Dec. 20/2012

JUSTICE PERELL

Dec. 8/2012

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

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence if forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $5,000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $100.00 for costs and have the costs assessed by the court.

Date AUG. 2/2006 Issued by "A. MILLER"
Local registrar

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Lawyers for the Defendants

CLAIM

1. The plaintiffs claim on their own behalf and on behalf of the Class:

   (a) damages in the amount of $100,000,000 or such other sum as this Court finds appropriate arising from the unauthorized transactions effected by the defendants in, and the defendants' collection of undisclosed and unauthorized foreign exchange fees from, registered trust accounts including registered retirement savings plan accounts ("RRSP"), registered retirement investment funds ("RRIF"), locked-in retirement accounts ("LIRA"), locked-in investment funds ("LIF"), locked-in retirement income funds ("LRIF"), registered education savings plans ("RESP"), and Tax Free Savings Accounts ("TFSA") (collectively, the "Trust Account(s)") held by the plaintiffs and the Class, and in particular:

      (i) undisclosed and unauthorized fees charged in connection with the unauthorized, systematic exchange of foreign currency held in the Trust Accounts to Canadian dollars ("Unauthorized Foreign Exchange Transaction(s)"); and,

      (ii) undisclosed fees charged in connection with the authorized exchange of foreign currency in the Trust Accounts in furtherance of an authorized purchase of foreign investments ("Foreign Exchange Transaction(s)") (collectively, with the Foreign Exchange Transaction(s) the "FX Transaction(s)");

   (b) a declaration that the defendants have breached their fiduciary and/or contractual obligations to the Class by effecting Unauthorized Foreign Exchange Transactions and/or by charging undisclosed fees on all FX Transactions;

   (c) a declaration that the defendants have been unjustly enriched at the expense of the Class by their receipt of undisclosed fees on all FX Transactions;

(d) a declaration that 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;

(e) an accounting and disgorgement to the Class of all profits derived by the defendants from the FX Transactions;

(f) a permanent injunction prohibiting the defendants from conducting Unauthorized Foreign Exchange Transactions and a permanent injunction prohibiting the defendants from charging undisclosed fees on any FX Transactions;

(g) punitive damages in the amount of $10,000,000 or, such other amount as this Court deems fit, arising from the high-handed, arrogant and oppressive manner with which the defendants have administered the Trust Accounts in knowing breach of trust, breach of contract, and in breach of their fiduciary duties to the plaintiffs and the Class;

(h) certification of this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, and an order appointing the plaintiffs as representative plaintiffs on behalf of the Class as defined herein;

(i) pre-judgment and post-judgment interest on the amount claimed in (a) 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;

(j) costs of this action fixed on a substantial indemnity basis; and,

(k) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The plaintiff, James Richard MacDonald ("MacDonald"), is an individual residing in Stouffville, Ontario, who has been diligently saving for his retirement. To that end, like other Class Members, MacDonald has invested and continues to invest in two Trust Accounts, an RRSP account and a LIRA account. These accounts were administered by BMO Trust Company ("BMO Trust") and BMO Nesbitt Burns Inc. ("Nesbitt") during the Class Period (defined below), until they were transferred to another trust company and brokerage firm in January 2005.

3. The plaintiffs, Lynn D. Zoppas ("Mrs. Zoppas") and John A. Zoppas ("Mr. Zoppas") are wife and husband, residing Mississauga, Ontario. They too, have been saving for their retirement. Mrs. Zoppas has held and continues to hold an RRSP account administered by BMO Trust and Nesbitt throughout the Class Period. Mr. Zoppas has provided instructions to and received advice from Nesbitt on behalf of Mrs. Zoppas on the authority of a power of attorney granted by her to Mr. Zoppas. Mr. Zoppas is, therefore, a necessary and proper party to this proceeding.

4. Michael Halasz ("Halasz") is an individual residing in Ottawa, Ontario. Like the other plaintiffs, he has been saving for his retirement. He holds an RRSP account with BMO InvestorLine Inc. ("InvestorLine") that was administered by BMO Trust and InvestorLine during the Class Period.

