CITATION: MacDonald et al v. BMO Trust Company et al, 2020 ONSC 93
COURT FILE NO.: 06-CV-316213 CP
DATE: 20200228

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JAMES RICHARD MACDONALD, LYNN D. ZOPPAS, JOHN A. ZOPPAS and MICHAEL HALASZ

Plaintiffs

- and -

BMO TRUST COMPANY, BMO NESBITT BURNS INC. and BMO INVESTORLINE INC.

Defendants

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Linda Rothstein, Odette Soriano, Jeffrey Larry and Paul Davis* for the Plaintiffs

Peter Griffin, Monique Jilesen, Jonathan Chen and Aoife Quinn for the Defendants

HEARD: January 7 and 9, 2020

Motions for Summary Judgment on the Common Issues

[1] This class action is about hidden foreign exchange fees, breach of trust, the disgorgement of profits and the time value of money. Certified as a class proceeding eight years ago,[1] the action is finally before the court for a hearing on the merits. The

[1] *MacDonald v BMO Trust.* 2012 ONSC 759.

parties bring cross-motions for summary judgment on the common issues.

[2] The class action alleges that the defendant financial institutions breached their duties as trustees and fiduciaries by failing to disclose the amount of the "markup" that they charged on foreign currency conversions in the RRSP and other registered accounts held by the class members.[2] The plaintiffs say that more than $100 million was secretly misappropriated over the ten-year class period and ask for an equitable accounting. The total monetary claim based on the plaintiffs' suggested measure for the time value of money is over $400 million.

[3] The defendants deny any wrongdoing. They ask that the common issues be answered in their favour and that the class action be dismissed. The defendants also add a motion for decertification if their primary motion for an outright dismissal does not prevail.

[4] Both sides agree that the common issues can be decided summarily. As do I. The core dispute involves standard-form documents. The relevant facts are largely uncontested and there are no credibility concerns. None of the common issues requires a trial.

[5] My reasons are organized as follows. I begin with a brief background describing the parties, their legal relationship and the defendants' currency conversion process for foreign currencies in the registered accounts. Next, I set out my key findings and conclusions. I then decide the common issues. I note that four of the 14 common issues as certified are no longer being pursued by the plaintiffs and are not listed herein. The remaining ten issues are set out and decided in the last section of this decision.

Background

(1) The parties

[6] The three defendants are wholly-owned subsidiaries of the Bank of Montreal. BMO Trust is a trust company under provincial trust and loan legislation. During the class period, the RRSPs and other accounts registered by BMO Trust as required under federal income tax law were offered to clients through the other two defendants, BMO

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[2] The registered accounts include Registered Retirement Savings Plans, Locked-in Retirement Accounts, Locked-in Investment Funds, Locked-in Retirement Income Funds and Registered Education Savings Plans.

Nesbitt Burns, a full-service investment dealer, and BMO InvestorLine, an online investment dealer. The Bank of Montreal itself is not a defendant in this action.

[7] Three representative plaintiffs held RRSPs with either Nesbitt Burns or InvestorLine. James MacDonald and Lynn Zoppas held RRSPs with Nesbitt Burns. Plaintiff John Zoppas was responsible for Lynn Zoppas' RRSP pursuant to a power of attorney. Michael Halasz held an RRSP with InvestorLine. Messrs. MacDonald, Zoppas and Halasz are experienced investors who often traded U.S. dollar-denominated securities or otherwise received foreign currency in their registered accounts.

(2) The class

[8] The class is defined as:

> All current and former clients of Nesbitt Burns and InvestorLine resident in Canada who held one or more registered accounts administered by BMO Trust, Nesbitt Burns and/or InvestorLine and purchased or sold investments denominated in foreign currency in their registered accounts or were paid dividends or interest in a foreign currency in their registered account(s), or otherwise received foreign currency into their registered account(s) which was then converted to Canadian dollars by the defendants during the period between:
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> - June 14, 2001 and September 6, 2011 for:
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>   (a) all clients and former clients of InvestorLine;
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>   (b) the 14 clients of Nesbitt Burns who opted out of the class proceeding entitled *Skopit v. BMO Nesbitt Burns*[3] either entirely or with respect to the overlap period with this action; and
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> - October 1, 2002 and September 6, 2011 for all other clients of Nesbitt Burns.

[9] The parties' estimate the class size to be about 200,000 members.

(3) The ten-year class period

[10] The ten-year class period begins June 14, 2001 for the InvestorLine claimants and October 1, 2002 for the Nesbitt Burns claimants and ends for all class members on

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[3] *Skopit v. BMO Nesbitt Burns Inc.*, [2010] O.J. No. 6360.

September 6, 2011. The June 14, 2001 and September 6, 2011 dates are explained by the following.

[11] Before June 14, 2001 federal income tax law did not allow investors to hold foreign currency in any registered accounts and the defendants routinely converted any foreign currencies in these accounts. This changed on June 14, 2001 when federal tax law was amended and the prohibition on holding foreign currency in RRSPs and the other registered accounts was eliminated.

[12] The defendants, however, were technologically unable to implement changes to their trading systems to allow their clients to hold foreign currencies in their registered accounts until September 6, 2011. Thus, over the ten years from 2001 to 2011 (the ten-year class period) Nesbitt Burns and InvestorLine continued to conduct foreign currency conversions for their registered account clients and continued to charge the markup.

(4) The foreign exchange markup

[13] Over the course of the ten-year class period, the defendants, and more accurately Nesbitt Burns and InvestorLine, charged their clients an extra fee or mark-up, over and above the "spot rate."[4] The fee that was charged to the client, the "client rate", consisted of the spot rate plus the defendants' markup.

[14] The amount of the markup, calculated in terms of "basis points" (100 basis points being one per cent) varied according to the size of the foreign currency conversion – the smaller the monetary amount, the larger the markup and vice versa. Over the ten years at issue, Nesbitt Burns and InvestorLine in their discretion increased and sometimes decreased the applicable markup. I have attached a chart in the Appendix that sets out the applicable markups over the course of the class period. For the purposes of this decision, it is sufficient to note that the markups ranged from a low of 20 basis points (or .2%) for amounts over $150,000 to a high of 150 basis points (or 1.5%) for the smaller amounts (under $30,000).

