CITATION: MacDonald v. BMO Trust Company, 2012 ONSC 759
COURT FILE NO.: 06-CV-316213 CP
DATE: 20120131

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the *Class Action Proceedings Act, 1992*, S.O. 1992, C. 6

BETWEEN:	)	
	)	
JAMES RICHARD MACDONALD, JOHN A. ZOPPAS, LYNN D. ZOPPAS and TAMAS VARGA	)	*Ken Rosenberg* and *Jeffrey Larry*, for the plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
BMO TRUST COMPANY, BMO NESBITT BURNS INC., BMO INVESTORLINE INC. and BMO BANK OF MONTREAL	)	*Joel Wiesenfeld* and *Andrew Gray*, for the defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** December 12, 13 and 14, 2011

C. HORKINS J.

INTRODUCTION

[1] This is a motion for certification of a proposed class action pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*").

[2] The action focuses on registered bank accounts denominated in Canadian currency, the conversion of foreign currency in the accounts into Canadian dollars and the resulting fee charged to the account holder.

[3] The registered accounts are Registered Retirement Savings Plans ("RRSP"), Locked-in Retirement Accounts ("LIRA"), Locked-in Investment Funds ("LIF"), Locked-in Retirement Income Funds ("LRIF") and/or Registered Education Savings Plans ("RESP").

[4] 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 registered 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*, R.S.O. 1990, c. I.2 ("ITA").

[5] Commencing June 14, 2001, the ITA was amended to allow foreign currency to be held in registered accounts without penalty. However, the defendants did not offer registered accounts denominated in a foreign currency until September 2011 (prior to September 2011, the defendants did not have the technology to offer this service). As a result, the conversion of foreign currency described above continued to take place.

[6] The plaintiffs allege that when the currency conversions were made, the defendants charged the account holder an exchange rate more favourable to the defendants than the rate at which the defendants purchased the currency (foreign exchange fee).The foreign exchange fee was charged on three types of transactions:

1. authorized conversion of foreign currency, when account holders direct or authorize purchase of a foreign security (frequently U.S.) using Canadian dollars held in a registered account;

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

3. unauthorized conversion of foreign currency, when account holders receive cash dividends in foreign currency.

[7] The plaintiffs commenced this action on behalf of a proposed class consisting of all current and former clients of BMO InvestorLine Inc. (“InvestorLine”) and BMO Nesbitt Burns Inc. (“Nesbitt Burns”) resident in Canada, who held one or more registered accounts administered by BMO Trust Company (“BMO Trust”), Nesbitt Burns and/or InvestorLine ("the registered accounts”) 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:

(1) June 14, 2001 and September 6, 2011 for:

   (a) all clients and former clients of InvestorLine;

   (b) the 14 clients of Nesbitt Burns who opted out of the class proceeding entitled *Skopit v. BMO Nesbitt Burns Inc.*, either entirely or with respect to the overlap period with this action; and

(2) October 1, 2002 and September 6, 2011 for all other clients of Nesbitt Burns.

[8] The plaintiffs allege that the foreign exchange fees were not disclosed to the account holder and were unnecessary and unauthorized. As a result, the plaintiffs allege the following:

- The defendants breached their contracts with the plaintiffs and the putative class.
- The defendants breached the fiduciary duties they owed to the plaintiffs and the putative class
- The defendants breached their duties as trustees that they owed to the plaintiffs and the putative class
- The defendants have been unjustly enriched.

[9] The plaintiffs are not pursuing the negligence claim.

THE EVIDENCE

[10] Before reviewing the evidence, it is important to note the purpose of evidence on a certification motion. Evidence explains the background to the action. A certification motion is not the time to resolve conflicts in the evidence: See *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 at para. 50 (C.A.).

[11] A plaintiff's evidentiary burden on a certification motion is low and the plaintiff is only required to adduce evidence to show some "basis in fact" to meet the requirements of ss. 5(1)(b) to (e) of the test for certification as a class action. See *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 16-26; *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 at paras. 56-74 (S.C.J.); *Cloud, supra*, at paras. 49 to 52 (C.A.); *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 at para. 21 (S.C.J.); *Lefrancois v. Guidant Corp*., [2009] O.J. No. 2481 at paras. 13-14 (S.C.J.), leave to appeal ref'd [2009] O.J. No. 4129 (Div. Ct.); *Ring v. Canada (Attorney General)*, [2010] N.J. No. 107 (Nfld. C.A.).

[12] The following is a review of some of the evidence. As required, further evidence will be reviewed when the certification criteria are considered.

THE PARTIES

[13] The representative plaintiffs are individuals who held registered accounts with either Nesbitt Burns and/or InvestorLine at some point in the class period. Tamas Varga was a client of InvestorLine beginning in March 2006 when he opened an RRSP account. James MacDonald opened an RRSP and a LIRA account at Nesbitt Burns in February 1999. Lynn Zoppas has had an RRSP account with Nesbitt Burns since mid 1990. John Zoppas is Lynn Zoppas' husband. Mrs. Zoppas granted her husband a power of attorney that assigned responsibility for the management of the RRSP account throughout the life of the account. The power of attorney included the authority to commence this action.

[14] BMO Bank of Montreal is a Canadian chartered bank. During the certification motion it was agreed that the action would be dismissed without costs against the defendant BMO Bank of Montreal.

[15] BMO Trust is a trust company under the *Trust and Loan Companies Act,* S.C. 1991, c. 45. It is a wholly-owned subsidiary of BMO Bank of Montreal. BMO Trust is the trustee for custodial purposes for the registered accounts that Nesbitt Burns and InvestorLine offer.

[16] Nesbitt Burns is a licensed full service investment dealer. It is an indirect subsidiary of BMO Bank of Montreal. Nesbitt Burns offers its clients the ability to open a variety of investment accounts through branches of Nesbitt Burns located across Canada, including cash, margin and registered accounts.

[17] InvestorLine is a discount brokerage firm, and an indirect subsidiary of BMO Bank of Montreal. InvestorLine operates across Canada. Unlike Nesbitt Burns, a client of InvestorLine does not work with an investment advisor in respect of his/her account. In addition to regular cash and margin accounts, InvestorLine also offers registered accounts of the kind described above.

THE AGREEMENTS

Agreement between BMO Trust and Nesbitt Burns/InvestorLine

[18] A "RRSP, RRIF and TFSA Agency Agreement" (Agency Agreement) governed the relationship between BMO Trust and Nesbitt Burns and the relationship between BMO Trust and InvestorLine. This Agency Agreement provided as follows :

(i) BMO Trust acts as trustee of the registered accounts.

(ii) BMO Trust is authorized to delegate the performance of tasks, duties and responsibilities with respect to the registered accounts.

(iii) BMO Trust appoints Nesbitt Burns/InvestorLine as agent for performing the above tasks, duties and responsibilities and the agents accept same.

(iv) Despite delegation to the agent, the trustee retains ultimate responsibility pursuant to the trust law and applicable tax and pension legislation.

(v) Trustee and agents are not required or expected to take any actions on the registered accounts except on the prior instructions of the planholder (class member).

(vi) As compensation for the trustee's services the agent will pay the trustee a trustee fee.

Agreements between Class Members and Nesbitt Burns /InvestorLine

[19] The defendants entered into contracts with the plaintiffs and the putative class members that governed the administration of the registered accounts ("Account Agreements"). The Account Agreements are standard form contracts of adhesion. The class members had and have no opportunity to modify or negotiate any of the Account Agreements.

1. Nesbitt Burns Account Agreements

[20] For the Nesbitt Burns customers, the Account Agreements consist of:

(i) The BMO Nesbitt Burns Retirement Savings Plan Trust Agreement (the "Nesbitt Burns RSP Trust Agreement").

(ii) The BMO Nesbitt Burns Client Account Agreement (“Nesbitt Burns Client Account Agreement”) and the Account Opening Booklet that is incorporated by reference into the Client Account Agreement.

[21] When Mr. MacDonald opened his accounts at Nesbitt Burns on February 3, 1999, he was given copies of the above agreements. Copies of Mr. MacDonald’s agreements have been produced. These agreements remained unchanged until 2007 when the Nesbitt Burns Client Account Agreement was revised.

[22] The Nesbitt Burns RSP Trust Agreement describes BMO Trust as a trustee of a Nesbitt Burns Retirement Savings Plan for the Planholder (the class member). As the trustee, BMO Trust can “delegate the performance of any duties and responsibilities under the Plan” to Nesbitt Burns (described as “Agent”). Further, the Nesbitt Burns RSP Trust Agreement provides:

(i) The Fund shall be invested and reinvested by the trustee “exclusively” on the instructions of the Planholder (para. 5).

(ii) Nesbitt Burns is the investment advisory firm for the Planholder and is governed by the Nesbitt Burns Client Account Agreement (para. 5).

(iii) Neither BMO Trust or Nesbitt Burns “shall have any duty or responsibility, fiduciary or otherwise … to make or choose any investment, to decide whether to hold or dispose of any investment or to exercise any discretion with regard to any investment of the Plan, except as otherwise provided in this Trust Agreement.” (para. 5).

(iv) Other than the duties expressly stated in this Trust Agreement, “the Trustee shall not be required or expected to take any action with regard to an investment without prior instructions from the Planholder.” (para. 5)

(v) BMO Trust will maintain an account showing all contributions and transfers made to each registered account, all investment transactions and investment earnings,

gains, losses and all transfers and withdrawals made from each registered account (para. 6).

