to 146(3)(*b*)(v) or that arise because of a uniform reduction in the entitlement to the periodic payments as a consequence of a partial surrender of rights to the periodic payments, and

(*d*) such other investments as may be prescribed by regulations of the Governor in Council made on the recommendation of the Minister of Finance;

- “RRSP deduction limit”

  « maximum déductible au titre des REER »

  “RRSP deduction limit” of a taxpayer for a taxation year means the amount determined by the formula

  A + B + R - C

  where

  A

  is the taxpayer’s unused RRSP deduction room at the end of the preceding taxation year,

  B

  is the amount, if any, by which

  (*a*) the lesser of the RRSP dollar limit for the year and 18% of the taxpayer’s earned income for the preceding taxation year

  exceeds the total of all amounts each of which is

  (*b*) the taxpayer’s pension adjustment for the preceding taxation year in respect of an employer, or

  (*c*) a prescribed amount in respect of the taxpayer for the year,

  C

  is the taxpayer’s net past service pension adjustment for the year, and

  R

  is the taxpayer’s total pension adjustment reversal for the year;

- “RRSP dollar limit”

  « plafond REER »

  “RRSP dollar limit” for a calendar year means

  (*a*) for years other than 1996 and 2003, the money purchase limit for the preceding year,

  (*b*) for 1996, $13,500, and

  (*c*) for 2003, $14,500;

- “refund of premiums”

  « remboursement de primes »

"refund of premiums" means any amount paid out of or under a registered retirement savings plan (other than a tax-paid amount in respect of the plan) as consequence of the death of the annuitant under the plan,

(*a*) to an individual who was, immediately before the death, a spouse or common-law partner of the annuitant, where the annuitant died before the maturity of the plan, or

(*b*) to a child or grandchild of the annuitant who was, immediately before the death, financially dependent on the annuitant for support;

- "registered retirement savings plan"

  « régime enregistré d'épargne-retraite »

  "registered retirement savings plan" means a retirement savings plan accepted by the Minister for registration for the purposes of this Act as complying with the requirements of this section;

- "retirement income"

  « revenu de retraite »

  "retirement income" means

  (*a*) an annuity commencing at maturity, and with or without a guaranteed term commencing at maturity, not exceeding the term referred to in paragraph (*b*), or, in the case of a plan entered into before March 14, 1957, not exceeding 20 years, payable to

  (i) the annuitant for the annuitant's life, or

  (ii) the annuitant for the lives, jointly, of the annuitant and the annuitant's spouse and to the survivor of them for the survivor's life, or

  (*b*) an annuity commencing at maturity, payable to the annuitant, or to the annuitant for the annuitant's life and to the spouse after the annuitant's death, for a term of years equal to 90 minus either

  (i) the age in whole years of the annuitant at the maturity of the plan, or

  (ii) where the annuitant's spouse is younger than the annuitant and the annuitant so elects, the age in whole years of the spouse at the maturity of the plan,

  issued by a person described in the definition *"retirement savings plan"* in this subsection with whom an individual may have a contract or arrangement that is a retirement savings plan,

  or any combination thereof;

- "retirement savings plan"

  « régime d'épargne-retraite »

  "retirement savings plan" means

(*a*) a contract between an individual and a person licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada an annuities business, under which, in consideration of payment by the individual or the individual's spouse or common-law partner of any periodic or other amount as consideration under the contract, a retirement income commencing at maturity is to be provided for the individual, or

(*b*) an arrangement under which payment is made by an individual or the individual's spouse or common-law partner

(i) in trust to a corporation licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada the business of offering to the public its services as trustee, of any periodic or other amount as a contribution under the trust,

(ii) to a corporation approved by the Governor in Council for the purposes of this section that is licensed or otherwise authorized under the laws of Canada or a province to issue investment contracts providing for the payment to or to the credit of the holder thereof of a fixed or determinable amount at maturity, of any periodic or other amount as a contribution under such a contract between the individual and that corporation, or

(iii) as a deposit with a branch or office, in Canada, of

(A) a person who is, or is eligible to become, a member of the Canadian Payments Association, or

(B) a credit union that is a shareholder or member of a body corporate referred to as a "central" for the purposes of the *Canadian Payments Association Act*,

(in this section referred to as a "depositary")

to be used, invested or otherwise applied by that corporation or that depositary, as the case may be, for the purpose of providing for the individual, commencing at maturity, a retirement income;