[15] The total amount of the markup charged and taken from class member accounts over the ten-year class period was just over $100 million. The exact amount was either $103.9 million or just under $102.9 million. There is some dispute about the $1 million

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[4] Generally, only banks buy and sell at the spot rate. Individuals and even very large corporations cannot do so. The spot rate is sometimes called the interbank rate.

difference. For the purposes of this motion, however, the plaintiffs are content to accept the $102.9 million figure.

(5) The core dispute

[16] The plaintiffs say the RRSPs and other registered accounts are classic trust accounts. That BMO Trust as trustee and Nesbitt Burns and InvestorLine as agents had clear fiduciary obligations under both the trust agreements and general trust law to disclose the amount of the markup that was being charged for the foreign currency conversions. The plaintiffs say that no such disclosure was ever made. The defendants paid themselves these fees in breach of trust and in violation of their fiduciary obligations. The plaintiffs submit that the appropriate remedy is an accounting and disgorgement of the profits made on these hidden and unauthorized self-payments. Starting with the $109.2 million aggregate amount and using the Bank of Montreal's overall return on equity as a measure of the accumulated interest, the plaintiffs say the total disgorgement should be about $419 million.

[17] The defendants deny any wrongdoing and dispute almost every step in the plaintiffs' analysis – from the characterization of the parties' legal relationships, to the process of foreign exchange markups, to the evidence of what was known by the plaintiffs. The defendants make much of the fact that the plaintiffs knew and understood that some profit would be made by the defendants on the foreign exchange conversions and thus no real losses were sustained. The defendants ask that the common issues be answered in their favour, and if not, that the class action be decertified because it has failed to maintain the commonality requirement.

[18] I have set out my analysis of the relevant factual and legal issues under ten key findings that will help explain and underpin my answers to the common issues.

Ten key findings

(1) The defendants are trustees and fiduciaries

[19] This first finding is easily made. It cannot be disputed that the RRSPs and other registered accounts were express trust accounts and that at least within the confines of the registered account relationship and, in particular, the disclosure issues herein, the defendants were trustees and fiduciaries to the class member/beneficiaries.

[20] ***BMO Trust.*** The standardized Trust Agreement between BMO Trust and the class member/registered account holders described BMO Trust as the "trustee" of the registered account that was opened for the Planholder/beneficiary. Although BMO Trust could delegate its duties to its agents, Nesbitt Burns and InvestorLine, it would remain "ultimately responsible" for the administration of the registered trust account. The

Agency Agreement between BMO Trust as trustee and Nesbitt Burns and InvestorLine as trust agents repeats these statements and adds that BMO Trust would retain ultimate responsibility for the administration of the Plans "in accordance with trust law."

[21] Given the language in this documentation and the judicial acknowledgement that the relationship between trustee and beneficiary is a "traditional"[5] and "obvious"[6] fiduciary relationship I can easily find that BMO Trust was a traditional trustee with traditional fiduciary obligations.[7] These obligations also flow from the legislation under which BMO Trust was established. The federal loan and trust company law[8] is designed "to ensure that the trust companies discharge their duties as laid down by the law of trusts in a strictly fiduciary manner".[9]

[22] ***Nesbitt Burns and InvestorLine.*** The trustee's agents, Nesbitt Burns and InvestorLine, also had certain trust and fiduciary responsibilities to the class member/beneficiaries. Section 6.1 of the Agency Agreement provides that Nesbitt Burns and InvestorLine are obliged to manage and administer the Plans "*in accordance with trust law* [and] *the Plan Terms*" [i.e. the Trust Agreement].[10] Agents carrying out delegated trust obligations have joint liability with the named trustee for any violations of these obligations.[11]

[23] Under general trust law, trustees and fiduciaries must act in the utmost good faith and put the interests of the beneficiary above their own and must at a minimum be honest and loyal, provide full disclosure of all material information to the beneficiary and refrain from taking compensation from trust funds without authorization.[12]

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[5] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at para. 125.

[6] *Ibid.*, at para. 31. Also see *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 at para. 33, that a trustee-beneficiary relationship is a recognized *per se* fiduciary relationship.

[7] Waters, *Law of Trusts in Canada*, 4th ed. (2012) at 42: "[T]he hallmark of a trust is the fiduciary relationship which the trust creates between the trustee and the beneficiary."

[8] *Loan and Trust Companies Act*, S.C. 1991, c. 45.

[9] Waters, *supra*, note 7, at 126.

[10] Emphasis added.

[11] Waters, *supra*, note 7, at 42.

[12] Ellis, *Fiduciary Duties in Canada* (Looseleaf) at 1-5 to 1-8.02 and 2-6 to 2-7.

[24] The defendants plead that the trust established under the Trust Agreements is a "bare" trust or trust for "custodial purposes only." I do not agree. The Trust Agreement makes clear that Nesbitt Burns and InvestorLine as agents are authorized to do much more than simply maintain custody of the trust funds. In any event, even bare trustees, at minimum, are obliged not to take compensation from the corpus of the trust without prior disclosure and authorization and not to generate hidden profits from the trust. As noted by the British Columbia Court of Appeal, "any trustee, bare or otherwise is a fiduciary, at least to a limited extent".[13]

[25] There can be no doubt that the three defendants assumed certain trust and fiduciary obligations to the class member/beneficiaries in the administration of the registered trust accounts. In any event, the obligations of the defendants as trustees and fiduciaries on the matter of markups are expressly set out in the Trust Agreement.

(2) The Trust Agreement required written disclosure of the amount of the markup fee

[26] The case law is clear that the "main source" of a trustee's duties is the trust agreement and that general trust law continues to govern where the trust instrument is silent.[14] Here, we have explicit fee provisions in the Trust Agreement, reinforced by similar provisions in the Agency Agreement, that impose traditional trust and fiduciary obligations.

[27] Section 15 of the Trust Agreement provided as follows:

> 15. **FEES, EXPENSES, TAXES, INTEREST AND PENALTIES.** The Trustee and/or the Agent may charge administration and transaction fees on such amounts and at such times as may be fixed by the Trustee and/or the Agent from time to time, provided that Trustee and/or the Agent shall give reasonable prior written notice to the Planholder of a change in the amount of such fees. Such fees may be paid from or out of the Fund or recovered from the Fund, to the extent that they are not paid when due by the Planholder.
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> Planholder acknowledges that the Agent (or an affiliate) may charge fees, commissions and expenses to the Fund in its capacity as the investment advisory firm for the Planholder …

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[13] *Scoretz v. Kensam Enterprises Inc*, 2018 BCCA 66, at para. 24.