(vi) Dealing with "Fees, Expenses, Taxes, Interest and Penalties" BMO Trust and/or Nesbitt Burns, may charge administration or transaction fees in such amounts and at such times as may be fixed by BMO Trust and/or Nesbitt Burn, provided that BMO Trust and/or Nesbitt Burns "shall give reasonable prior written notice to the Planholder of a change in the amount of such fees." (para. 15)

(vii) The Planholder acknowledges that Nesbitt Burns may charge fees commissions and expenses. (para. 15)

[23] The Account Opening Booklet provides in part that:

(i) The "Client will pay any service fees or service charges relating to the services provided by BMO Nesbitt Burns for the administration of the account." (Para. 3(c) Terms and Conditions)

(ii) Nesbitt Burns commits to putting the account holder's interests ahead of its own. (Charter of Client Rights)

(iii) Nesbitt Burns commits to ensuring that account holders are always fully informed about their investments through comprehensive account statements. (Charter of Client Rights)

(iv) Nesbitt Burns commits to notifying account holders of important business and regulatory changes through statement bulletins and inserts and special mailings. (Charter of Client Rights)

(v) Transactions cannot be made without the approval of the account holder. (Charter of Client Responsibilities)

[24] While the above documents discuss fees in general, there is no specific provision that addresses foreign currency conversions and resulting fees.

[25] In August 2007, the Nesbitt Burns Client Account Agreement was revised. In particular, the following statement concerning foreign denominated registered accounts was added:

Operation of the Account

…

(b) … 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.

2. InvestorLine Account Agreements

[26] The Account Agreements for an InvestorLine client are found in a document titled "Client Agreements" ("Client Agreements document"). The 2005 and 2007 versions of the Client Agreements document were produced. The Client Agreements document covers all InvestorLine accounts including the registered accounts that are the focus of this action.

[27] The Client Agreements document is divided into the following four sections:

(i) BMO InvestorLine Account Agreements (for all InvestorLine accounts);

(ii) BMO Trust Company Account Agreements (for RRSP and RIF registered accounts);

(iii) BMO Bank of Montreal Account Agreements (for all personal accounts at BMO); and

(iv) Client Information.

[28] The 2007 version of the Client Agreements document provided additional information about foreign currency and fees. The difference between the 2005 and 2007 versions will be noted below.

[29] The defendants have not answered undertakings regarding whether there is an account opening booklet for InvestorLine. If there is, there may be additional contractual obligations owed by InvestorLine. The provisions of the Client Agreement document relevant to this action are set out below.

[30] In Section One (that applies to all InvestorLine accounts) terms and conditions are set out. A provision dealing with foreign currency adjustments was changed in 2007. The 2005 and 2007 versions are set out below:

2005

3. Foreign Currency Adjustments

Conversion of any foreign currency funds when necessary, shall take place on the trade date using the rate applicable unless otherwise agreed to.

2007

3. Foreign Currency Adjustments

i) Conversion of any foreign currency funds when necessary, shall take place on the trade date at rates established or determined by BMO InvestorLine.

ii) As BMO InvestorLine does not offer foreign denominated registered accounts, any foreign currency deposited into a registered account, including

> dividends, interests 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.

[31] Section Two covers BMO Trust Company Account Agreement for RRSP and LRIF accounts. It provides as follows:

(i) BMO Trust is the trustee of each registered account (referred to as the Fund), with the right to delegate its duties for each registered account to InvestorLine. (Part A introduction)

(ii) The trustee may delegate the performance of any of the trustee's duties and responsibilities under the Plan to InvestorLine but the trustee remains ultimately responsible for the administration of the Plan. (Part A introduction)

(iii) The Fund shall be invested and reinvested by the trustee "exclusively" on the instructions of the Planholder. (para. 5).

(iv) InvestorLine will be governed by the BMO InvestorLine Client Agreements entered into with the Planholder. (para. 5)

(v) Neither BMO Trust or InvestorLine "shall have any duty or responsibility, fiduciary or otherwise…to make or choose any investment, to decide whether to hold or dispose of any investment or to exercise any discretion with regard to any investment of the Plan, except as otherwise expressly provided in this Declaration." (para. 5)

(vi) Other than the duties with respect to the Fund expressly stated in this Declaration, "the Trustee shall not be required or expected to take any action with regard to an investment without prior instructions from the Planholder." (para. 5)

(vii) 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. (para. 6)

(viii) Dealing with "Fees, Expenses, Taxes, Interest and Penalties" BMO Trust and/or InvestorLine may charge administration or transaction fees to the Planholder in such amounts and at such times as fixed by BMO Trust and/or InvestorLine provided that they "shall give reasonable prior written notice to the Planholder of a change in the amount of such fees". (para. 15)

(ix) The Planholder acknowledges that the agent may charge fees commissions and expenses to the Fund in its capacity as the investment dealer firm for the Planholder's account. (para. 15)

FOREIGN CURRENCY CONVERSIONS & FEES

Overview of Foreign Currency Conversions – Nesbitt Burns &InvestorLine

[32] On June 14, 2001, when the ITA was amended to allow foreign currency to be held in registered accounts without penalty, it was not possible to hold foreign currency in a registered account with Nesbitt Burns or InvestorLine. The defendants did not offer this service until September 2011. The proposed class period covers the June 2001 to September 2011 time frame. A summary of the evidence dealing with foreign currency conversions during this time frame follows.

[33] Bob Markovski is the Chief Financial Officer for Nesbitt Burns and InvestorLine. He provided the following evidence. Nesbitt Burns and Investorline clients pay fees in exchange for the services they receive. Clients compensate Nesbitt Burns and Investorline for the services they receive in a variety of ways, including paying a fee when foreign currency is converted to give effect to the client's instructions to buy, hold or sell a security. He believes most clients would understand that they do not receive a service without compensating the service provider. Fees paid for foreign currency conversions contributed towards compensating Nesbitt Burns and Investorline for all the services provided by them to clients.

[34] For Nesbitt Burns and Investorline, foreign currency conversions typically occur at the spot rate plus a small fee (or "spread") which is added automatically to the spot rate. In some circumstances, clients transacting large amounts of foreign currency are able to negotiate a different fee.

[35] Foreign currency conversions occurred in the following manner:

(i) Requests for ordinary foreign currency conversions occurred automatically through an internal system and an aggregate position of these ordinary course conversions was routed to the foreign exchange desk at the end of each day.

(ii) Transactions involving large amounts of foreign currency could involve a discussion of the exchange rate directly with the foreign exchange desk.

(iii) In both of the circumstances described above, the exchange rate was set when the client agreed to the transaction. At that point, Nesbitt Burns/InvestorLine were obligated to complete the transaction with the client at that exchange rate.

(iv) Nesbitt Burns or Investorline did not act as an agent for the client by going into the foreign currency market on behalf of the client and buying or selling foreign currency for her or him. They bought and sold foreign currency to the client as principal.

(v) The foreign exchange desk handled foreign currency conversions for many businesses within BMO Financial Group, including Nesbitt Burns and Investorline.

(vi) At any given time, the foreign exchange desk may have had adequate inventory on hand to meet the aggregate foreign currency requirements of the businesses it served. At other times, it may have been short a particular foreign currency on an aggregate basis in which case it was required to transact in the marketplace to make up the shortfall.

(vii) The risk that foreign exchange rates could move adversely was a risk born by Nesbitt Burns and/or Investorline because a Nesbitt Burns or Investorline client was promised a particular exchange rate at the time the client agreed to a transaction giving rise to an obligation to supply the foreign currency at that promised exchange rate. The foreign exchange desk may end up having acquired the foreign currency inventory sold to the client at an exchange rate that was more expensive to it than the rate promised and delivered to the client.

Foreign Currency Exchange and Fees

1. What did Nesbitt Burns Disclose?

[36] Michele Goddard is a senior vice president and managing director at Nesbitt Burns. She provided the following evidence.

[37] During the class period, Nesbitt Burns did not offer registered investment accounts that were denominated in a foreign currency. All registered accounts were denominated in Canadian dollars during the class period and so a client could not hold foreign currency in a registered account. Conversions from Canadian dollars to a foreign currency and conversions from a foreign currency to Canadian dollars were necessary in order for the client to buy, hold and sell foreign currency denominated securities.

[38] In connection with transactions of this kind, Ms. Goddard explains that Nesbitt Burns sells the foreign currency to the client, withdrawing an appropriate amount of Canadian dollars from the client's account to pay for the cost of purchasing the foreign currency. Absent such withdrawal and a foreign currency conversion, the client's instructions to purchase the security could not be completed. Similarly, when a client wishes to sell that security, or when the client receives interest, dividend or other cash payments in respect of that security that are denominated in a foreign currency, foreign currency must be converted into Canadian dollars in order to be deposited into the client's Canadian dollar denominated account.

[39] Ms. Goddard believes that it would have been apparent to a client reviewing their account documentation that their registered accounts did not include holdings in foreign currencies. As a result, clients dealing with a Canadian financial institution would likely have understood that, unless their account agreements explicitly stated otherwise, they were denominated in Canadian dollars and not foreign currency.

[40] In June 2002, Nesbitt Burns sent an updated Fee and Interest Rate Schedule ("2002 Fee Schedule") to all of its clients (registered and non-registered account holders). The 2002 Fee Schedule covered fees that came into effect in September 2002. There is no evidence about what, if anything, Nesbitt Burns disclosed to clients before delivery of this 2002 Fee Schedule.

[41] The cover page of the 2002 Fee Schedule sets out the following note regarding foreign currency conversions:

> 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.
>
> [Emphasis Added.]

[42] Aside from the cover sheet, the actual 2002 Fee Schedule is one page. It lists various fees and interest rates. The schedule includes the typical yearly fee for any registered account. There are no fees listed that deal with the conversion of foreign currency.

[43] Nesbitt Burns used the 2002 Fee Schedule for all accounts (registered and non-registered). It did not distinguish between those accounts where currency conversions were always required (the registered accounts) and those accounts where the conversion could be carried out at the instance of the account holder.

[44] The 2002 Schedule does not state that conversions of Canadian currency were not required by the ITA or any other applicable laws or regulations. The defendants confirm that disclosure of this change in the ITA was not provided at any other time.

[45] As noted above the 2007 Client Account Agreement informed clients that “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 that Nesbitt Burns may earn revenues from the foreign currency conversion.