- "spousal or common-law partner plan"

  « régime au profit de l'époux ou du conjoint de fait »

  "spousal or common-law partner plan", in relation to a taxpayer, means

  (*a*) a registered retirement savings plan

  (i) to which the taxpayer has, at a time when the taxpayer's spouse or common-law partner was the annuitant under the plan, paid a premium, or

  (ii) that has received a payment out of or a transfer from a registered retirement savings plan or a registered retirement income fund that was a spousal or common-law partner plan in relation to the taxpayer, or

  (*b*) a registered retirement income fund that has received a payment out of or a transfer from a spousal or common-law partner plan in relation to the taxpayer;

- *"spousal plan"*[Repealed, 2001, c. 17, s. 246(1)(E)]
- "tax-paid amount"

  « montant libéré d'impôt »

"tax-paid amount" paid to a person in respect of a registered retirement saving plan means

(*a*) an amount paid to the person in respect of the amount that would, if this Act were read without reference to subsection 104(6), be income of a trust governed by the plan for a taxation year for which the trust was subject to tax because of paragraph 146(4)(*c*), or

(*b*) where

(i) the plan is a deposit with a depositary referred to in clause (*b*)(iii)(B) of the definition *"retirement savings plan"* in this subsection, and

(ii) an amount is received at any time out of or under the plan by the person,

the portion of the amount that can reasonably be considered to relate to interest or another amount in respect of the deposit that was required to be included in computing the income of any person (other than the annuitant) otherwise than because of this section;

- "unused RRSP deduction room"

« déductions inutilisées au titre des REER »

"unused RRSP deduction room" of a taxpayer at the end of a taxation year means,

(*a*) for taxation years ending before 1991, nil, and

(*b*) for taxation years that end after 1990, the amount, which can be positive or negative, determined by the formula

A + B + R - (C + D)

where

A

is the taxpayer's unused RRSP deduction room at the end of the preceding taxation year,

B

is the amount, if any, by which

(i) the lesser of the RRSP dollar limit for the year and 18% of the taxpayer's earned income for the preceding taxation year

exceeds the total of all amounts each of which is

(ii) the taxpayer's pension adjustment for the preceding taxation year in respect of an employer, or

(iii) a prescribed amount in respect of the taxpayer for the year,

C

is the taxpayer's net past service pension adjustment for the year,

D

is the total of all amounts each of which is an amount deducted by the taxpayer,

(i) under subsection (5) or (5.1) or paragraph 60(*v*), in computing the taxpayer's income for the year, or

(ii) under paragraph 10 of Article XVIII of the *Canada-United States Tax Convention* signed at Washington on September 26, 1980 or a similar provision in another tax treaty, in computing the taxpayer's taxable income for the year, and

R

is the taxpayer's total pension adjustment reversal for the year.

Restriction — financially dependent

(1.1) For the purpose of paragraph (*b*) of the definition *"refund of premiums"* in subsection (1), clause 60(*l*)(v)(B.01) and subparagraph 104(27)(*e*)(i), it is assumed, unless the contrary is established, that an individual's child or grandchild was not financially dependent on the individual for support immediately before the individual's death if the income of the child or grandchild for the taxation year preceding the taxation year in which the individual died exceeded the amount determined by the formula

A + B

where

A
is the amount used under paragraph (*c*) of the description of B in subsection 118(1) for that preceding taxation year; and
B
is nil, unless the financial dependency was because of mental or physical infirmity, in which case it is $6,180 adjusted for each such preceding taxation year that is after 2002 in the manner set out in section 117.1.

Class Proceedings Act, 1992

S.O. 1992, CHAPTER 6

1. In this Act,

"common issues" means,

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; ("questions communes")

"court" means the Superior Court of Justice but does not include the Small Claims Court; ("tribunal")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") 1992, c. 6, s. 1; 2006, c. 19, Sched. C, s. 1 (1).

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

Idem, subclass protection

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

Certain matters not bar to certification

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members. 1992, c. 6, s. 6.

APPENDIX A – TIMELINE OF ACTION

[to be inserted into hard copy]

Court File No. 06-CV-316213 CP

JAMES RICHARD MACDONALD et al. Plaintiffs	-and-	BMO TRUST COMPANY et al. Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
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