AMENDED THIS FEB - 1 2018 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☒ RULE/LA RÈGLE 28.02 ( )
☐ THE ORDER OF
L'ORDONNANCE DU
DATED / FAIT LE
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No. 06-CV-316213 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Plaintiffs

- and -

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

Defendants

FRESH AS AMENDED STATEMENT OF DEFENCE

1. The Defendants, BMO Trust Company, BMO Nesbitt Burns Inc. and BMO InvestorLine Inc., deny each and every allegation contained in the Fresh as Amended Statement of Claim, unless specifically admitted below. The Defendants also deny that the Plaintiffs or any of the class members are entitled to any of the relief claimed in paragraph 1 of the Fresh as Amended Statement of Claim.

Overview

2. At all relevant times, both prior to and subsequent to June 2001, retail clients of the Defendants who had registered accounts could not hold foreign currency in those accounts. The Defendants did not offer this service, nor was it under any obligation to do so. Prior to June 2001, by law, under the *Income Tax Act*, foreign currency could not be held in registered accounts, and therefore, if a client wished to trade or hold securities denominated in a foreign currency in her registered account, the purchases or sales of such securities necessitated the conversion of Canadian dollars to the foreign currency and *vice versa*. Similarly, any deposits of foreign currency into the registered account and any receipt of dividends or interest into the registered account required a currency conversion.

3. Beginning in June 2001, amendments to the *Income Tax Act* permitted foreign currency to be held in registered investment accounts. While changes to tax legislation permitted foreign currency to be held in registered accounts, there was no obligation on the part of any financial institution, including any of the Defendants, to offer its clients investment accounts with this feature. As a result, if an account holder during the class period wished to transact and hold foreign currency-denominated securities in her or his registered account, it was necessary for Canadian dollars to be converted into foreign currency and for foreign currency to be converted into Canadian dollars with respect to the purchase and sale of such securities or in respect of dividend or interest payments made in respect of such securities. In connection with the foreign currency conversions, the Defendants purchased or sold the foreign currency or Canadian dollars required, and like other financial institutions, charged a fee for that service.

4. All of these facts regarding registered accounts and foreign currency conversions were known or ought have been known to the Plaintiffs, at least two of who are sophisticated financial professionals. Nonetheless, the Plaintiffs have brought this action seeking damages and ancillary relief and alleging with respect to the class period (i) an obligation on the part of the Defendants to have offered registered accounts where foreign currency could be held, and (ii) a failure on the part of the Defendants to make disclosure relating to foreign currency conversions and the fees charged by the Defendants in respect of those conversions. The Plaintiffs' claim is misguided in every respect, from the legal duties alleged to the factual underpinnings of the claim.

The Defendants

5. *Relationships between the defendants.* The Defendants are part of the BMO Financial Group.

6. BMO Nesbitt Burns Inc. ("BMO Nesbitt Burns") is a licensed investment dealer. BMO Nesbitt Burns is an indirect subsidiary of Bank of Montreal, a Canadian chartered bank ("Bank of Montreal").

7. BMO InvestorLine Inc. ("BMO InvestorLine") is a licensed investment dealer. BMO InvestorLine is an indirect subsidiary of Bank of Montreal.

8. BMO Trust Company ("BMO Trust") is a trust company under the *Trust and Loan Companies Act*. It is a wholly-owned subsidiary of Bank of Montreal. BMO Trust is the trustee for custodial purposes only with respect to registered accounts offered by BMO Nesbitt Burns and BMO InvestorLine.

9. *The business of BMO Nesbitt Burns.* BMO Nesbitt Burns is a full service investment dealer. BMO Nesbitt Burns offers its clients the ability to open a variety of investment accounts through branches of BMO Nesbitt Burns located across Canada, including cash, margin and registered accounts (which are all cash accounts).

10. The Plaintiffs, James MacDonald and Lynn Zoppas, were clients of BMO Nesbitt Burns. Mr. MacDonald is a former investment advisor employee of BMO Nesbitt Burns.