[14] *Valard Construction v. Bird Construction*, 2018 SCC 8, at para. 15.

[28] The defendants agree that the markup in question is indeed a "fee."

[29] The first part of section 15 makes clear that while fees may be charged by Nesbitt Burns and InvestorLine (and this would obviously include foreign exchange fees) they can only be charged if prior written notice about the *amount* of the fee has been given to the Planholder. Strictly speaking, the actual wording in this fees provision requires written notice of any *change* in the amount of the fee but I take this to mean written notice of the *amount* of the fee.[15]

[30] Section 8.3 of the Agency Agreement reinforces section 15 of the Trust Agreement by noting, among other things, that fees may be charged and recovered from the trust funds "in accordance with trust law and/or the Trust Agreement..."

[31] In my view, section 15 of the Trust Agreement and section 8.3 of the Agency Agreement simply restate general trust law principles of honesty, loyalty and full disclosure and underscore the more specific proposition that trustees and fiduciaries must provide beneficiaries with prior disclosure of the amount of any fees or expenses that they intend to take out of trust account as self-payment.

[32] The defendants point to the second paragraph in section 15, set out above, that allows the Agent (or an affiliate) to charge fees, commissions and expenses to the Fund in its capacity as the investment advisory firm for the Planholder. However this provision must be read in the context of the entire Trust Agreement and cannot reasonably be interpreted as trumping the explicit 'notification of amount' obligation in the opening paragraph of section 15 or the obligations that Nesbitt Burns and InvestorLine assumed under section 8.3 of the Agency Agreement (that fees may be charged and recovered from the trust funds "in accordance with trust law"). The latter, to repeat, prohibits the self-payment of hidden fees.

[33] The second paragraph in section 15, in my opinion, does not nullify the explicit trust-based content of the first paragraph. There is no ambiguity. And if there is, any ambiguity must be resolved *contra proferentem*, that is in favour of the class member/beneficiaries. The defendants drafted the standard-form Trust Agreements and the related Agency Agreement and deliberately selected the language set out therein.

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[15] If I focussed on the "*change* in the amount" rather than "the amount" the overall result would be the same except (arguably) for those class members that paid markups in the early years of the class period *before* the amount of the markup changed and was increased from, say 90 basis points to 150 basis points. On the other hand, one can argue, I think successfully, that underlying trust law would require notice of the amounts themselves, not just the "changes" in the amounts. I therefore read section 15 as requiring written notice of the amount of the markup.

[34] I therefore conclude that under the Trust and Agency Agreements, Nesbitt Burns and InvestorLine were explicitly obliged as trustees and fiduciaries to provide class member/beneficiaries with written notice about the amount of the markup on the foreign conversion of trust funds in the registered trust accounts.

(3) The amount of the mark-up fee was not disclosed

[35] This is obviously a key finding. The amount of the markup fee has not been disclosed – even to this day. It is true that this information could have been obtained by a diligent class member if he or she took the time to do their own research or press their investment advisors or call centre contacts for these details. It is also true that the "client rate" - that is the combined spot rate and markup – was set out as the "exchange rate" on the registered account or trading documentation sent to the clients. But the actual amount of the markup fee (whether by way of basis points or percentages) was not disclosed as specifically required by section 15 of the Trust Agreement.

[36] It is self-evident that the written disclosure of the markup fee would be important information to the class members. If the markup was thought to be excessive, the class members could transfer their registered accounts to another trust company with more competitive rates. The class members know (today) that they were being charged from 20 to 150 basis points in markup fees (see the chart in the Appendix). They also know (today) that markup fees on foreign conversions in registered accounts at competitor banks are as low as 10 basis points. One financial institution is charging no markup fee. Presumably, lower competitor rates were also being offered over the course of the ten-year class period. But comparison shopping was difficult, if not impossible, because the amount of the markup was not disclosed.

[37] This is not a *de minimis* claim. While the financial impact on the individual class member in paying the undisclosed markups was probably manageable, over the years the overall amount added up even at the individual level. And for the class as a whole, the financial impact was significant. Recall again that over the course of the ten-year class period, the defendants paid themselves just over $100 million in undisclosed markups.

[38] The defendants make three submissions in response.

[39] First, they present evidence from the plaintiffs' cross-examinations, that each of them expected to be charged more than just the spot rate and that some profit would be made by the defendants on the foreign currency conversions – that is, there would be some markup.

[40] But the actual amount of the mark-up that was being charged and taken from trust funds was not disclosed as required in section 15 of the Trust Agreement. The plaintiffs only discovered the actual amount of the markup during this litigation. I agree with the

plaintiffs that disclosure of the blended "exchange rate" (that is, the spot rate plus the markup) is not disclosure of the markup fee as required by the Trust Agreement. As plaintiffs' counsel put it: the hidden fee, i.e. the defendants' mark up on the spot rate, cannot be divined from the disclosure of an all-inclusive exchange rate.

[41] The defendants' second submission points to provisions in the fee schedule (that listed the fees for the other banking services being provided) and in the client account agreement. In both documents, the client is advised that Nesbitt Burns or InvestorLine "may earn revenue from the foreign currency conversion."

[42] Here again the suggested disclosure falls well short of the mark. The unilateral insertion of a provision in the client account agreement or the fee schedule that the defendants' "may earn revenue" on the foreign currency conversions does not satisfy the precise obligation in section 15 of the Trust Agreement that the amount of every fee must be disclosed before monies are taken from the trust account. It is also conflicts with section 8.3 of the Agency Agreement that fees may be charged and recovered from the trust funds "in accordance with trust law and/or the Trust Agreement."

[43] The defendants' third submission relates to the 'account verification clause' in the client account agreement. The verification clause provides, in essence, that all confirmations or communications received by the client (including the blended "exchange rate" information) shall be deemed to have been accepted and approved by the client unless the client notifies the defendants to the contrary within a specified number of days, typically 15 or 45 days, from receipt.

[44] This submission also does not succeed.