5. The defendants, BMO Trust, Nesbitt, and InvestorLine, are companies forming part of the BMO Financial Group, a highly diversified financial services conglomerate, reporting assets of $298 Billion at October 31, 2005 and having its origins in BMO Bank of Montreal, which owns and/or controls the other Defendants.

6. BMO Trust was incorporated or continued pursuant to the *Trust and Loan Companies Act*, S.C. 1991, c. 45 (the "TLCA"), with its registered head office in Toronto, Ontario. It is or was, during all or part of the Class Period, the trustee of Trust Accounts owned by members of the Class. During the Class Period all cash balances in the Class members' Trust Accounts are and were held by BMO Trust in accounts at BMO Bank of Montreal.

7. Nesbitt is a company incorporated under the laws of Canada with its registered head office in Toronto, Ontario. Nesbitt is a full service investment advisory firm which, among other things, administers Trust Accounts, acting both as principal and as agent for BMO Trust. It has been a member of the Investment Dealers' Association, the Investment Industry Regulatory Organization of Canada and the Toronto Stock Exchange.

8. InvestorLine is a company incorporated under the laws of Canada with its registered head office in Toronto, Ontario. It is a "discount" brokerage, which, among other things, provides its customers with the ability to open and hold self-directed RRSPs, LIRAs, self-directed RRIFs, LIFs, LRIFs, self-directed RESPs and self-directed TFSAs. Customers of InvestorLine are able to trade in their accounts without the direct interface of an investment advisor, and can effect trades by telephone with an InvestorLine representative, by automated telephone trading services, or through the internet.

9. On all accounts opened by customers of InvestorLine, InvestorLine acts as the "introducing broker" and Nesbitt acts as the "carrying broker". All InvestorLine customers are considered clients of Nesbitt for accounting and regulatory purposes. Nesbitt is responsible for the trade executions and settlement, custody of securities and preparation of trade confirmation and account statements of InvestorLine customers.

10. BMO Bank of Montreal is a chartered Canadian bank carrying on business throughout Canada. It owns BMO Trust, InvestorLine, and Nesbitt and provides banking services for each of BMO Trust, InvestorLine, and Nesbitt, including provision of bank accounts into which currency held for the benefit of the Trust Accounts is or may be deposited, and conversion of currencies from and to foreign and Canadian currencies.

THE PROPOSED CLASS

11. The plaintiffs bring this action pursuant to the *Class Proceedings Act, 1992* on behalf of the following class (the "Class"):

All current and former clients of BMO InvestorLine ("InvestorLine") and BMO Nesbitt Burns Inc. ("BMO NB") resident in Canada, who held one or more registered account(s) 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.

THE TRUST ACCOUNTS

12. RRSPs are basic tax planning arrangements by which a taxpayer's interest in assets is structured so as to defer the payment of taxes in accordance with Division G of Part I (the "Deferred Income Arrangement Division") of the *Income Tax Act* of Canada (the "*Income Tax Act*").

13. An RRSP is a savings plan that is registered with the Canada Revenue Agency. The central features of an RRSP, from a tax planning perspective, are that the taxpayer is permitted to deduct payments made into the RRSP from income in the year that the payment is made, and that the income and growth in value of the investments in the RRSP is tax sheltered until it is withdrawn. The RRSP must mature when the annuitant reaches the age of 69, at which time the amount remaining in the account may be paid

out to the annuitant, rolled into a RRIF, or used to purchase an annuity, or any combination of the three.

14. A LIRA is a special kind of RRSP that holds locked-in pension funds that have been transferred out of a pension plan. The funds in a LIRA come from vested pension assets from a previous employer of the taxpayer. LIRAs offer the same tax sheltered growth as an RRSP, but they differ in that, among other things, the taxpayer cannot withdraw the funds held in a LIRA until a specified age and then usually only at a certain rate. When the LIRA matures, the remaining funds are generally rolled into a LIF, which is a special form of RRIF, or used to buy an annuity.

15. A RRIF is an arrangement between an annuitant (generally aged 69 or older) and a "carrier" (as defined in s. 146.3 of the *Income Tax Act*) under which the carrier undertakes to pay to the annuitant (or his or her spouse/partner after death of the annuitant) a minimum annual sum from the amount held by the carrier for the annuitant at rates required by the *Income Tax Act*. BMO Trust is a "carrier".