[46] The plaintiffs allege that this fee disclosure does not state when a foreign currency transaction is required. Further, the disclosure fails to make clear that it was Nesbitt Burns' practice to carry out a conversion of currency every single time that foreign currency is deposited into a registered account. In other words, from Nesbitt Burns' perspective, conversions of currency in the registered accounts were always "required" (although they were not required by the ITA).

2. What did InvestorLine Disclose?

[47] Connie Stefankiewicz, the President and Chief Executive Officer of the InvestorLine provided evidence. She confirms that the during the relevant time period, clients who had registered accounts with InvestorLine could not hold foreign currency in their InvestorLine

accounts. InvestorLine did not offer this service. Conversions from Canadian dollars to a foreign currency and conversions from a foreign currency to Canadian dollars were necessary so the client could buy, hold and sell foreign currency denominated securities

[48] When an InvestorLine client had a registered account that was denominated in Canadian dollars and wished to acquire and hold securities denominated in a foreign currency, a conversion of currency was necessary. Whether the client wanted to purchase, hold or sell a foreign currency denominated security in a registered account, every aspect of the transaction would necessarily require a foreign currency conversion.

[49] In connection with transactions of this kind, InvestorLine sold the foreign currency to the client, withdrawing an appropriate amount of Canadian dollars from the client's account to pay for the cost of purchasing the foreign currency. Absent such withdrawal and foreign currency conversion, the client's instructions to purchase the security could not be completed. Similarly, when a client wished to sell that security, or when the client received interest, dividend or other cash payments in respect of that security that were denominated in a foreign currency, foreign currency had to be converted into Canadian dollars again in order to be deposited into the client's Canadian dollar denominated account.

[50] Ms. Stefankiewicz believes that it should have been apparent to a client reviewing their account documentation that a registered account did not include holdings in foreign currencies, and, in general, clients dealing with a Canadian financial institution would likely have understood that, unless their account agreements and other documentation explicitly stated otherwise, the accounts were denominated in Canadian dollars and not a foreign currency.

[51] Further, Ms. Stefankiewicz states that an InvestorLine client should have expected, in a purchase and sale transaction involving foreign currency, that InvestorLine would have earned profit in connection with those transactions.

[52] In March 2003, InvestorLine sent its clients an updated Commission and Fee Schedule describing the fees in effect as of May 2003. There is no evidence about what, if anything, InvestorLine advised clients prior to delivery of this 2003 Schedule. In the 2003 Commission and Fee Schedule, InvestorLine disclosed the following with respect to foreign currency conversions:

> Conversion of any foreign currency <u>when necessary</u>, shall take place on the trade date using rates established by BMO InvestorLine. The <u>rates are subject to change without notice</u> and may vary depending on market, type of currency and the gross value of the trade. BMO <u>InvestorLine may earn revenue from foreign currency exchange</u> 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.
>
> [Emphasis added.]

[53] The plaintiffs allege that this 2003 Schedule did not explain when conversion of foreign currency would be "necessary". The 2003 Schedule does not state that foreign currency

transactions will occur every single time a purchase, sale, or dividend redemption takes place in a registered account, or whenever dividends are paid on foreign-denominated securities.

[54] The BMO InvestorLine Account Agreement (part of the Client Agreement document) covers registered and non-registered accounts. As previously noted, this document provided some information about "Foreign Currency Adjustments" under the General Terms and Conditions section. For ease of reference the relevant excerpts are set out again. The 2005 version of this agreement stated as follows:

> **3. Foreign Currency Adjustments**
>
> Conversion of any foreign currency when necessary, shall take place on the trade date using the applicable rate unless otherwise agreed to.

[55] In the 2007 version of the BMO InvestorLine Account Agreement, the following paragraph was added to section 3 dealing with "Foreign Currency Adjustments:

> 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.

EVIDENCE OF THE PLAINTIFFS

Mr. MacDonald

[56] Mr. Macdonald worked as an investment advisor with Nesbitt Burns between 1999 and 2004. On occasion, his clients asked him whether they could hold U.S. dollars in their registered accounts. As well, they asked why their dividend and interest income on foreign holdings in their registered accounts was automatically converted to Canadian funds. When he made inquires at Nesbitt Burns, he was repeatedly told that it was not possible to hold foreign currency in a registered account. The main reason given was that it was prohibited by Revenue Canada. In the summer of 2005, Mr. MacDonald learned that this was not accurate and that after a certain date money denominated in any currency could be held in these accounts (it is not disputed that the date is June 14, 2001.)

[57] After Mr. MacDonald learned that foreign currency could be held in the registered accounts, he decided to inquire further about the defendant's continuing practice of automatically converting all U.S. dollars in his registered accounts into Canadian dollars and charging fees without his authorization. On March 20, 2006, he wrote to the Chief Financial Officer of BMO Trust and asked specifically:

> (a) Who authorized the transactions and under what authority were they deemed necessary?

(b) How were the transactions determined to be in the best interest of the beneficiaries of the RRSP?

(c) How were the exchange rates determined for the foreign currency transactions?

[58] When he did not receive a reply from BMO Trust, he sent another letter requesting a reply. BMO Trust responded on May 17, 2006, but only on a "without prejudice" basis. The letter is not part of the record.

[59] Between 1999 and 2004, on occasion Mr. MacDonald instructed Nesbitt Burns to purchase and sell securities denominated in a foreign currency (U.S dollars) in his registered accounts. In connection with these transactions, Mr. MacDonald states that the defendants earned fees including foreign exchange fees and commission fees. Mr. MacDonald states that these fees were not disclosed. All of these fees were automatically withdrawn from Mr. MacDonald's registered accounts without authorization.

[60] Mr. MacDonald illustrates the foreign exchange fees and the commission fees through the following examples of a purchase and a sale of foreign securities in one of his registered accounts.

(a) Purchase of Securities

[61] Each time Mr. MacDonald instructed Nesbitt Burns to purchase a foreign denominated security, he was aware that Canadian funds would be converted to the appropriate foreign currency. However, without authorization, he states that the defendants applied an exchange rate which did not reflect the rate actually paid by them to effect these transactions.

[62] Specifically, he states that the defendants bought U.S. dollars at wholesale prices and then sold the U.S. dollars to him at a higher retail price. This difference between the actual cost of the foreign currency to the defendants and the cost charged to Mr. MacDonald (and all class members) on every foreign exchange transaction represents the foreign exchange fee that the defendants earned.

[63] Mr. MacDonald offers the following example. On March 3, 2003, he directed Nesbitt Burns to buy 500 shares of Tyco International Ltd. ("Tyco") at US$14.89. Tyco trades on the New York Stock Exchange in U.S. dollars. Therefore, it was necessary for Mr. MacDonald to buy U.S dollars to effect this stock purchase.

[64] According to his Nesbitt Burns statement for the month ended March 31, 2003, the exchange rate applied by Nesbitt Burns to this share purchase transaction was 1.5020. This means that it cost Mr. MacDonald CAN $1.5020 for each U.S. dollar that he purchased.

[65] The actual Bank of Canada exchange rate in effect on the day of the transaction was 1.4846. Mr. MacDonald states that this rate is indicative of the rate that the defendants would actually pay to acquire U.S. dollars. Therefore, the defendants paid approximately CAN $1.4846 to purchase the U.S. dollar but then charged Mr. MacDonald CAN $1.5020 for that same U.S.

dollar. On this single transaction, Mr. MacDonald states that the defendants generated a total foreign exchange fee equal to $129.54.

[66] In addition to the foreign exchange fee, the defendants also earned a $45.18 commission fee on this transaction.

(b) Sale of Securities

[67] Mr. MacDonald's evidence is that each time Nesbitt Burns sold a foreign denominated security, they systematically and automatically undertook a second transaction to convert the foreign currency to Canadian currency. He never provided any authorization to Nesbitt Burns (or any of the defendants) to carry out this conversion of U.S. dollars into Canadian dollars. Further, he states that his Account Agreement did not authorize or permit these conversions.

[68] It is Mr. MacDonald's evidence that when the defendants converted his or any of the class members' U.S. dollars to Canadian dollars, they bought the U.S. dollars from the class members at rates that were lower than the rates the defendants could exchange them at. In so doing, the defendants generated foreign exchange fees.

[69] For example, on May 12, 2003, Mr. MacDonald directed Nesbitt Burns to sell the 500 shares of Tyco that he purchased on March 3, 2003. They were sold at US$16.04, as is reflected in his account statement for the month ending May 31, 2003.

[70] Upon completing the sale, Mr. MacDonald states that the defendants converted the proceeds from U.S. to Canadian dollars at a rate of 1.38100 without his authorization. He explains that the defendants gave him CAN $1.381 for each U.S. dollar converted. The actual Bank of Canada rate on that day was 1.3887. As a result, Mr. MacDonald states that the defendants could get approximately CAN$1.3887 for each U.S. dollar that they sold on that date. Mr. MacDonald explains that the spread between these rates resulted in a total foreign exchange fee of $61.75 on this transaction.

[71] In addition to the foreign exchange fee, the defendants generated a commission fee of $34.81 (or 0.31% of the total proceeds of the transaction). Mr. MacDonald states that this commission fee is not clear or apparent on his May Nesbitt Burns Account Statement.

[72] In summary, Mr. MacDonald was aware that he could only hold Canadian currency in his registered account. He knew that a currency conversion would be required to purchase a foreign security. He knew that Nesbitt Burns could charge a fee but did not know what fee or if a fee was charged. Lastly, he states that he did not authorize the fees.

MR. ZOPPAS' EVIDENCE

[73] Lynn Zoppas is a retired school teacher. She has had an RRSP account with Nesbitt Burns since mid 1990. Her husband John Zoppas has managed their investments including the RRSP Nesbitt Burns registered account. Ms. Zoppas gave him a power of attorney to do so. Mrs. Zoppas did not file an affidavit. Mr. Zoppas provided the following evidence.