11. Clients of BMO Nesbitt Burns work with an investment advisor who provides the client with information and where appropriate advice regarding investments. The information and advice provided by an investment advisor can include information and advice regarding foreign currency conversions in their BMO Nesbitt Burns accounts.

12. Mr. MacDonald was an investment advisor employed by BMO Nesbitt Burns from 1999 to 2004. In that role, and in order to qualify as and fulfill his responsibilities as an investment advisor and a registrant under the *Securities Act* (Ontario), Mr. MacDonald was required to understand the way that investment accounts operate (including registered accounts), and he was required to understand the way that foreign currency conversions occur in connection with securities transactions and deposits of foreign currency in registered accounts. Mr. MacDonald's circumstances are described in more detail below.

13. BMO Nesbitt Burns offers its clients the ability to open registered accounts including a registered retirement savings plan account ("RRSP"), registered education savings account ("RESP"), registered retirement investment funds account ("RRIF"), tax free savings account ("TFSA"), locked-in retirement account ("LIRA"), locked-in investment fund account ("LIF") and locked-in retirement income funds account ("LRIF"). Registered accounts offer tax benefits for clients, including tax sheltering in respect of deposits or revenue generated in the account. The Plaintiffs, Mr. MacDonald and Ms. Zoppas, held RRSP accounts at BMO Nesbitt Burns.

The assets deposited to a registered account cannot be removed other than in certain prescribed circumstances and, in some cases, without giving rise to tax ramifications.

14. *The business of BMO InvestorLine.* BMO InvestorLine is an investment dealer operating across Canada. BMO InvestorLine is a discount brokerage and therefore, unlike BMO Nesbitt Burns, a client of BMO InvestorLine does not work with an investment advisor in respect of her account, nor does a client of BMO InvestorLine receive investment advice. Clients of BMO InvestorLine have access to information about their accounts, including regarding foreign currency matters, through BMO InvestorLine representatives.

15. In addition to regular cash and margin accounts, BMO InvestorLine also offers registered investment accounts of the kind described above in paragraph 13, which accounts are all cash accounts.

16. The Plaintiff, Michael Halasz, opened a self-directed RRSP account at BMO InvestorLine in or around November 2000.

Registered Accounts & Foreign Currency

17. The Plaintiffs' allegations concern the necessity for, and the disclosure relating to, foreign currency conversions with respect to registered accounts at BMO Nesbitt Burns or BMO InvestorLine.

18. *Defendants did not offer foreign-currency denominated registered accounts.* In June 2001, Canadian tax legislation changed, permitting taxpayers to hold foreign currency in registered accounts. While holding foreign currency in registered accounts became permissible, no law obligated the Defendants (or any other financial institution) to offer its clients a service that took advantage of this development.

19. During the class period, neither BMO Nesbitt Burns nor BMO InvestorLine offered registered accounts denominated in a foreign currency. As a result, if a client wanted to buy, hold or sell a security denominated in a foreign currency in a registered account, a conversion of or to Canadian dollars in the registered account was necessary. Even if a client was able to source foreign currency from a third party, it was necessary to convert that currency into

Canadian dollars for it to be deposited into the registered account before a security denominated in a foreign currency could be acquired. It was never an option during the class period that a client of BMO Nesbitt Burns or BMO InvestorLine could hold foreign denominated currency in her or his registered account.

20. During the class period, all registered accounts offered by BMO Nesbitt Burns and BMO InvestorLine were denominated in Canadian dollars. Nor did any other large Canadian investment dealer offer to their clients registered investment accounts that were denominated in a foreign currency.

21. When a client of BMO Nesbitt Burns or BMO InvestorLine had a registered account that was denominated in Canadian dollars and s/he wished to acquire and hold securities denominated in a foreign currency, a conversion of currency was necessary. In connection with transactions of this kind, BMO Nesbitt Burns or BMO InvestorLine (as the case may be) 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 are denominated in a foreign currency, foreign currency was required to be converted into Canadian dollars again in order to be deposited into the client's Canadian dollar-denominated registered account.