[45] As the Court of Appeal noted in *S.N.S. Industrial Products v. Bank of Montreal*,[16] account verification clauses must be interpreted strictly in favour of the customer.[17] In this case, the verification clauses are directed at the account statements and trade confirmations and, as such, they can only operate to absolve the defendants from liability for information that was actually disclosed in these documents. However, as I have already found, the markup fees were not disclosed in either the account statements or the trade confirmations and thus could not reasonably be the subject of complaint or consent. The defendants cannot rely on account verification clauses when the nature of the alleged

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[16] *S.N.S. Industrial Products Limited v. Bank of Montreal*, 2010 ONCA 500.

[17] *Ibid.*, at para. 14.

wrong is non-disclosure and the client is being asked to verify information that was not disclosed.

[46] In sum, I find that the defendants, in particular Nesbitt Burns and InvestorLine, breached section 15 of the Trust Agreement by failing to disclose the amount of the markup fee on the foreign currency conversions and then paying themselves these amounts out of the trust funds without authorization. Breach of the terms of a trust agreement can constitute a breach of trust. As Gillese J.A. noted in her text on trust law:

> A breach of trust takes place whenever a trustee fails to fulfil his or her obligations with respect to the administration of the trust or fails to dispose properly of the trust property. The breach may be a failure to meet the obligations created by the terms of the trust instrument, the rules of equity, or statute.[18]

[47] Having found a breach of trust, I now turn to the appropriate remedy.

(4) The appropriate remedy is an accounting of profits

[48] Equity provides a wide range of remedies for breach of trust or fiduciary duty including an accounting of profits (also known as equitable accounting or disgorgement), equitable compensation, equitable lien, equitable tracing and constructive trust.[19] Here the plaintiffs ask for an accounting of the profits made by the defendants on the $102.9 million in undisclosed markup fees.

[49] Both courts and commentators agree that an accounting of profits or disgorgement is the conventional remedy for breaches of trust and fiduciary duty in the management of assets where, as here, fiduciary misconduct results in the wrongful acquisition of benefits.[20] As the Court of Appeal noted in *Brock v. Cole*:[21]

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[18] Gillese and Milczynski, *The Law of Trusts*, (2005) at 167. See also *Malitza v. Iclanzan*, 2011 ONSC 4202, at para. 128.

[19] Rotman, *Fiduciary Law*, (2005) at 706.

[20] *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 155; Rotman, *supra*, note 20, at 712.

[21] *Brock v. Cole*, 1981 CarswellOnt 2818 (C.A.)

> Where a trustee has retained trust money in his own hands, he will be accountable for the profit which he has made or which he is assumed to have made from the use of the money.[22]

[50] The accounting of profits remedy focuses on the defendant's gain, not the plaintiff's loss, and is available even in cases where no actual loss can be established. The reason for this, as made clear over centuries of case law, is the need to ensure that trust and fiduciary obligations be taken seriously and wrongdoers be deterred from breaching these obligations. In *Strother,*[23] the Supreme Court discussed the accounting of profits remedy and the importance of the "prophylactic"[24] or preventive purpose even where the beneficiaries have suffered no loss:

> Such a remedy may be directed to either or both of two equitable purposes. Firstly is a prophylactic purpose, aptly described as appropriating for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest.[25]
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> ...
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> [E]quity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship.[26]
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> Denying [the wrongdoer] profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of

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[22] *Ibid.* at para. 17.

[23] *Strother, supra,* note 20.

[24] Online dictionaries define "prophylactic" as a "preventive measure." The word comes from the Greek for "an advance guard" which is said to be "an apt term for a measure taken to fend off a disease or another unwanted consequence."

[25] *Strother, supra,* note 20, at para. 75.

[26] *Strother, supra,* note 20, at para. 77.

> interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.[27]

[51] The Court of Appeal made the same point in *Mady Development v. Rossetto*:[28]

> [D]eterrence is of particular importance where the beneficiary suffers no identifiable loss... In *Strother*, disgorgement of profits gained through a breach of fiduciary duty was ordered not for the purpose of making the beneficiary whole; but rather, to ensure that the fiduciary did not benefit from his wrongdoing, thereby deterring faithlessness, and achieving the prophylactic goal.[29]

[52] The fact that the class member/beneficiaries may have consented to the markup fee or expected that some level of profit (some markup) would be charged for the foreign exchange service does not preclude a breach of trust or breach of fiduciary duty claim when a provision of the trust instrument is clearly breached.

> It is not relevant in that regard for the fiduciary to argue that the principal would have consented to the profit, had he been asked... It is the profit for which the fiduciary must account, rather than any profit over and above a hypothetical level to which his principal may have potentially agreed.[30]

[53] In sum, an accounting of profits is the conventional remedy on the facts herein. But it is not granted automatically. Like all equitable remedies, the accounting for profits remedy is subject to the discretion of the court.[31] The defendants make, in essence, three broad submissions on this point - about causation, the trend towards eliminating the distinction between equitable and common law remedies, and the overall balancing of the equities. I will consider each in turn.

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[27] *Ibid.*

[28] *Mady Development Corp. v. Rossetto,* 2012 ONCA 31.

[29] *Ibid* at para. 20. Also see Rotman, *supra,* note 19, at 713: "The purpose of equitable accounting in the context of fiduciary interactions is to deter fiduciary misconduct by strictly requiring that all gains ... by fiduciaries be yielded up to their beneficiaries. This eliminates fiduciaries incentives to breach their duties."

[30] Bridge et al., *Snell's Equity*, (33rd ed.), at 186-87.

[31] *Strother, supra* note 20, at para. 74.

[54] *Causation.* The defendants are right. A causal relationship between the breach of fiduciary duty and the profits is required for an accounting to be ordered.[32] In *Strother*, however, the Supreme Court concluded that in cases where disgorgement [an accounting of profits] is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss).[33]

[55] *Harmonizing equitable and legal remedies.* The defendants are also right that the general trend in the case law is to eliminate the outdated distinctions between remedies available at common law and those available in equity. In *Hodgkinson,*[34] LaForest J., building on his analysis in *Canson,*[35] said this:

> [B]arring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.[36]

[56] The same point about the "need for harmonizing common law and equitable remedies where the same facts give rise to concurrent duties at equity and law" was made by McLachlin J, as she then was, in *Strother.* [37]

[57] The defendants submit that the plaintiffs should not be able to achieve a better result using the equitable remedy of disgorgement (accounting of profits) that focuses on the defendants' gain than they would using, say, equitable compensation or breach of contract that focuses on the plaintiffs' loss. Here, say the defendants, the plaintiffs would have had to pay a fee for the foreign exchange service in any event and their actual losses, given the absence of any evidence to the contrary, were probably modest at best.