[74] For many years, Mr. Zoppas was the General Manager of Sales for Manulife Financial Corporation. In 2001, he retired from Manulife and then worked as a "self-employed investment advisor" until he retired in December 2010.

[75] In his affidavit, Mr. Zoppas states that he was troubled by fees incurred on transactions when he sold U.S. securities and immediately bought other U.S. securities. On these occasions, even though the securities were bought and sold within minutes of each other, Nesbitt Burns charged a foreign exchange fee to convert the proceeds of the sale to Canadian dollars, and then charged him a foreign exchange fee again to immediately convert the funds for the purchase back to U.S. dollars.

[76] Nesbitt Burns charged similar undisclosed and unauthorized fees on dividends that his wife received from U.S. stocks in her RRSP account. For example, on or about December 13, 2002, Mrs. Zoppas was granted a cash dividend in respect of 100 shares of Walt Disney Co. Holding Co. which she held in the Zoppas RRSP Account. For reasons unknown to Mr. Zoppas, Nesbitt Burns did not credit the dividend to the Zoppas RRSP Account for 27 days. When Nesbitt Burns finally credited the account on January 9, 2003, they converted the dividend to Canadian dollars, and charged a foreign exchange fee in the process. The original U.S. dollar amount of the dividend did not appear anywhere on Lynn's RRSP statement, nor was there any indication of the fees or exchange rate applied to the dividend.

[77] Mr. Zoppas states that he did not authorize the conversion of this dividend to Canadian dollars and it is not possible to ascertain from the statement the fees or exchange rate that was taken from the account in effecting this transaction.

[78] Further evidence was provided when Mr. Zoppas was cross-examined. He confirmed the following. He knew that his wife's RRSP account was a Canadian dollar dominated account. If he bought a U.S. security he knew that he had to pay for it in U.S. dollars. If there were no U.S. dollars in the account (because the account was a Canadian dollar denominated account), he knew that Nesbitt Burns had to effect a currency conversion. He knew that the exchange rate would be less favourable than the prevailing Bank of Canada rate. But he was unaware that he would be charged a fee for the conversion.

MR. VARGA'S EVIDENCE

[79] Mr. Varga worked at various CIBC branches from 1974 to 1990. He then worked as a real estate agent for 19 years. He has a strong interest in personal investing and has traded securities for himself for several years.

[80] In March 2006, he opened a self-directed RRSP account with InvestorLine. Before opening this account, he had held a securities trading account with Investorline. Upon opening the RRSP account, he transferred shares consisting of a mix of Canadian and U.S. securities from his trading account to this new RRSP account.

[81] When he opened the RRSP account, he did not understand that he could not hold U.S. funds in this account. Moreover, InvestorLine did not disclose to him that they would automatically effect foreign exchange conversions when he made trades and would charge him

an exchange rate which was less favourable than the rate Nesbitt Burns paid for currency exchanges.

[82] Mr. Varga opened the RRSP account with the intention of investing in a mix of Canadian and U.S. securities. He was stunned to discover that each time he sold U.S. securities to purchase other U.S. securities, InvestorLine converted the proceeds of the sale to Canadian dollars, charging him a foreign exchange fee and then immediately re-converted the same funds back to U.S. dollars to effect the next purchase, charging him an additional foreign exchange fee.

[83] As an example, on June 22, 2006, Mr. Varga sold 65 shares of Dell Inc. ("Dell") at US$23.93 per share in order to make a purchase of Parlux Fragrances Inc. ("Parlux"). These transactions are reflected in his account statement for the month ending June 30, 2006.

[84] Upon completing the sale of Dell Shares and without any authorization, Mr. Varga states that the defendants converted the proceeds from U.S. to Canadian dollars and earned a foreign exchange fee of $11.67 in the process. Immediately after making the Dell sale, Mr. Varga purchased 140 shares of Parlux Fragrances Inc. at US$10.7157 per share. This is reflected in the June Account Statement.

[85] In order to make this purchase, InvestorLine converted Mr. Varga's funds from Canadian dollars back into U.S. dollars. In so doing, InvestorLine generated another foreign exchange fee, this time equal to $18.75.

[86] Mr. Varga states that it is egregious that InvestorLine earned foreign exchange fees twice by converting currency back and forth unnecessarily in a matter of minutes with no purpose other than to enrich themselves.

[87] Mr. Varga had a similar experience with dividend earnings in his RRSP account. Once again, he states that he was charged undisclosed and unauthorized foreign exchange fees. This negatively impacted the dividends he earned on his U.S. stocks. He was particularly frustrated by a transaction which took place in April of 2006. When Mr. Varga opened his RRSP account, he deposited shares in Whole Foods Market Inc. ("WFMI"), a stock that trades in U.S. dollars on the Nasdaq exchange. On or about April 14, 2006, WFMI declared a dividend in U.S. dollars. For reasons unknown to Mr. Varga, InvestorLine did not credit the dividend to his account for ten days. When they finally credited his account on April 24, 2006, they did so in Canadian dollars. The original U.S. dollar amount of the dividend did not appear anywhere on his statement, nor did the exchange rate applied by InvestorLine when they made this conversion. Further, neither BMO Trust nor InvestorLine disclosed this information to Mr. Varga at any other time. Mr. Varga states that he did not authorize the conversion of the dividend to Canadian dollars.

[88] Similar unauthorized conversions occurred for every subsequent dividend that Mr. Varga received from his foreign securities. In each instance, the defendant delayed crediting the dividend for several days from the defendant's receipt of the payment and charged undisclosed fees when it finally credited his RRSP account.

Mr. Varga's Inquiries

[89] When Mr. Varga discovered that InvestorLine was automatically converting all foreign-denominated funds directed to his RSSP account into Canadian dollars (described above) and also taking foreign exchange fees on each conversion, he emailed InvestorLine on March 5, 2006 and asked that U.S. funds simply be held in his U.S. dollar account.

[90] Mr. Varga was told that it was not possible to hold U.S. currency within an InvestorLine registered account. He was not fully satisfied with the explanation given. Therefore, he made further inquiries of InvestorLine and was told that currency conversions for trades settled on the same day could be treated as "wash" trades. Mr. Varga understood this to mean that InvestorLine would indeed hold U.S. currency in his account, rather than converting it. In late April or early May of 2006, however, he received a dividend in U.S. currency and was surprised to find that InvestorLine converted it to Canadian dollars upon deposit.

[91] On May 2, 2006, Mr. Varga again wrote to InvestorLine for clarification. On May 3, 2006, he received a reply from InvestorLine which stated that:

(a) He was only able to hold Canadian currency in the RRSP account.

(b) For orders involving U.S. stocks, InvestorLine would "wash" the foreign exchange rate. This did not mean Mr. Varga would not be charged foreign exchange fees (as he had mistakenly understood), but rather that the same rate would be applied to purchase and sale of stocks which were traded on the same day.

(c) If he wanted to wash trades, he would have to call InvestorLine to request this "service" each time he made trades in U.S. securities in his RRSP account.

[92] During the course of his inquiries with InvestorLine, Mr. Varga states that he was informed that federal government regulation prohibited the holding of foreign-denominated funds in RRSP accounts. In his May 3, 2006 e-mail to InvestorLine, he referred to this belief. He later learned that this was not the case and that since 2001 there has been no government prohibition. However, he states that at no time did InvestorLine or any of the defendants advise him that his understanding was not correct.

[93] On June 25, 2006, Mr. Varga again wrote to InvestorLine to complain about the foreign exchange fees. He specifically asked why the unnecessary step of buying and selling Canadian dollars was taken and made the point that the only basis he could see for this step was for the defendant to earn a profit.

[94] InvestorLine replied and again offered Mr. Varga the option of "washing" trades in his account by phoning them each time he made a trade. Investorline did not respond to Mr. Varga's inquiry about the reasons for what he called unnecessary currency conversions.

[95] On June 26, 2006, Mr. Varga replied to InvestorLine and indicated his dissatisfaction with InvestorLine's practices and the failure to make the currency conversion practice clear. He

stated “Don’t you think the maker of the RULES should make the user of the rules, knowledgeable”. He explains that he was completely exasperated when he asked rhetorically in his email: “What kind of Idiot would sell US stocks to buy Cdn Currency so they could sell the Canadian currency to buy US stocks?”

[96] Mr. Varga was not cross-examined on his affidavit.

THE LEGAL FRAMEWORK

[97] Subsection 5(1) of the *CPA* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

> (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.

[98] 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 proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers." (*Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.).)

[99] Winkler J. pointed out in *Frohlinger v. Nortel Networks Corp*, [2007] O.J. No. 148 at para. 25 (S.C.J.), that the core of a class proceeding is "the element of commonality". It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm. Commonality is measured qualitatively rather than quantitatively. There

must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

[100] The decision to certify is not merits-based. The test must be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers and encouraging them to modify their behaviour: see *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 26-29; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 at para. 15.

[101] In *Hollick, supra,* at para. 25, the "some basis in fact" test was introduced when the court stated that "the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action."

[102] Since it is not the role of the court on a certification motion to "find facts", I conclude that *Hollick* directs the court to confirm that there is some evidence to support the s. 5 (b) – (e) requirements. This interpretation of the test is consistent with the low burden that rests on the plaintiff as explained in *Hollick* at para. 16 and consistent with how the numerous courts have applied the "some basis in fact" test (for example, see *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 61.)

5(1)(a) - Cause of Action

[103] The test under s. 5(1)(a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. 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: See *Hollick* at para. 25.
- 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 that the plaintiff cannot succeed: *Hunt v. Carey Canada Inc*, [1990] 2 S.C.R. 959 at para 33; *Cloud* at para. 41.
- Matters of law not fully settled in the jurisprudence must be permitted to proceed: *Ford v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 at para. 17(e) (S.C.J.).

[104] 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: *Hunt v. Carey Canada Inc., supra,* at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at 679 (C.A.).