22. With respect to the registered accounts, it was not possible to hold foreign currency at any time during the class period in the account, nor was it possible to hold foreign currency generated by the registered account outside the registered account without, for instance, giving rise to a taxable withdrawal from the account. If a client chose 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.

23. In September 2011, BMO Nesbitt Burns and BMO InvestorLine began to offer the service of holding foreign in registered accounts.

24. *Disclosure regarding registered accounts & foreign currency.* It was apparent to a client reviewing her or his account documentation that registered accounts did not include holdings in foreign currencies, and clients dealing with a Canadian financial institution understood that, unless their account agreements explicitly stated otherwise, the accounts were denominated in Canadian dollars and not any foreign currency. The clients' account statements plainly disclosed that the account did not hold foreign currency and that the registered accounts were Canadian dollar denominated.

25. In addition, with respect to BMO Nesbitt Burns, communications also occurred between clients and investment advisors explaining that foreign currency conversions were a necessary aspect of purchasing, holding and selling foreign-currency denominated securities. With respect to BMO InvestorLine, if a client placed a trade in respect of a foreign-currency denominated security, the client's computer screen disclosed that the transaction was being effected in Canadian dollars and that a conversion of currency had occurred to complete the client's transaction.

26. *Disclosure regarding foreign currency conversions and fees.* A client of BMO Nesbitt Burns or BMO InvestorLine pays fees in exchange for the services s/he receives, depending on the nature of the account, including transaction services, the provision of information and reporting. Clients compensate BMO Nesbitt Burns and BMO InvestorLine for the services they receive in a variety of ways, including by paying a fee when foreign currency was converted to give effect to the clients' instructions to buy, hold or sell a security. During the class period, clients knew that they did not receive a service without compensating the service provider. The fees paid in respect of foreign currency conversions contributed towards compensating BMO Nesbitt Burns and BMO InvestorLine for all the services provided by them to clients in respect of their accounts.

27. As in any commercial arms-length transaction involving a purchase and a sale, profit would sometimes be generated through the purchase and sale of foreign currency to BMO Nesbitt Burns and BMO InvestorLine clients.

28. A client of BMO Nesbitt Burns or BMO InvestorLine knew, in a purchase and sale transaction involving foreign currency, that BMO Nesbitt Burns or BMO InvestorLine may have

earned profit in connection with those currency conversion transactions. In addition, BMO Nesbitt Burns specifically disclosed that fact to its clients when it sent an updated Fee and Interest Rate Schedule to its clients in June 2002 in respect of fees that came into effect in September 2002. The Fee and Interest Rate Schedule was updated thereafter from time to time.

29. In March 2003, BMO InvestorLine sent its clients an updated Commission and Fee Schedule describing the fees in effect as of May 2003 and specifically noting that revenue was earned on foreign currency conversions. The Commission and Fee Schedule was updated thereafter from time to time.

30. *The nature of foreign currency conversions.* For BMO Nesbitt Burns and BMO InvestorLine, foreign currency conversions typically occurred at the spot rate plus a small fee (or "spread") which was added automatically to the spot rate. In some circumstances, clients transacting large amounts of foreign currency negotiated a different fee.

31. Foreign currency conversions occurred in the following manner:

(a) requests for ordinary-course 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;

(b) transactions involving large amount of foreign currency could involve a discussion of the exchange rate directly with the foreign exchange desk;

(c) neither BMO Nesbitt Burns nor BMO InvestorLine acted 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;

(d) the foreign exchange desk handled foreign currency conversions for many businesses within BMO Financial Group, including BMO Nesbitt Burns and BMO InvestorLine; and

(e) sometimes, the foreign exchange desk had adequate previously purchased inventory on hand to meet the aggregate foreign currency requirements of the

businesses it served, and at other times it did not and was required to transact in the marketplace to meet particular foreign currency requirements.