[58] This submission, in my view, ignores the important proviso that was clearly articulated by the Supreme Court. Recall that in *Hogkinson* Justice LaForest noted (see paragraph 55 above) that the otherwise sensible objective of harmonizing equitable and

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[32] *Ibid.*, at para. 79.

[33] *Ibid.,* at para. 77.

[34] *Hodgkinson, supra,* note 5.

[35] *Canson Enterprises Ltd. v Boughton & Co.,* [1991] 3 S.C.R. 534, at 581.

[36] *Hodgkinson, supra,* note 5, at 81.

[37] *Strother, supra,* note 20, at para. 158 (dissenting but not on this point).

common law remedies will give way when there are "policy considerations" that justify the remedial distinctions. Here, as already noted, there is an important policy reason why the accounting of profits remedy should not be denied or otherwise "harmonized" into a breach of contract-type damages assessment – and that is the deterrence rationale.

[59] In my view, the prophylactic or deterrence factor must be duly considered when the court comes to balancing the equities.

[60] *Balancing the equities.* The defendants breached their trust and fiduciary duties by failing to disclose the amounts of the markup fees, an obligation that was explicitly set out in the Trust Agreement and is rooted in general trust law. Nonetheless, the defendant investment dealers performed a service for the trust account holders by providing the foreign currency conversion; the plaintiffs expected that some level of markup would be charged for this service; it was made clear in the trading documentation that "revenues may be earned" on the foreign currency conversions; and there is no evidence that the markups were excessive.

[61] If this was all that I had to balance, the defendants' submission that I exercise my discretion to award what they say is a more appropriate remedy such as equitable compensation or simple breach of contract, focussing more on the class members' loss rather than the fiduciaries' gain, may well have succeeded. However, as already noted, both the Supreme Court and the Court of Appeal have affirmed the importance of the prophylactic or deterrence objective when engaging the accounting for profits remedy even in cases with little or no beneficiary loss. The deterrence objective remains a "predominant" public policy factor:

> Thus, a beneficiary who has suffered a breach of fiduciary duty is entitled only to a court's assessment of what is appropriate given the nature of the duty owed and the circumstances surrounding its breach; this is assessed however in light of the predominant function of facilitating the deterrence necessary to further the fiduciary concept's foundational purpose.[38]

[62] When I add the deterrence factor to the balancing process, the scale tips decidedly in the plaintiff's favour. The Court of Appeal has confirmed that the equitable remedy appropriate for a particular case should "address not only fairness between the parties, but

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[38] Rotman, *supra,* note 19, at 77.

also the public concern about the maintenance of the integrity of fiduciary relationships."[39]

[63] It is fundamental to the viability of trust law in general, and banking and investment relationships in particular, that trust and fiduciary duties be taken seriously – especially when they are explicitly set out in a standard-form trust instrument that was drafted by the fiduciaries. And even more so, when they involve a duty on the part of the trustees and fiduciaries to disclose the amount of any fee that will be taken out of the beneficiaries' trust accounts by these same trustees and fiduciaries for self-payment.

[64] I note that the defendants had no difficulty providing written disclosure about the other fees that were being charged to the trust accounts – such as annual administration fees, trading commissions and interest charges. It would have been dead simple to add information about the amounts of the markups on foreign currency conversions (whether in basis points or percentages). But this was never done and, it appears, has still not been done.

[65] Balancing all the circumstances surrounding the defendants' breach of trust and fiduciary duty and paying due regard to the deterrence factor as set out in the case law, I exercise my discretion in favour of the plaintiffs. I find that the plaintiffs are entitled to an accounting of the profits.

(5) The need for a reference to determine the "profits"

[66] Both sides agree that the profits in question are determined by identifying the impugned revenues and subtracting reasonably related expenses. That is, from the $102.9 million, one must deduct the "reasonable and necessary expenses" [40] that were incurred by the defendants to generate this top-line amount.

[67] Here, the foreign exchange service that is being provided by the defendants in the context of the registered accounts is not a stand-alone storefront operation but one that is integrated into the overall trading operation of the two investment dealer defendants. The reasonable and necessary expenses of providing the foreign exchange service in the context of a fully functioning investment advisory business must include not only the variable costs that change in direct proportion to the volume of activity. They must also include an appropriate portion of the fixed costs that are directly related, such as

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[39] *McBride Metal Fabricating Corp v. H&W Sales Company Inc.* (2002) 59 O.R. (3d) 97 (C.A.) at para. 30.

[40] *Strother, supra,* note 20, at para. 97; *MacMillan Bloedel Ltd. v. Binstead,* 1983 CarswellBC 540 (S.C.C.) at para. 64.

professional education and training, technical and computer support, quality control and legal compliance, relevant infrastructure and any other overhead that is directly related to the provision of the foreign exchange service.[41]

[68] Unfortunately, the parties do not agree on how the reasonable and necessary expenses amount should be determined. The plaintiffs' expert, Duff and Phelps, says that only the "incremental costs" (that is only the variable costs) should be deducted from the $102.9 million. The defendants' expert, Deloitte, urges a "full costs" approach (variable and fixed) but goes on to include everything *and* the kitchen sink in their calculation.

[69] The reports of the parties' experts do not assist the court in any meaningful way. The plaintiffs' expert undershoots the mark – the "incremental costs" approach ignores important, albeit fixed costs, such as the infrastructure and supporting functions that permit the regulated services of the investment dealers and the provision of the foreign exchange services in an integrated business context. The defendants' expert overshoots the mark. The "full costs" approach purports to allocate all the costs set out in the general ledger, including cross-charges to the defendants from related BMO Financial Group entities. These costs include charges that have nothing to do with the foreign exchange process or the markup fees – for example, insurance commissions paid to investment advisors for referrals of life insurance products and even outside legal fees including those incurred to defend this class action.