[105] The statement of claim refers to various documents (i.e. the agreements between the parties, fee schedules and account documentation for each representative plaintiff). It is agreed that for the purpose of assessing the s. 5(1)(a) criterion, these documents are incorporated by reference into the pleading. This approach is consistent with well established case law: *Montreal Trust Co. of Canada v. Toronto-Dominion Bank* (1992), 40 C.P.C. (3d) 389 at 395-396 (Ont. (Gen. Div.)) ; *Lubarevich v. Nurgitz,* [1996] O.J. No. 1457 (Ont. (Gen. Div.)) ; *Vaughan v. Ontario (Minister of Health)* (1996), 49 C.P.C. (3d) 119 at 123 (Ont. (Gen. Div.)) and *Web Offset Publications Ltd. v. Vickery,* [1999] O.J. No. 2760 (C.A.)

[106] The statement of claim in this case discloses the following causes of action against each of the defendants:

(1) breach of fiduciary duty and duties as trustees;

(2) breach of contract; and

(3) unjust enrichment.

[107] The plaintiffs are not pursuing the negligence cause of action.

The Defendants' Position – There is No Cause of Action

[108] Before I consider each cause of action, I will summarize the defendants' position. Simply put, the defendants say that there is no cause of action. Two reasons are advanced.

[109] The first reason incorrectly characterizes the plaintiffs' claims. The defendants say that the claim depends upon the allegation that the defendants ought to have offered them the ability to hold foreign currency in their registered accounts after the tax law changed to allow foreign currency to be held in these accounts. They say that no cause of action can be premised on this allegation.

[110] While the plaintiffs may have initially taken this approach, this is no longer part of their claim. This approach was withdrawn during cross-examinations. Further, the plaintiffs have stated in their factum that the defendants are entitled to offer whatever financial product they choose to offer. The focus of the claim is on the manner in which this product (i.e. registered accounts) are offered and managed by the defendants. The plaintiffs say that the defendants are not permitted to profit from unnecessary, unauthorized and undisclosed or inadequately disclosed fees, particularly in circumstances where the defendants act as the statutorily imposed trustee of the registered accounts.

[111] Second, the defendants say it is plain and obvious that the plaintiffs' claim will not succeed because the documents referenced in the pleading show that the fee was disclosed and all account holders agreed to pay fees.

[112] It is not plain and obvious that the plaintiffs' claims cannot succeed. The documents referenced in the statement of claim do not support the defendants' position. This is obvious when the documents are reviewed. I now turn to an examination of these documents.

Nesbitt Burns Documents

[113] The following review of the Nesbitt Burns documents supports my decision to reject the defence position.

- The Nesbitt Burns RSP Trust Agreement states that BMO Trust and/or Nesbitt Burns "may charge" fees. Fees are not defined. This document does not state that Nesbitt Burns will always charge fees on the conversion of foreign currency.

- The cover page of the Nesbitt Burns 2002 Fee Schedule does not state that conversion of foreign currency in a registered account is always required. The actual one page schedule does not disclose the fees that are charged on the conversion of foreign currency that are the subject of this action.

- The Nesbitt Burns 2002 Fee Schedule does not distinguish between registered and non-registered accounts.

- The Nesbitt Burns documents do not state that conversions were not required by the ITA or any other law.

- The Nesbitt Burns RSP Trust Agreement states that it "shall" give reasonable notice to the Planholder of a change in the amount of fees.

- The Nesbitt Burns Account Opening Booklet states that the client "will pay any service fees or service charges relating to the services provided by BMO Nesbitt Burns for the administration of the Account". A service fee or service charge is not defined. This document does not state that a service fee or service charge includes a fee charged on the conversion of foreign currency. This document does not state that conversion of foreign currency is always required in a registered account and that the client will always pay a foreign exchange fee for this conversion.

- The Nesbitt Burns Account Opening Booklet (Charter of Clients Rights and Client Responsibilities section) states that clients' interests "always come first", that Nesbitt Burns ensures that clients are "always fully informed" and that "transactions cannot be made without [the client's] approval.

InvestorLine Documents

[114] The following review of the InvestorLine documents supports my decision to reject the defence position

- The May 1, 2003 Commission and Fee Schedule and the 2005 Client Agreement refer to foreign currency exchange "when necessary". It does not specify that for registered accounts, it is always necessary to convert foreign currency and does not state how this will occur in a registered account.

- The May 1, 2003 Commission & Fee Schedule states that InvestorLine "may" earn revenue from foreign currency exchange. This schedule does not distinguish between registered and non-registered accounts. It does not state that it is always necessary to convert foreign currency in a registered account and that a fee is always charged for this conversion. It does not state how this will occur in a registered account.

- The 2005 and 2007 Client Agreements state that the defendants "may charge administration and transaction fees" and state that the defendants "shall" give reasonable prior written notice of a change in the amount of the fees. It does not state that a fee is always charged when foreign currency is converted in a registered account and does not state how this will occur

Account Documentation for the Representative Plaintiffs

[115] A review of the claims of the representative plaintiffs and their account documents confirms it is not plain and obvious that their claims will fail.

1. Mr. MacDonald's Account Statements

[116] The statement of claim alleges that for the purchase of each foreign denominated security, Mr. MacDonald authorized the conversion of Canadian funds to the appropriate foreign currency to effect the purchase. In effecting each foreign currency transaction, the defendants charged Mr. MacDonald an undisclosed fee.

[117] On March 3, 2003, Mr. MacDonald directed Nesbitt Burns to buy 500 shares of Tyco at US$14.89 per share. The account statement confirms that an exchange rate of 1.5020 was applied to this share purchase. However the account statement does not reveal the rate that Nesbitt Burns incurred to purchase the U.S. dollars to effect the purchase of the Tyco shares. Further, it does not reveal the fee that Mr. MacDonald was charged or the steps that Nesbitt Burns took to carry out this share purchase.

[118] In the statement of claim Mr. MacDonald alleges that after each sale of a foreign denominated security the defendants "systematically and automatically undertook a second transaction to convert the foreign currency into Canadian currency without any instructions authorization or consent" from Mr. MacDonald. Further, on each occasion, Mr. MacDonald was charged an undisclosed fee.

[119] The account statement shows that on May 12, 2003, Mr. MacDonald directed Nesbitt Burns to sell the 500 shares of Tyco that he purchased on March 3, 2003, at US$16.04 per share. The account statement shows that an exchange rate of 1.38100 was applied to convert the proceeds of the sale of the Tyco shares into Canadian dollars. The statement does not reveal the fee that was charged as a result of this conversion.

2. Mrs. Zoppas' January 31, 2003 RRSP Nesbitt Burns Statement

[120] The Zoppas' statement provides a foreign content summary and the values are stated to be in Canadian currency. The account statement does not state that the client cannot hold U.S. currency in this registered account.

[121] The market value for U.S. shares is listed in Canadian currency. The conversion rate used is not revealed.

[122] The statement records the dividends paid during the month on shares held in U.S. companies. The value of the dividend is reported in Canadian currency. The statement does not reveal the original U.S. dollar value of the dividend or that the U.S. dividend is actually converted into Canadian currency (as opposed to simply reporting the value of the dividend in Canadian currency).

[123] The statement does not reveal what Nesbitt Burns does when the U.S. dividend is received. It does not reveal when the U.S. dividend is converted, the rate of conversion and what fee Nesbitt Burns earned and the cost to the account holder.

[124] The statement of claim alleges that the conversion of the dividend into Canadian dollars was not authorized. Further, an undisclosed fee was charged that was not authorized.

3. Mr. Varga's InvestorLine Account Statements

[125] The April 30, 2006 and June 30, 2006 RRSP statements record the value of the assets in the account in Canadian dollars. The statements do not state that you cannot hold U.S. funds in this account.

[126] The April statement records the receipt of a dividend from Whole Foods Market. In the statement of claim, Mr. Varga alleges that this dividend was granted in U.S. dollars on April 14, 2006 and that the defendant delayed crediting the dividend in his account until April 24, 2006, when the defendant converted the dividend into Canadian dollars ($13.20). Further, he alleges that the statement does not reveal the original U.S. value of the dividend, the exchange rate applied to convert it into Canadian dollars, the fee charged for same or the profit the defendant earned.

[127] The account statement records the dividend in Canadian currency. It does not state when the dividend was received, the original value in U.S. dollars, the exchange rate used to convert the dividend, the fee that was charged or why there was a delay in crediting the account with the dividend.

[128] On June 22, 2006, Mr. Varga alleges in the statement of claim that he sold 65 shares of Dell at US$23.93 per share. On the same day as the sale of the Dell shares, Mr. Varaga alleges that he bought 140 shares in Parlux at US$10.7157 per share.

[129] The statement of claim alleges that the proceeds from the sale of the Dell shares were converted into Canadian currency and then reconverted back into U.S. currency to buy the Parlux

shares. It is alleged that Mr. Varga did not authorize these foreign currency conversions, that the conversions were not disclosed and that he was charged an undisclosed fee.

[130] The June statement records the sale of the Dell shares and the purchase of the Parlux shares on the same day. The sale and purchase are recorded in Canadian currency. The statement does not reveal the conversion of the sale proceeds into Canadian currency and the conversion back into U.S. dollars to buy the Parlux shares. The statement does not reveal the various exchange rates that were used for these conversions. The statement does not reveal the fee that was charged to carry out these conversions.

The Pleading Discloses Causes of Action

[131] The following review confirms that the statement of claim discloses three causes of action that are properly pleaded. As already noted, it is not plain and obvious that any will fail.

1. Breach of Contract

[132] The statement of claim alleges that the parties entered into contracts. The contracts are identified as well as the relevant terms of these contracts. The pleading describes the defendants' conduct that amounts to a breach of the terms in question. This cause of action is properly pleaded.