The Positions of the Plaintiffs

32. *James MacDonald.* Mr. MacDonald was an investment advisor employed by BMO Nesbitt Burns from 1999 to 2004. Mr. MacDonald held registered accounts at BMO Nesbitt Burns during the period of his employment. The agreement between BMO Trust Company and Mr. MacDonald in respect of his registered accounts disclosed to him that BMO Nesbitt Burns would "charge fees, commissions and expenses" to the account, and that BMO Trust Company would apply cash held in the account for such fees. The trust agreement specifically excluded a fiduciary relationship. The ability of BMO Nesbitt Burns to charge service charges and service fees for the services provided for the account was also disclosed in the account agreement between Mr. MacDonald and BMO Nesbitt Burns.

33. Mr. MacDonald understood at all times with respect to registered accounts and foreign currency conversions:

(a) as a registrant, he was required to know and understand the products he was recommending and selling to clients, including as to whether registered accounts were denominated in Canadian dollars or a foreign currency;

(b) he knew that BMO Nesbitt Burns did not offer foreign-currency denominated registered accounts;

(c) he provided that information to clients and told his clients they could only hold Canadian currency in their registered accounts, both before and after the tax laws changed to permit that;

(d) he understood and told clients that if they wished to acquire, hold or sell foreign currency denominated securities they had to convert Canadian dollars;

(e) he understood, with respect to foreign currency conversions, that BMO Nesbitt Burns could have charged a fee, like other financial institutions; and

(f) he understood that information about the fees charged was in the account documentation.

34. *The Zoppas.* Lynn Zoppas had a BMO Nesbitt Burns registered account from approximately 1996. No claim is asserted in respect of any account John Zoppas had with any Defendant, and therefore he has no cause of action. However, it is alleged that Mr. Zoppas controlled the account of his wife, Mrs. Zoppas. Mr. Zoppas was a sophisticated financial professional and registrant for many years, working for an investment dealer and then as a self-employed investment advisor.

35. As a BMO Nesbitt Burns client, Mrs. Zoppas received the 2002 Interest Rate and Fee Schedule described above. As a result, she knew that BMO Nesbitt Burns earned revenue on foreign currency conversions. Her account statements reported to Mrs. Zoppas that the assets in her account (including cash) were reported in Canadian dollars, and that her account did not hold other currencies.

36. Mr. Zoppas knew at all times that:

(a) tax law permitted his wife to hold foreign currency, but he was also aware that Mrs. Zoppas' registered account was a Canadian dollar denominated account;

(b) when foreign currency was going to be deposited into an account denominated in Canadian dollars, a conversion was required, and that when he wanted to purchase a security denominated in a foreign currency a conversion from Canadian dollars was required;

(c) when a dividend was paid on a U.S. security in U.S. dollars that it was converted into Canadian dollars before it was deposited into the registered account;

(d) the registered account owned by his wife did not hold U.S. dollars, and he was not provided with any documentation by BMO Nesbitt Burns that suggested to him that BMO Nesbitt Burns allowed his wife's account to hold U.S. dollars; and

(e) there is a charge for converting foreign currency when it is sold to him.

37. *Michael Halasz.* In or around November 2000, Mr. Halasz opened a self-directed RRSP account at BMO InvestorLine and in connection with opening that account, he was provided with and/or had access to the InvestorLine account opening documentation.

38. In particular, Mr. Halasz also received BMO InvestorLine account statements. The statements disclose, in prominent text, that the account is in Canadian dollars, and it shows that there are no foreign currency holdings. The account statement discloses the rate at which foreign currency conversions occurred in respect of the purchase and sale of foreign currency denominated securities. Mr. Halasz knew that his account did not report foreign currency holdings and transactions other than in Canadian dollars.

39. As a BMO InvestorLine client, Mr. Halasz received and/or had access to the 2003 Commission and Fee Schedule referred to above, which explained to him that "BMO InvestorLine may earn revenue from foreign currency exchange since we sell the applicable currency to you at the ask price and buy from you at the bid price."