16. An RESP is a savings plan that allows for earnings on contributions to an RESP to be tax exempt until paid out towards the cost of a beneficiary's post-secondary education expenses. It, too, is registered with the Canada Revenue Agency.

17. A TFSA is a savings account that is registered with the Canada Revenue Agency. A taxpayer may place after-tax income into the TFSA account, subject to an annual contribution limit. Any income and capital gains generated within the account are sheltered from taxation, and can be withdrawn at any time. TFSAs first became available on January 1, 2009.

18. Importantly, in order for an arrangement to qualify as a Trust Account, the assets forming the subject matter of the Trust Account cannot be held directly by the Class Member. Rather, the assets must be held by, *inter alia*, an individual or company licenced or otherwise authorized under the laws of Canada or a province to carry on in Canada an annuities business, or to act as a trustee, or to issue investment contracts.

BMO Trust is one such authorized entity, and in this case, BMO Trust is or was the authorized trustee/carrier for the Trust Accounts of the plaintiffs and the Class.

19. The owners of Trust Accounts receive the benefit of deferred tax status or tax sheltered growth for their payments into and holdings in the Trust Accounts. As a matter of public policy, residents of Canada are encouraged to save for and provide for their retirement from active employment, to save for and provide for the higher education of Canadian youths and to save for and provide for other financial goals.

THE TRUST RELATIONSHIP

20. Throughout the Class Period, BMO Trust exercised control over the assets in the Class Members' Trust Accounts. At all material times the trustee, BMO Trust, was a fiduciary of the Trust Account holders (i.e. the Class Members) and owed them all the duties of a fiduciary, both in general, and as particularized herein. In addition, BMO Trust was contractually obliged to operate the Trust Accounts as agreed and directed by the Class Members.

21. As agents for BMO Trust, Nesbitt and InvestorLine also owed the same fiduciary duties to the Class Members.

22. Further, BMO Trust, InvestorLine, and Nesbitt owed a duty to the Class Members to develop and maintain an operational infrastructure, including computer systems, that would allow the Trust Accounts to be administered in accordance with the contractual obligations, applicable statutory regimes and fiduciary obligations the defendants owed to the Class Members.

QUALIFIED INVESTMENTS IN TRUST ACCOUNTS

23. The Deferred Income Arrangement Division of the *Income Tax Act* does not limit the kinds of investments that can be made in an RRSP or RRIF. However, investments that do not fall within the definition of qualified investment stipulated in the *Income Tax Act* may give rise to the attribution of income to the taxpayer who is the annuitant under the RRSP or RRIF at the time that the investment is made.

24. At all relevant times, subsection 146(10) of the Income Tax Act stipulated that where, at any time in a taxation year, a trust governed by an RRSP or RRIF, respectively, acquires a non-qualified investment, the fair market value of the non-qualified investment at the time that it is acquired must be included in computing the income for the year of the taxpayer who is the annuitant under the RRSP or RRIF at that time.

25. Non-qualified investments are not permitted in RESPs. There have been no restrictions for taxation purposes on the types of investments that can be held in TFSAs since their introduction.

26. Prior to June 14, 2001, foreign currency and deposits denominated in foreign currency were non-qualified investments for purposes of a Trust Account.

27. Prior to June 14, 2001, sections 146 and 204 of the *Income Tax Act* stipulated that "qualified investment" for a Trust Account, meant

> (a) money that is legal tender in Canada... and deposits (within the meaning assigned by the *Canada Deposit Insurance Corporation Act* or with a bank) of such money standing to the credit of the trust,...

28. However, on June 14, 2001, the definition of "qualified investment" was expanded by the *Income Tax Amendment Act, 2000,* S.C. 2001, c. 17 to exclude the limitation of "that is legal tender in Canada", with the effect that from June 27, 1999, qualified investments include foreign currency (the "2001 Amendments"). After the 2001 Amendments, sections 146 and 204 of the Income Tax Act stipulated that "qualified investment", for a Trust Account, means, *inter alia,*

> (a) money... and deposits (within the meaning assigned by the *Canada Deposit Insurance Corporation Act* or with a branch in Canada of a bank) of such money standing to the credit of the trust,...