2. Breach of Fiduciary Duty and Duties as Trustees

[133] The pleading alleges that BMO Trust is the trustee of the registered accounts and that Nesbitt Burns and InvestorLine acted as the trustee's agents in respect of the registered accounts. It is alleged that the accounts in question are registered trust accounts. The terms of the agreements that support this are set out. As well, it is pleaded that Nesbitt Burns undertakes with the account holder that clients' interests always come first

[134] The claim pleads that the class members cannot hold title to their own accounts. In order to benefit from the deferred tax status, the assets in these accounts must be held by an individual or company (such as the defendants) that is licensed to carry on an annuities business, act as trustee of such accounts or issue investment contracts.

[135] As a trustee, it is alleged that BMO Trust is a fiduciary and owes the representative plaintiff and class members all the duties of a fiduciary. As agents for BMO Trust, it is alleged that Nesbitt Burns and InvestorLine owed the same fiduciary duties to the representative plaintiffs and class members.

[136] It is further alleged that the defendants are fiduciaries by virtue of the contractual statutory and regulatory framework in which they operate. Particulars of this pleading are provided .

[137] 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.

[138] The plaintiffs plead that by profiting from unauthorized, unnecessary and undisclosed or inadequately disclosed foreign exchange fees, the defendants breached these duties.

[139] 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.

[140] First, the defendants assert that the management of trust accounts is an arm's length, commercial transaction and they were and are entitled to earn a profit for trustee services rendered. While the plaintiffs do not dispute that the defendants are entitled to charge agreed upon fees for services rendered, the premise of the pleading is that the foreign exchange fees were not properly disclosed and authorized by the class. Further, as trustees and fiduciaries, the pleading alleges that the defendants are obliged to act in the best interest of the class members not to allow their interests to conflict, not to take any undisclosed profits fees or charges from the registered accounts and not to engage in any unauthorized transactions.

[141] 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. The plaintiffs agree that the defendants are free to choose which types of services to offer to their clients. 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 with undisclosed fees or generate a profit at the expense of the account holder.

[142] This cause of action is properly pleaded.

3. Unjust Enrichment

[143] There are three essential elements to an unjust enrichment claim: an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of juristic reason for the enrichment. (See *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] S.C.J. No. 21 at para. 30.)

[144] The statement of claim pleads that the defendants was enriched by receiving the undisclosed fees on the foreign exchange transactions, that the plaintiffs were deprived because they suffered a corresponding deprivation and there is no juristic reason for the defendants enrichment.

[145] The defendants assert that the unjust enrichment cannot succeed in the face of a claim for breach of contract because the contract is the justification for the alleged enrichment. As well, they assert that the claim is repetitive of the disgorgement remedy that is claimed under the breach of fiduciary duty cause of action. The second point has no merit. The plaintiffs are entitled to advance alternative causes of action.

[146] The defendants' argument fails to appreciate the plaintiffs' pleading. The plaintiffs allege that, as trustees and fiduciaries, the defendants owed the class over-arching duties at common law and in equity which extend beyond the scope of the defendants' contractual obligations. The claim of unjust enrichment arises in respect of the alleged breach of the defendants' equitable duties. It is the alleged breach of these duties that allegedly negates any juristic reason for the defendants' enrichment. The fact that the plaintiffs have alternative causes of action, one being breach of contract, does not stand in the way of the plaintiffs alleging unjust enrichment.

[147] As a result, this cause of action is properly pleaded and it is not plain and obvious that the claim will not succeed.

[148] I conclude that criterion 5(1)(a) is satisfied.

5(1)(b) - Identifiable Class

[149] The plaintiffs propose the following class definition:

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

[150] Subsection 5(1)(b) requires that there be "an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant". The purpose of a class definition is: (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *see Bywater v. Toronto Transit Commission,*

[1998] O.J. No. 4913, 27 C.P.C. (4th) 172 at para. 10 (Gen. Div.). To serve the mutual benefit of the parties, the class definition should not be unduly narrow or unduly broad.

[151] Class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class. There simply must be a rational connection between the class member and the common issues: *Sauer v. Canada (Attorney General),* [2008] O.J. No. 3419 (S.C.J.) at para. 32

[152] 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.

[153] 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.

[154] The class definition satisfies all of these requirements and objectives.

[155] One concern that the defence raised relates to a settlement in an earlier foreign exchange fee action that involved the defendants in this action (*Skopit v. BMO Nesbitt Burns Inc.* "Skopit"). The defence was concerned that the class definition in this action included some people whose claims were released in the Skopit settlement. This concern was resolved during the hearing when counsel agreed to amend the class definition as set out above.

[156] I conclude that criterion 5(1)(b) is satisfied.

5(1)(c) - Common Issues

[157] Subsection 5(1) of the *CPA* requires that "the claims or defences of the class members raise common issues". 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 …

[158] For an issue to be common it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: See *Hollick* at para. 18.

[159] An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant: See *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.).

[160] The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: See *Western Canadian Shopping Centres Inc.*, *supra,* at para. 39.

[161] The core of a class proceeding is the element of commonality; there must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this: See *Frohlinger, supra* at para. 25; *Fresco, supra,* at para. 21.

[162] An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: See *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[163] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in the evidence to show that issues are common: *Hollick* at para. 25. As Lax J. stated in *Fresco,* at para. 61 “[w]hile only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common. Otherwise, the task for the common issues trial judge would not be to determine a common issue, but rather to identify one.” [Emphasis added.]

Proposed Common Issues

[164] The plaintiffs ask the court to certify the following common issues:

(1) Were the defendants, or any of them, acting as trustees of the Trust Accounts held by the class members, and if so, what duties did the defendants owe to the class members in this capacity?

(2) 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")?

(3) 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?

(4) 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?

(5) Did the defendants breach their contracts with the class members?

(6) 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")?

(7) 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?

(8) 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?

(9) Have the defendants been unjustly enriched at the expense of the class by their receipt of undisclosed fees on all FX Transactions?

(10) 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?

(11) Is the class entitled to an accounting and disgorgement of all profits earned by the defendants from the FX Transactions?

(12) Should the defendants be permanently enjoined from conducting unauthorized foreign exchange transactions and charging undisclosed and unauthorized fees on any FX Transactions?

(13) Does the defendants' conduct warrant an award of punitive damages, and, if so, in what amount?

(14) 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?

The Defendants' Position

[165] The defendants' primary position on this motion is that the plaintiffs do not have a cause of action and so there can be no common issues. I have already rejected this argument above.

[166] The defendants' response to the common issues is general in nature. They do not attack a specific common issue and explain why it should not be certified. Rather, the defendants identify the following three reasons why the issues cannot be decided in common.

(1) There is a limitation period issue that cannot be decided on a common basis (the defendants say that this issue also impacts the class definition and the preferable procedure criteria).

(2) Most of the common issues are premised on a finding that a fiduciary duty and/or a trust duty exist for all class members. Whether such a duty exists is disputed and in any event is a highly individual issue. As a result, the defendants say that these common issues lack commonality and cannot be decided on a common basis.

(3) The plaintiffs have not provided a sufficient evidentiary basis to allow the court to conclude that the commonality criteria has been satisfied. On the contrary, the defendants state that the proposed representative plaintiffs who filed evidence were each sophisticated, knowledgeable and informed about the allegedly undisclosed facts relating to registered accounts and foreign currency conversions. As a result, the defendants state that the outcome of the fiduciary analysis with respect to the representative plaintiffs would not mean "success for all", as there is no prospect for success for them on the claims as alleged based on the evidence they have filed.

[167] I will consider the limitation period and deal with remaining arguments as I consider the common issues.

The Limitation Period Issue

[168] The defence raised this issue for the first time during oral argument. I requested a written submission and gave the plaintiffs an opportunity to respond. The defence argument is as follows.

[169] The limitation period issue is relevant to whether the criteria under sections 5(1)(b), (c) and (d) are satisfied. With respect to the class definition, the defendants say that the class definition is overly broad because it includes people who do not have a claim because a limitation period has expired. With respect to common issues and preferable procedure, the defendants argue that discoverability is a critical element of the limitations issue and discoverability is an inherently individual matter incapable of being determined on a class-wide basis.

[170] This action deals with alleged breaches of duties beginning in June 14, 2001. The statement of claim was issued on August 2, 2006, and at that time claims were asserted only on behalf of Nesbitt Burns clients. When the claim was issued, s. 28 of the *CPA,* suspended the limitation periods for claims of the putative class members as against Nesbitt Burns.

[171] On March 6, 2007, the statement of claim was amended to add claims against InvestorLine. From March 6, 2007, s. 28 suspended limitation periods for the claims of putative class members against InvestorLine.

[172] Pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, on January 1, 2004, the defendants say it is necessary to consider what limitation periods, if any, apply to the claims

asserted in the action and whether class members' claims expired before the action was commenced (in respect of claims asserted against Nesbitt Burns) or before the statement of claim was amended (in respect of claims asserted against InvestorLine).

[173] Since some of the relevant acts or omissions preceded January 1, 2004, the limitations analysis engages the basic limitation and discoverability rules set out in ss. 4 and 5 of the *Limitations Act, 2002*, as well as the transition provisions in s. 24. In particular, the defendants say that s. 24(5) applies. This section raises the issue of discoverability. It states as follows:

> s.24 (5) If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:
>
> 1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.
>
> 2. If the claim was discovered before January 1, 2004, the former limitation period applies.

[174] If the person's claim was not discovered before January 1, 2004, then the statute applies as though the act or omission occurred on January 1, 2004 and the two year limitation period applies, subject to discoverability. If the claim was discovered before January 1, 2004, the former limitation period applies.

[175] The defendants argue that the application of s. 24(5) will trigger individual issues as follows. To determine when a claim was discovered the defendants say it is necessary to decide which limitation period applies - a former limitation period or the basic limitation period set out in s. 4 of the *Limitations Act, 2002*. If the putative class member discovered the claim before January 1, 2004, then the claim would not be barred. However, before reaching this conclusion, the defendants say there must be a determination for each individual claim as to when the claim was discovered.