The Defendants Do Not Have the Duties Alleged

40. *No duty to offer foreign-currency denominated registered accounts.* Contrary to the allegations in, among other places, paragraphs 22 and 30 of the Fresh as Amended Statement of Claim, the Defendants had no obligation to offer foreign-currency denominated registered accounts and they did not offer such accounts, to the knowledge of the Plaintiffs and the other class members.

41. *No fiduciary duties.* Contrary to the allegations in paragraphs 20 to 21 of the Fresh as Amended Statement of Claim, none of the Defendants owed the Plaintiffs (or other class members) a fiduciary duty, and specifically in respect of foreign currency conversion-related matters in their registered accounts.

42. With respect to BMO Trust, the relationship between the Plaintiffs and BMO Trust was contractual in nature, with BMO Trust in the role as a custodian only of the assets in the registered accounts acting as a bare trustee. Through its agreements with the Plaintiffs (and other class members) and through its agreements with BMO Nesbitt Burns and BMO InvestorLine, BMO Trust delegated to the investment dealers the day-to-day responsibility for managing the registered accounts.

43. The relationships between BMO Nesbitt Burns, BMO InvestorLine and the Plaintiffs and other class members were governed by the terms of the account agreements and the relationships were not fiduciary in nature. With respect to the Plaintiffs, as set out above, the individual circumstances that are capable in principle of giving rise to a fiduciary duty were not present.

44. Contrary to the allegations in paragraphs 66 to 69 of the Fresh as Amended Statement of Claim, there was no breach of fiduciary duty by the Defendants, at all and with respect to foreign currency conversion-related matters in registered accounts.

45. *Alleged contract and tort duties and breaches.* The Defendants fulfilled every contractual and other obligation of disclosure that they had to the Plaintiffs and other class members with respect to registered accounts, foreign currency conversions and fees. There were no "secret" or "undisclosed" fees, as alleged in, among other places, paragraphs 59 to 64 of the Fresh as Amended Statement of Claim.

46. Contrary to the allegations in paragraphs 70 to 72 of the Fresh as Amended Statement of Claim, there was no breach of a principal and agent relationship; as pleaded above, the purchase and sales of foreign currency with the Plaintiffs and other class members were conducted on a principal to principal basis.

47. Contrary to the allegations in paragraphs 73 to 74 of the Fresh as Amended Statement of Claim, the conduct of foreign currency conversions with respect to registered accounts complied in every respect with the agreements between the Plaintiffs (and other class members) and the Defendants and there was not, as alleged, any breach of those agreements.

48. The Defendants met every industry and other standard applicable to the conduct of their business with the Plaintiffs and other class members.

49. *All transactions authorized.* Contrary to the allegations in paragraph 31 of the Fresh as Amended Statement of Claim, each and every foreign currency conversion in respect of the registered accounts of the Plaintiffs and other class members was authorized.

50. *No unjust enrichment.* Contrary to the allegations in paragraphs 75 to 77 of the Fresh as Amended Statement of Claim, the Defendants were not unjustly enriched at the Plaintiffs'

expense or the expense of the other class members. All fees earned were earned pursuant to valid and enforceable account agreements and such agreements were the juristic reason for the earning of such fees.

No Damages; Limitations

51. The Plaintiffs and the class members suffered no damages with respect to the foreign currency transactions. The cost to the Plaintiffs and the other class members of acquiring foreign currency from the Defendants was no greater (and may have been less) than the cost of acquiring equivalent amounts of foreign currency from other sources.

52. In any event, any damages claimed by the Plaintiffs and the class members were caused by their own failure to act on the information available to them and to make arrangements to acquire foreign currency, or to avoid foreign currency transactions with respect to their registered accounts.

53. With respect to the claim for prejudgment interest, no interest is payable in any event in respect of the period of time in which the action was stayed.

54. Furthermore, claims that the Plaintiffs and other class members may have had (which claims are denied) are barred as a result of the operation of the *Limitations Act, 2002*, the equivalent limitations legislation in other provinces, and the doctrine of laches.

Conclusion

55. The Defendants ask that this action be dismissed with costs.

January 22, 2018

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