[70] Hence the need for a reference. I simply cannot rely on the expert evidence that is currently before the court – from either side. There is no credible evidence about the "reasonable and necessary expenses" that were incurred by the defendants to generate the $102.9 million in impugned revenue. I could direct a mini-trial to "clarify" this evidence[42] but, in my view, it would be easier and more focussed to direct a reference under Rule 20.4(5) which provides that "where the plaintiff is a moving party and claims an accounting … the court may grant judgment on the claim with a reference to take the accounts." I also rely on Rule 54.02(1)(c) that allows, among other things, a reference where "a substantial issue in dispute requires the taking of accounts."

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[41] In determining an accounting of profits for breach of fiduciary duty, deductions for a proportion of overhead expenses have been allowed where appropriate in order to represent the additional expenses that were incurred to obtain the impugned profit: see *W.J. Christie & Co. v. Greer*, (1981) 121 D.L.R. (3d) 472 (C.A.) at para. 26; *Dow Chemical Company v. Nova Chemicals Corporation*, 2017 FC 350, at paras. 140, 146 and 165, and *Beyer-Brown & Associates Ltd. v. S&R Interiors Ltd.*, 2007 BCSC 327, at para. 69.

[42] *Hryniak v. Mauldin,* 2014 SCC 7, at para. 51.

[71] Rule 54.03(1) provides that "a reference may be directed to the referring judge." That is, I may conduct the reference myself. Normally, I would hesitate to take on this responsibility but here it makes sense to do so. I am familiar with the issues at hand and the material that is before the court and, with counsels' cooperation, I would be able to complete the reference without undue delay.

[72] Assuming the reference will result in the appropriate "profits" amount, the next question is the interest rate and to what extent this "profits" amount should be increased to fairly reflect the time value of money.

(6) An elevated interest rate is not justified

[73] There is no dispute that if disgorgement of profits is ordered, that an appropriate interest rate should be awarded to reflect the time value of money. The dispute between the parties is about the appropriate measure and quantum.

[74] The plaintiffs submit that an elevated interest rate is justified in all the circumstances (breach of an explicit trust provision and unauthorized self-payment) and that a reasonable proxy for the financial benefits the defendants derived from the fees they took from the class member trust accounts is BMO's overall return on equity over the affected time period. BMO's return on equity is derived from the Bank's public annual financial results.

[75] The plaintiffs argue as follows. The defendants have had the benefit to the "profits" portion of the $102.9 million aggregate amount over the ten years of the class period and the eight or so subsequent years to the date of this judgment. The defendants are presumed to have made the most beneficial use of the monies they took in breach of trust.[43] Given that the defendants are part of the BMO Financial Group, and in the absence of any evidence from the defendants demonstrating that they generated a lower rate of return on the impugned trust funds,[44] BMO's return on equity rate is a reasonable metric by which to quantify the time value of money.

[76] Using BMO's return on equity as the appropriate interest rate measure, say the plaintiffs, would not only fairly reflect the defendants "gain" but would also reinforce the all-important deterrent purpose and prevent the defendants from exploiting and profiting from the delayed repayment of wrongly-taken monies.

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[43] *Brock v. Cole, supra,* note 21, at paras. 17-20; *Wallersteiner v. Moir (No. 2),* [1975] 1 All E.R. 849 (Eng. C.A.) at 856.

[44] The plaintiffs point out that the defendants declined to produce financial statements.

[77] The defendants respond in two ways to the suggested use of BMO's overall return on equity as a proxy for the appropriate interest rate First, relying on their expert Bradley Heys, they say it is not possible to determine what if any additional profits may have been made from the reinvestment of any portion of the profits associated with foreign exchange conversions. Second, and more importantly, an elevated interest award would result in over-compensation and would be manifestly unjust and inequitable. The defendants submit that the appropriate interest rate is the simple interest rate set out in the *Courts of Justice Act*[45] ("CJA").

[78] I agree with the defendants. Here is my reasoning.

[79] I accept the plaintiffs' opening salvo on this point – that this court has both an equitable jurisdiction, given the equitable remedy herein, and a statutory jurisdiction under the CJA, to award an elevated interest (and even use an appropriate proxy) where it is just and equitable to do.[46] Both the equitable and statutory bases require the court, in essence, to consider all of the relevant circumstances[47] and (my words) balance the equities.

[80] The problem with the suggested BMO return on equity proxy is two-fold. And here, I part company with the plaintiffs and agree with the defendants. First, I am not satisfied on the evidence before me that it is even possible to determine what if any additional profits might have been made from the reinvestment of any portion of the profits associated with the foreign exchange conversions.[48] Secondly, the award of an elevated interest rate using this return on equity proxy, will indeed result in over-compensation out of all proportion to the defendants' wrong-doing.

[81] I pause to note that if the suggested return on equity measure is used, the "profits" amount on the impugned $102.9 million will probably be somewhere (my guess) in the tens of millions. Add to this a simple interest rate and the resulting amount will probably

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[45] *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[46] *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 at paras. 39-52, and see s. 130(1)(b) of the CJA.

[47] *Ibid.*, and see ss. 130(2)(b) and (g) of the CJA.

[48] The evidence of Bradley Heys, the defendants' expert on this point, is that the foreign exchange revenue from registered accounts is indistinguishable from other assets at the bank. As such, it is not possible to trace any specific business activities or investments of the bank to the collection of the foreign exchange fees. Also, as the plaintiff's expert, Errol Soriano, candidly acknowledged, he did not know whether some of the fees were held as cash, used to reduce borrowing or simply rolled into capital.

be somewhere under $100 million. But if the suggested return on equity measure is used, the final amount of the requested disgorgement would jump to about $400 million.[49]

[82] This result would not be equitable or just on the facts herein.

[83] As stated in *Snell's Equity,* "the remedy of account is a conventional remedy for a breach of fiduciary duty but one which must not be allowed to become a vehicle for the unjust enrichment of the claimant."[50] Nor can it become a vehicle for punishing defendants with harsh and disproportionate damage awards. The Supreme Court made this clear in *Hodgkinson:*

> Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour.[51]

[84] Consider the defendants' actual behaviour. This is not a "secret profits" case. The plaintiffs knew that they were being provided a foreign currency conversion service and expected that there would be some charge for that service. The client account agreements and fee schedules advised class members that the defendants "may earn revenue" on the foreign currency conversions. There is no evidence that the defendants systematically refused to provide information about the amount of the markup when asked directly to do so. There is no evidence that the markup was excessive.