[176] The plaintiffs dispute the defendants' position. They plead that the class members' claims arose on June 14, 2001, when the ITA was amended to permit foreign denominated cash to be held in registered accounts. As a result, the plaintiffs say that the limitation period for all class members is the same. It is six years and runs from June 14, 2001. Since the claims against all defendants were commenced within the six year period, the plaintiffs say that there is no limitation period issue. This position assumes that all class members had registered accounts with one or both of the defendants as of June 14 2001.This is not reflected in the class definition that is broad enough to include those who opened accounts after January 1 2004. In such a case a two year limitation period applies as set out in ss. 4 and 5 of the *Limitations Act*.

[177] The defendants have not filed a statement of defence. Therefore, it remains to be seen whether a limitation defence will be pursued and the specifics of this defence. I appreciate that the above defence argument may represent what will be in the statement of defence. However, it is premature to be concluding that an anticipated defence should narrow the scope of the class

definition, render the proposed common issues to individual to certify and/or conclude that a class action is not the preferable procedure. This is particularly so when the parties disagree on what the limitation period is and how it applies in this case. Furthermore, the defendants did not provide any evidence to support their position and so we are dealing with a hypothetical class member. There must be some basis in the evidence to justify the defendants' position.

[178] The possibility that discoverability may require an individual inquiry is not a reason to deny certification. The Ontario Court of Appeal addressed this issue in Pearson v. Inco, [2005] O.J. No. 4918 at para.63 as follows:

> [I]t is now clear as a result of this court's decision in Cloud, supra, at paras. 61, 81-82 and 95, that the possibility of individual limitation defences and discoverability issues does not necessarily negate a finding that the case is suitable for certification.

[179] Recently the Court of Appeal again addressed this issue in Smith v. Inco, 2011 ONCA 628 at para.165:

> 165 Other certification decisions have recognized that discoverability is often an individual issue that will require individual adjudication after the common issues are determined. Indeed, when this court certified this action, Rosenberg J.A. referred to the possibility of individual limitation defences: see Pearson v. Inco Limited (2005), 78 O.R. (3d) 641, at para. 63. On the trial judge's findings, the applicability of the Limitations Act as he characterized its applicability was not a common issue. (Emphasis added.)

[180] If the defendants have a potential limitation period defence, they can plead it in the statement of defence. If the parties continue to disagree about whether there is a limitation period issue, then it may be possible to propose a further common issue to address this dispute. Of course this will depend on whether such an issue can be managed on a common basis. At this point it is premature to decide one way or the other.

[181] If there is a limitation issue, it is apparent that it will not apply to all claims and all class members. It would be grossly unfair to conclude on this motion that a possible limitation defence, that might apply to some class members, for some of their claims, should limit certification. The specific management of the limitation period issue (assuming the issue exists) is best dealt with later in the life of this class action.

Analysis of the Common Issues

[182] The following analysis and conclusions apply to the common issues as a group.

[183] The common issues describe the registered accounts as "Trust Accounts". Since the first common issue asks whether the defendants were acting as trustees, it is presumptuous for this common issue to assume that the accounts are "Trust Accounts". One might say that this is an obvious characterization of the registered accounts, since the Nesbitt Burns agreement with the account holder is called a trust agreement, the InvestorLine agreement is called a Declaration of

Trust and BMO Trust is described as the trustee and can delegate the trust duties to Nesbitt Burns. However, the accounts are not called “trust accounts” in the various documents. For example, the Nesbitt Burns RSP Trust Agreement refers to the RRSP Plan. In other documents reference is simply made to the “account”. None of the account statements use the phrase “trust account”.

[184] All of the accounts are registered accounts. Whether they are trust accounts and whether the defendants acted as trustees is the issue. As a result, the certified common issues must be amended to reflect this point. The phrase “trust accounts” must be replaced with the phrase “registered accounts”.

[185] Several basic evidentiary points demonstrate that the common issues can be assessed in common.

- Each common issue deals with only with registered accounts.
- Class members cannot hold the registered accounts directly but must have the registered accounts held by qualified entities such as the defendants.
- Standard form documents (described in the review of evidence) were used to define the relationship between BMO Trust and Nesbitt Burns/InvestorLine.
- Standard form documents (described in the review of evidence) were used to define the relationship between the defendants and the representative plaintiffs and class members.
- Standard form documents (described in the review of evidence) were used to provide the representative plaintiff and class members with monthly statements.
- The monthly statements that the representative plaintiffs produced always reported the value of the assets sold and purchased in Canadian dollars. The statements never revealed the value in the foreign currency, the actual foreign currency exchange transactions or the fees that resulted. The defendants offered no evidence to show that this method of reporting varied. The monthly statements followed the same systemic approach

[186] The liability common issues (#1-5) are all rooted in common agreements and a systemic approach to managing the registered accounts and reporting to the account holders. This is compelling evidence of commonality. Further, it shows that the resolution of these common issues is capable of extrapolation to each class member and will clearly move the litigation forward.

[187] Several courts have certified common issues that ask if a defendant owes a duty as a trustee or a fiduciary. Where, as in this case, the relationship is rooted in common documents and there is a systemic approach to the business in question, then the issue will be accepted as common: *Sharbern Holding Inc. Vancouver Airport Centre Ltd.* [2005] B.C.J. No. 347 at paras.

69-85 (certification upheld on appeal, at [2006] B.C.J. No. 437, 2006 BCCA 96); Elms v. Laurentian Bank of Canada, [2001] B.C.J. 1284 (C.A.) at para.44; Caponi v. Canada Life Assurance, [2009] O.J. No. 114 (paras.31-45)

Common Issue # 1

[188] There is evidence that this common issue exists. The defendants use the term trust and trustee throughout their standard form agreements. They describe BMO Trust as a trustee of the registered accounts and state that BMO Trust may delegate such powers to Nesbitt Burns and/or InvestorLine. Whether a duty exists and what duties were owed is capable of being assessed in common for the reasons I have stated above.

Common Issues # 2, 3 and 4

[189] These common issues assume that the defendants owe the class members duties as fiduciaries and duties as trustees. Common issue #1 will decide if any of the defendants owe a duty as a trustee. To the extent that the answer is no, then the common issues trial judge will amend common issues 2, 3 and 4 accordingly.

[190] The defendants dispute the existence of a fiduciary duty. It is not clear why the plaintiffs ask in common issue # 1 if a trust duty exists and yet assume the fiduciary duty exists for these common issues. One might say that the existence of the fiduciary duty in the circumstances of these registered accounts is obvious. Nevertheless, the better approach is to first ask if there was a fiduciary relationship between any one or more of the defendants and the class members and then ask whether there was a breach of the fiduciary duty.

[191] Common issue 2 asks if the defendants breached their fiduciary duties and duties as trustees owed to the class by making unauthorized, systematic exchanges of foreign currency.

[192] Common issue 3 asks if the defendants breached 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.

[193] Common issue 4 defendants asks if the defendants breached 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.

[194] Common issues 2, 3 and 4 focus on the systemic exchange of foreign currency. There is evidence that the foreign exchange process was systemic. Each representative plaintiff has provided sample monthly account statements and have elaborated on these statements in their affidavits. Foreign currency was always exchanged and the manner of reporting remained the same. Both were systemic.

[195] There is some evidence (detailed above) that the exchange of foreign currency was unauthorized (common issue 2). It is Mr. MacDonald's evidence that he did not authorize the conversion of currency that happened on the sale of foreign denominated currency. Mr. Zoppas' evidence is that he did not authorize the exchange of foreign currency when the U.S. dividend

was paid. Mr. Varga did not authorize InvestorLine to exchange the foreign currency. Prior to May 2006, Mr. Varga did not know that he could not hold foreign currency in his registered account.

[196] There is some evidence (detailed above) that undisclosed and unauthorized fees were charged for unauthorized exchanges of foreign currency (common issue 3). This happened when trades in U.S. securities were settled in foreign currency. Mr. MacDonald evidence is at paras. 61-71 above. Mr. Zoppa's evidence is at paras. 75-77 above. Mr. Varga's evidence at paras. 83-87 above.

[197] There is some evidence (detailed above) that undisclosed unauthorized fees were charged for authorized exchanges of foreign currency (common issue 4). Mr. MacDonald authorized the purchase of foreign securities and he knew that Canadian funds had to be converted to carry out the purchase. It is his evidence that the fee for this conversion was not disclosed or authorized.

[198] For common issues 3 and 4 there is some evidence that fees in general would be charged and there is some evidence that the defendants did not tell the account holder that he would always be charged a fee as a result of foreign currency conversions.

Common Issue # 5

[199] This common issue asks if the defendants breached their contracts with the class members. First, there is evidence that the contracts exist and that they were standard form. There is also evidence that the contracts were breached. I refer to the extensive evidence about unauthorized systemic exchanges of foreign currency and the undisclosed and unauthorized fees.

[200] Prior to August 2007, the Nesbitt Burns contract documents did not identify that foreign currency conversions occurred and the resulting fees. The Fee Schedule did not advise clients that conversion of foreign currency was always required in a registered account and that a fee would always be charged. The Fee Schedule did not reveal fees for foreign currency conversions.

[201] In August 2007, the Nesbitt Burns Client Account Agreement was revised. In particular it included the following statement concerning foreign denominated registered accounts:

> Operation of the Account
>
> …
>
> (b) … 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.

[202] However, at all times the Charter of Client Rights was in place. Nesbitt Burns represented that "Clients interests always come first" and agreed that "Transactions cannot be made without [the clients] approval".

[203] While the Nesbitt Burns disclosure improved as of August 2007, this does not eliminate evidence of a breach. Transactions could not be made without client approval and there is no evidence that approval for the foreign currency conversion and resulting fee was obtained. Similarly, InvestorLine did not tell clients that that conversion of foreign currency was always required in a registered account and that a fee would always be charged. As a result, I reject the defendants' argument that by August 2007, no evidence exists to support the common issues extending beyond this date.