29. As of June 14, 2001 foreign currency and deposits denominated in foreign currency with a bank branch in Canada are qualified investments for Trust Accounts.

Any foreign currency in Trust Accounts from June 27, 1999 would not be subject to the "inclusion in income" provisions of the *Income Tax Act*.

30. The defendants knew or ought to have known of the pending amendment to the definition of "qualified investment" in the Deferred Income Arrangement Division of the *Income Tax Act* from at least as early as August 8, 2000, when notice of the intended change to the *Income Tax Act* was given to them by the Federal Department of Finance. The defendants knew or should have known of the coming amendment as of the date of that announcement, and they should have made changes or prepared changes to the manner in which they operated the Trust Accounts in order to cease all automatic conversions of foreign currency to Canadian currency, as was, and remains their practice, as detailed below, as of the date the change in definition became effective.

THE IMPUGNED FX TRANSACTIONS

31. Despite the 2001 Amendments to the *Income Tax Act*, throughout the Class Period and without any instructions, authorization, consent, or any prior notice whatsoever to the Class Members, the defendants systematically and automatically have converted and continue to convert foreign currency in Trust Accounts to Canadian currency (Unauthorized Foreign Exchange Transactions). For example, foreign currency paid into a Trust Account upon the sale of an equity denominated in a foreign currency, or foreign currency paid into a Trust Account in the form of a dividend from a foreign investment is automatically converted to Canadian funds.

32. Not only do the Unauthorized Foreign Exchange Transactions occur without authorization from the Class Members, but in effecting the Unauthorized Foreign Exchange Transactions the defendants charge an undisclosed fee to Class Members, which is systematically and automatically withdrawn from the Trust Accounts.

33. Furthermore, throughout the Class Period, the defendants did not and do not charge the Class Members the best available exchange rate in effecting the conversion, nor did/do they charge to the Class Members the price actually paid by the defendants

to effect the transactions (the "Bank Foreign Exchange Rate"). Rather, the defendants add a percentage fee (the "Foreign Exchange Fee") (the particulars of which are not known to the plaintiffs but are known to the defendants) to the rate charged to the defendants, without the agreement of or any notice whatsoever to the Class Members. The Foreign Exchange Fee is retained by the defendants, for their benefit, at the expense of the Class Members, and their retirement, education or other savings plans.

34. The plaintiffs seek, on their own behalf and on behalf of the Class, damages in the amount of the total Foreign Exchange Fees and the Bank Foreign Exchange Rate charged to them and the Class (and the corresponding amount unlawfully withdrawn from their and the Class' Trust Accounts) in respect of all Unauthorized Foreign Exchange Transactions effected during the Class Period.

35. Similarly, the Foreign Exchange Fee was charged and continues to be charged by the defendants to the Class Members on each purchase of a security, bond or other investment denominated in a foreign currency (the Foreign Exchange Transactions). In relation to these transactions, the plaintiffs seek, on their own behalf and on behalf of the Class, damages in the amount of the Foreign Exchange Fee charged to them and to the Class (and unlawfully withdrawn from their Trust Accounts).

36. On behalf of the Class, the plaintiffs seek, inter alia, damages and injunctive relief for the FX Transactions effected in their Trust Accounts.

THE PLAINTIFFS' TRUST ACCOUNTS

37. On or about February 3, 1999, MacDonald opened the following Trust Accounts with BMO Trust and Nesbitt:

(a) RRSP Account No. 456-99097-1 (the "MacDonald RRSP"); and,

(b) LIRA Account No. 456-99098-1 (the "MacDonald LIRA").

38. Mrs. Zoppas opened an RRSP Account with BMO Trust and Nesbitt at or about the time that registered retirement savings plans were first permitted under the Income Tax Act. Mrs. Zoppas' holds RRSP Account Number 431-04560-19.

39. In or about November 2000, Halasz opened RRSP Account No. 211-42511-15 with BMO Trust and InvestorLine (the "Halasz RRSP").