[85] What about the defendants' conduct during the course of this protracted litigation? The plaintiffs' attempt to blame the defendants for the long delay post-certification does not succeed. Some of the delay was on consent; another large chunk of delay, as the plaintiffs well know, can be directly attributed to the conduct, rather misconduct, of the defendants' former counsel and not to the defendants themselves.[52]

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[49] The defendants' "full cost" approach, discussed above, would result in about $33 million in "profits." Add a simple PJI rate and the final amount would be around $47 million. The plaintiffs' "incremental costs" approach when combined with the BMO's return on equity as a proxy for the appropriate interest rate would result in a final amount that would be just over $400 million.

[50] *Snell's Equity, supra,* note 30, at 185.

[51] *Hodgkinson, supra,* note 5, at para. 81.

[52] The details of this unfortunate episode are set out in an earlier endorsement. It had nothing to do with the defendants and resulted in the defendants' former counsel paying a significant costs award to the plaintiffs.

[86] Yes, I have found a breach of trust and fiduciary duty. I have also found, after balancing the equities and applicable public policies, that the plaintiffs are entitled to pursue the accounting of profits remedy primarily to achieve the preventive or deterrent purpose that is sensibly emphasized in the case law. However, I am not persuaded that the defendants' "actual behaviour" in all the circumstances justifies an elevated interest rate (even if the corelated return on equity could be determined).

[87] Having considered all the circumstances surrounding the defendants' breach of trust and exercising my discretion, I conclude that the appropriate interest rate on the profits realized on the $102.9 million amount is the simple PJI rate that is set out in the CJA.

[88] If there is need for a more detailed review of the PJI rates and amounts over the appropriate time frame, including the defendants' concern about the three years over which the action was stayed on consent, I direct that the PJI final rates and amounts be determined at the reference.

(7) The amount in question can be determined in the aggregate

[89] Both sides accept that the overall quantum in question is $102.9 million. This is the total amount in markup fees that were charged over the ten-year class period and taken from the class member trust accounts in breach of section 15 of the Trust Agreement and general trust law. The upcoming reference will determine the 'reasonable and necessary expenses' that should be deducted from this amount to yield the profits amount that must be disgorged and distributed, with interest, to the class members.

[90] Both the overall quantum of $102.9 million and the resulting profits amount can obviously be determined in the aggregate without proof by individual class members.[53] The fact that "aggregate damages" was not formally certified as a common issue is of no import. This court has ample jurisdiction to add aggregate damages as a common issue.[54] There is no need to do so, however, because the answer is self-evident: the compensation payable to class members can indeed be determined in the aggregate. The distribution logistics do not detract from this conclusion and will be worked out in due course by counsel or, if necessary, with the assistance of the court under s. 25 of the CPA.

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[53] *Class Proceedings Act,* 1992, S.O. 1992, c.6, s. 24(1)(c).

[54] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at para. 134: "[T]he failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge for invoking the provisions [for making an aggregate assessment] if considered appropriate once liability is found."

(8) There is no basis for a punitive damages award

[91] The plaintiffs ask for $10 million in punitive damages. Punitive damages are awarded in cases where the defendants have engaged in "malicious, oppressive and high handed" conduct that "offends the court's sense of decency."[55] This is not that case.

[92] There is no evidence of any malicious, oppressive or high-handed conduct that offends the court's sense of decency. The relevant evidence was summarized above in paragraphs 84 and 85 and will not be repeated. The defendants breached the Trust Agreement to be sure and are now obliged to disgorge the profits that were realized on this breach. However, I am satisfied that the disgorgement of profits (plus PJI) as determined on the reference will be sufficient to punish the defendants, leaving no room for a punitive damages claim.[56] Also, as a supplementary point of logic, if the plaintiffs' request for an elevated rate of interest based on the defendants' actual behavior was, in all the circumstances, rejected (as it was) it must follow that the request for punitive damages must also be rejected.

[93] There is no basis for a punitive damages award.

(9) The limitations defence bars certain claims

[94] This is an issue that was properly raised by the defendants on their cross-motion for summary judgment and it should be addressed. If I am required to formally add a limitations issue as a common issue, I do so in my discretion as the common issues judge.[57] If there is any doubt in this regard, I rely on s. 12 of the *Class Proceedings Act*[58] and I refer to the comments of the Court of Appeal in *Bancroft-Snell v. Visa Canada* about the scope and content of this important provision:

> [Section 12] permits the court to make any order it considers appropriate respecting the conduct of the class proceeding to ensure its fair and expeditious determination ... from the inception of an intended class

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[55] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 36.

[56] Punitive damages are only awarded if compensatory damages are insufficient to punish the defendant. See the discussion in *Panacci v. Volkswagen*, 2018 ONSC 6312, at para. 65.

[57] Winkler et al, *The Law of Class Actions in Canada*, (2014), at 126.

[58] *Class Proceedings Act*, *supra*, note 53.

> proceeding … throughout the stages of the proceeding until a final disposition.[59]

[95] The limitation case law is clear that a cause of action does not accrue for the purposes of the running of a limitation period until "the material facts on which [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence."[60] Knowledge of *some* damage – not necessarily the full extent – is sufficient to trigger the limitation period.[61] Here the plaintiffs expected that some profit would be made by the defendants (i.e. there would be some markup) on the foreign currency conversions and the client account agreements and fee schedules advised class members that the defendants "may earn revenue" on the foreign currency conversions. Discoverability is not an issue.

[96] The defendants submit, correctly, that pursuant to the *Limitations Act, 2002*, if the claim was not discovered before January 1, 2004, a two-year limitation period applies.[62] The statements of claim herein were issued on behalf of Nesbitt Burns clients on August 2, 2006; InvestorLine was added on March 6, 2007. The defendants submit, at the very least, that class members who executed their first foreign exchange conversion in a Nesbitt Burns registered account between January 1 and August 1, 2004 are statute barred, as are those who executed their first foreign exchange conversion in an InvestorLine registered account between January 1, 2004 and March 5, 2005.

[97] I agree with this analysis and I provide this as my answer to the limitations issue. The accounting implications of the limitation-based adjustments (for example, on the $102.9 million amount and the related profits calculation) will be determined at the reference.