Common Issues # 6-14

[204] The remaining common issues focus on damages. The defendants say that the plaintiffs have not presented a workable plan to show how these common issues can be dealt with on a class wide basis. I disagree.

[205] The Litigation Plan explains how damages will be quantified and distributed. The representative plaintiffs believe that the defendants have sufficient records to ascertain the precise amount of damages owing to each class member. The defendants have not provided any evidence to dispute this point.

[206] Each representative plaintiff provided their best calculation of the fee using the information that was available to them. They each prepared a spreadsheet with a calculation showing the fees incurred on the sample foreign currency conversions that they discuss in their evidence. The defendants do not dispute the correctness of the math.

[207] In the *Skopit* action, the court approved a settlement based on a spreadsheet that the defendants provided. This spreadsheet disclosed the amount of applicable foreign exchange revenue received from each class member during the class period. This spreadsheet was used to ascertain each class member's proportionate share of the settlement fund. Given that *Skopit* was an action involving foreign exchange fees and the same bank, I fail to see why the same approach is not workable in this case.

[208] In this case, the plaintiffs propose that they will use a similar methodology to determine damages and distribute amounts recovered. In particular, the defendants will disclose the total amount of foreign exchange fees paid by each class member with respect to each currency conversion in their registered accounts. The plaintiffs seek restitution in the total amount of these fees.

[209] The plaintiffs propose that damages will be distributed to the class members in accordance with the defendants' records. For example if the common issues judge determines that all foreign exchange currency fees that the defendants charged are to be disgorged, then each class member will be reimbursed the foreign exchange fee to their accounts as reflected in the defendants' records.

[210] If punitive damages are awarded, they will be distributed to the class members on a *pro rata* basis. I add that since the entitlement to punitive damages will focus on the systemic behaviour of the defendants, this issue is quite capable of being managed on a common basis.

[211] The defendants' attempt to demonstrate that the plan has no merit. They rely on the evidence of Bob Markovski. He explained that at any given time, the foreign exchange desk may have had adequate inventory on hand to meet the aggregate foreign currency requirements of the businesses it served. At other times, it may have been short a particular foreign currency on an aggregate basis in which case it was required to transact in the marketplace to make up the shortfall. Depending upon the supply of foreign currency and the existing exchange, the foreign exchange desk may end up having acquired the foreign currency inventory sold to the client at an exchange rate that was more expensive to it than the rate promised and delivered to the client. Based on this evidence, the defendants say that it cannot be assumed that the fee charged resulted in a profit being earned by the defendants.

[212] Mr. Markovski's evidence refers to having to sell the foreign currency at an exchange rate that was more expensive to it than the rate promised and delivered to the client. This evidence assumes that there was some contact between the defendant and the client concerning the exchange of foreign currency and the agreed upon rate. The plaintiffs' evidence is that no such contact ever occurred. If as Mr. Markovski suggests, the defendant actually contacted the account holder every time an exchange of foreign currency was required and agreed on a "promised" rate with the account holder, then such evidence would be in the possession of the defendants. Mr. Markovski's bare statement is based on a discussion he had with C.J. Gavsie, a person who works on the bank's foreign trading desk.

[213] The defendants offered no evidence to show how this evidence impedes the ability to manage the damage issues on a common basis. They also offered no evidence to show how often the bank is required to sell foreign currency at a loss.

[214] The plaintiffs must offer some basis in fact for the common issue. The burden on a defendant is inversely heavy as Cullity J. explained in *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 at para. 68. This is particularly so when the evidence is in the possession of the defendants. The bare statement suggesting a promise to sell at a certain rate and a loss for the defendants that may occur does not satisfy this burden.

[215] Aside from the points noted above, the defendants did not challenge the damage common issues.

[216] I am satisfied that the damage common issues can be assessed in common. I conclude that criterion 5(1)(c) is satisfied.

5(1)(d) - Preferable Procedure

[217] Subsection 5(1)(d) of the *CPA* requires that a class proceeding be the preferable procedure for the resolution of the common issues. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[218] The preferability inquiry is conducted through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification and by taking into account the

importance of the common issues to the claims as a whole including the individual issues: see *Cloud* at para. 73; *Hollick* at paras. 27-28; and *Markson* at para. 69.

[219] In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: see *Hollick* at para. 29.

[220] The preferable procedure requirement can be met even when there are substantial individual issues. However, a class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

[221] This class proceeding will be a fair, efficient and manageable method of advancing the class members' claims. The plaintiffs' litigation plan sets out a reasonable and workable plan that includes a comprehensive notice to the class, documentation management systems, discovery protocols, and the retainer of experts as required. As the case progresses, the plan will be reviewed and revised as required.

[222] 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 if not completely determine the damages, as well. The issues that are common to all class members should be decided in one action. No useful purpose is served by requiring a multiplicity of individual proceedings. This would result in excessive and unnecessary expense for the class members and the judicial system.

[223] For many class members, particularly those of modest means, the cost of litigating individual claims against the defendants would be prohibitive. A class action improves their access to justice.

[224] A class proceeding will achieve the goal of behavior modification. If the defendants are found liable they will be required to account for the undisclosed fees that they charged the class members.

[225] I conclude that criterion 5(1)(d) is satisfied.

5(1)(e) – A Representative Plaintiff with a Workable Litigation Plan

[226] Whether a proposed representative plaintiff can provide adequate representation was addressed by Chief Justice McLachlin in *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534 at para. 41:

> In assessing whether the proposed representative plaintiff is adequate, 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 class members generally). 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 ….

[227] The defendants argue that Mr. MacDonald is not a suitable representative plaintiff for two reasons. First, they suggest that because he engaged in litigation with the Bank of Montreal in the past, his motivation in prosecuting this action may be personal. There is no evidence to suggest Mr. MacDonald's motivation is personal. Furthermore, that fact that he may have sued the defendants in the past is not a reason to conclude that he is unsuitable as a representative plaintiff.

[228] Second, the defendants assert that Mr. MacDonald is an improper representative plaintiff because he was a former financial advisor with Nesbitt Burns. In this role, the defendants say that he knew and was obliged to know, and was obliged to advise his clients, that the defendants converted currency in the registered accounts and charged a fee. When the totality of the evidence is considered, I see no reason to accept the defendants' argument.

[229] Mr. MacDonald's uncontroverted evidence is that between 1999 and 2004, he inquired, on his own behalf and on behalf of his clients, as to why the defendants were engaged in the currency conversions. His uncontroverted evidence is that he was advised erroneously by Nesbitt Burns that the holding of foreign currency in registered accounts was prohibited by Revenue Canada. He learned for the first time in 2005 that the ITA, in fact, permitted foreign currency to be held in registered accounts and then began pursuing this action, on behalf of the putative class to redress the defendants' alleged wrongs.

[230] Similarly, the defendants assert that Mr. Zoppas is an inappropriate representative plaintiff because he became aware of the fee either through his work as an investment industry professional or by probing the defendants' representatives.

[231] I reject the defendants' argument. In essence, they are suggesting that any class member who was able to ascertain that he or she was being charged a fee for the exchange of foreign currency is an improper representative plaintiff. Clearly, an account holder has to discover that he is being charged the fee in order to decide to pursue the claim. If the defendants' logic operated to disqualify Mr. Zoppas and Mr. MacDonald, a claim for inadequate disclosure could ever proceed.

[232] The defendants argue that Lynn Zoppas is not a suitable representative plaintiff because she has not filed an affidavit to demonstrate that she is willing or capable of representing the class. Further they say that John Zoppas is not a suitable representative plaintiff because he does not have a claim. It is obvious from the evidence that Mr. Zoppas was included as a representative plaintiff with his wife because he managed her registered accounts pursuant to a power of attorney. In these circumstances I am satisfied that they are both suitable representative plaintiffs. Requiring Mrs. Zoppas to file an affidavit in this situation would serve no useful purpose. Class counsel has suggested that Mrs. Zoppas might be removed and her husband proceed as a representative plaintiff. This is a possible approach to this unusual situation. However at this early stage in the action I prefer to leave both in place as representative plaintiffs

[233] As noted above there is a workable litigation plan. I find that Mr. MacDonald, Mr. Varga, and Mr. and Mrs. Zoppas are suitable representative plaintiffs. Mr. MacDonald, Mr. Varga and Mr. Zoppas are experienced investors. Mr. MacDonald and Mr. Zoppas have had careers in the financial services industry. Mr. Varga has a background in personal banking. They understand the claim, and the procedure to be followed in a class proceeding. They have engaged competent counsel who are vigorously and capably prosecuting the claim. The representative plaintiffs have remained actively involved in the litigation, gathering evidence, instructing counsel, and seeking updates.

[234] I conclude that criterion 5(1)(e) is satisfied.

CONCLUSION

[235] The plaintiffs have satisfied the criteria under s. 5 of the *CPA*. I certify this action as a class action.

[236] In summary, I make the following orders:

(1) This action is certified as a class proceeding pursuant to the *CPA* on the basis of the common issues approved in these reasons.

(2) The class is defined as follows:

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

(3) James Richard MacDonald, Lynn D, Zoppas, John A. Zoppas and Tamas Varga are appointed as the representative plaintiffs for the class.

(4) Notice of certification will be given to the class in a manner approved by the court. Costs of the notice to be determined by the court.

[237] Counsel shall prepare an order that incorporates my conclusions and complies with s. 8 of the *CPA*.

[238] If the parties cannot agree on costs, they must deliver written submissions to the court by March 2, 2012, in accordance with a schedule to be agreed upon by counsel. This schedule must allow for a brief reply from the plaintiffs.

_____

C. Horkins J.

Released: January 31, 2012

CITATION: MacDonald v. BMO Trust Company, 2012 ONSC 759
COURT FILE NO.: 06-CV-316213 CP
DATE: 20120131

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

REASONS FOR JUDGMENT

C. Horkins J.

Released: January 31, 2012