(10) The motion to decertify is dismissed

[98] The defendants argue that if fiduciary duties are established (as they were) that their impact on the class members can only be decided on an individual basis. As a result, they say, the individual issues in the action overwhelm the common issues and the appropriate remedy is a decertification of the proceeding under s. 10(1) of the CPA.

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[59] *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONCA 896, at para. 67.

[60] *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at 224.

[61] *Hamilton (City) v. Metcalfe & Mansfield Capital Corporation*, 2012 ONCA 156, at paras. 59-61.

[62] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, ss. 4, 5 and 24.

[99] I do not accept this submission.

[100] The class members' case at certification was based on the standard-form documents the defendants delivered during the class period including, in particular, the Trust Agreements and the fee schedules.[63] Nothing has changed. The class members' case continues to be based on these standard-form documents that apply class-wide. There is no lack of commonality. There is no basis for a motion to decertify.

[101] The defendants' decertification motion is dismissed.

Conclusion

[102] The core finding is that the defendants' failure to disclose the amount of the markup fee charged on the foreign exchange conversions and the unauthorized self-payment are a breach of trust and fiduciary duty. The most appropriate remedy is an equitable accounting of the profits that were realized on the $102.9 million[64] in undisclosed markup fees. There is no basis for an elevated interest award.

[103] The said profits, as well as the precise PJI amount, will be determined on the reference that will be conducted as soon as convenient.

Answers to Common Issues

[104] Having set out my findings, I am now able to decide the common issues. I have deleted common issues (b), (c), (j) and (l) because these are no longer being pursued. I answer each of the remaining issues in turn.

[105] **Common issue (a).** ***Were the Defendants, or any of them, acting as trustees of the registered accounts held by members of the Class (the "Class Members") as identified below, and if so, what duties did the defendants owe to the Class Members in this capacity?***

> *Answer*: Yes, the defendants acted as trustees of the Class Members' registered accounts during the Class Period. As such they were obliged to comply with the terms of the Trust Agreement and the related obligations under general trust law. Discussed above at paras. 19 to 25.

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[63] *Supra,* note 1, at para. 197.

[64] As may be adjusted based on the impact of the limitations defence: recall above paragraph 97.

[106] **Common issue (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 exchange of foreign currency in the Trust Accounts in furtherance of a purchase of foreign investments?***

> *Answer*: Yes. Discussed above at paras. 35 to 47.

[107] **Common issue (e).** ***Did the Defendants breach their contracts with the Class Members?***

> *Answer*: The defendants breached section 15 of the Trust Agreement. Discussed above at paras. 35 to 47.

[108] **Common issue (f).** ***What damages are the Class Members entitled to in respect of the foreign exchange transactions?***

> *Answer*: The plaintiffs have asked for and are entitled to an accounting of profits. Discussed above at paras. 48 to 65.

[109] **Common issue (g).** ***Are the defendants obliged to disgorge all profits they made during the class period with respect to the foreign exchange transactions?***

> *Answer*: Yes. The profits will be determined on a reference. Discussed above at paras. 48 to 65 and 66 to 72.

[110] **Common issue (h).** ***Are the defendants obliged to disgorge all the foreign exchange fees they charged to the Class during the class period with respect to the foreign exchange transactions?***

> *Answer*: No, just the profits realized on these fees. Discussed above at paras. 48 to 65.

[111] **Common issue (i).** ***Have the Defendants been unjustly enriched at the expense of the Class by their receipt of undisclosed fees on the foreign exchange transactions?***

> *Answer*: The plaintiffs have asked for and are entitled to an accounting of profits. There is no need to consider unjust enrichment.

[112] **Common issue (k).** ***Is the Class entitled to an accounting and disgorgement of all profits earned by the defendants from the foreign exchange transactions?***

> *Answer*: Yes. Discussed above at paras. 48 to 65.

[113] **Common issue (m).** ***Does the Defendants' conduct warrant an award of punitive damages, and if so, in what amount?***

Answer: No. Discussed above at paras. 91 to 93.

[114] **<u>Common issue (n).</u>** ***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?***

> *Answer*: No, the plaintiffs *are not* 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. Discussed above at paras. 73 to 88.
>
> Yes, the plaintiffs *are* entitled to pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act,* R.S.O. 1990, c. C.43 – the appropriate rate and total amount to be determined at the reference. Discussed above at paras. 73 to 88.

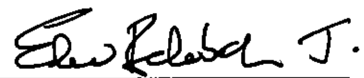
Disposition

[115] The certified common issues are answered as set out above. The plaintiffs' have prevailed on five of the 10 common issues namely (a), (d), (f), (g) and (k). Note that (f), (g) and (k) ask the same question. The defendants have prevailed on three of the common issues, (h), (m) and (n).

[116] The motions for summary judgment are therefore granted in part and dismissed in part. The defendants' motion for decertification is dismissed.

[117] The profits achieved on the total markup amount and the applicable PJI will be determined on a reference. Counsel should arrange a case conference as soon as convenient to discuss the format and scheduling of the directed reference. Cost submissions on these motions will be deferred until after the completion of the reference.

[118] I am grateful to counsel on both sides for the quality of their oral and written submissions.



Date: February 28, 2020

Justice Edward P. Belobaba

Appendix

Markups During the Class Period

Nesbitt Burns		InvestorLine	
June 14, 2001 to April 27, 2003	90 bps above the spot rate for all transactions	June 14, 2001 to Feb. 22, 2006	90 bps above the spot rate for all transactions
April 28, 2003 to April 2007	150 bps for trades of less than $30,000 90 bps for trades between $30,000 and $100,000 30 bps for trades over $100,000		
April 2007 to June 10, 2007	150 bps for trades of less than $30,000 90 bps for trades between $30,000 and $150,000 30 bps for trades over $100,000	Feb. 23, 2006 to June 10, 2007	100 bps for trades of less than $30,000 80 bps for trades between $30,000 and $75,000 20-35 bps for trades over $75,000
June 11, 2007 to end of Class Period	75 bps for trades of less than $30,000 70 bps for trades between $30,000 and $150,000 20-30 bps for trades over $150,000	June 11, 2007 to end of Class Period	75 bps for trades of less than $30,000 70 bps for trades between $30,000 and $75,000 20-35 bps for trades over $75,000