40. The Class Members' Trust Accounts are governed by standard form contracts of adhesion.

41. The Nesbitt RRSP Trust Accounts are governed by:

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

(b) The BMO Nesbitt Burns Client Account Agreement, which incorporates the terms and conditions in the Account Opening Booklet, which includes, at Part One of Section Three, the terms and conditions for the operation of a registered account and, at Section Four, the Charter of Client Rights and Client Responsibilities (the "Account Operating Agreement").

42. The InvestorLine Trust Accounts are governed by the BMO InvestorLine Account Agreement, as well as:

(a) BMO Trust Company Account Agreement(s) for either or both RRSP or RRIF accounts; and,

(b) BMO Bank of Montreal Account Agreements.

43. Trust agreements, with virtually identical relevant terms, govern the Class Members' Trust Accounts, including RRSPs, RESPs, RRIFs and TFSAs.

44. Pursuant to the terms of the RSP Trust Agreement:

(a) BMO Trust is trustee of each Trust Account, with the right to delegate its duties in respect of the Trust Account to Nesbitt or InvestorLine, as the case may be;

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

(c) Nesbitt, as agent for BMO Trust, is to prepare periodic statements of the account for Class Members in accordance with the rules, regulations and practices of the Investment Dealers Association (section 6), which stipulate, in turn, that no member of the IDA shall impose on any customer or deduct from the account of any customer any service fee or service charge relating to services provided by the Member for the administration of the customer's account unless written notice shall have been given to the customer on the opening of the account or not less than 60 days prior to the imposition or revision of the fee or charge (IDA By-Law No. 29.8).

(d) BMO Trust is permitted to invest and reinvest the assets of the Trust Accounts exclusively on the instructions of Class Members and neither BMO Trust nor Nesbitt or InvestorLine, as the case may be as agent for BMO Trust, has 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 in the Trust Accounts, although BMO Trust is permitted to deposit any uninvested cash in the Trust Accounts into an interest bearing account at the BMO Bank of Montreal or another financial institution selected by BMO Trust (section 5).

(e) Neither BMO Trust nor Nesbitt or InvestorLine, as the case may be, is responsible for determining whether any investment made on their instructions is or remains a qualified investment or whether any

investment is foreign property for the purposes of the Deferred Income Arrangement Division of the *Income Tax Act*. The making of such determinations is the right and responsibility of each Investor (section 5).

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

(g) Class Members are obliged to use Nesbitt as their investment advisory firm, and, in that capacity, Nesbitt is governed by the Account Operating Agreement, all applicable laws, the rules and regulations of applicable securities regulators, the Investment Dealers Association (and subsequently, the Investment Industry Regulatory Organization of Canada) and the Toronto Stock Exchange (section 5).

45. Pursuant to the terms of the Nesbitt Account Operating Agreement:

(a) Nesbitt commits to putting Class Members' interests ahead of its own (Section Four, Page 16);

(b) Nesbitt commits to ensuring that Class Members are always fully informed about their investments through comprehensive account statements (Section Four, Page 16);

(c) Nesbitt commits to notifying Class Members of important business and regulatory changes through statement bulletins and inserts and special mailings (Section Four, Page 17);

(d) Nesbitt is prohibited from engaging in transactions in Class Members' accounts without the approval of Class Members, who are entitled to

make the final decision whether to invest in a security (Section Four, Page 17);

(e) Nesbitt is only entitled to the payment of those fees and charges for authorized dealings in investments in the Trust Accounts that have been disclosed to Class Members and it is not entitled to payment of fees and charges that have not been disclosed.

46. In addition to the standard form contracts described above, the relationship between Class Members and BMO Trust, Nesbitt, and InvestorLine are governed by the *Loan and Trust Companies Act,* S.C. 1991, c. 45 (the "TLCA") and Rule 31-505 of the Ontario Securities Commission.

47. The Loan and Trust Companies Act (Canada):

(a) obliges BMO Trust and its agents to disclose to the Class Members and to the public the charges applicable to the Trust Accounts, and the usual amount charged by BMO Trust for services normally provided by it to the Class Members, and prohibits BMO Trust from exercising any of its powers in a manner that is contrary to the *TLCA*;

(b) obliges the directors of BMO Trust to establish procedures to provide for the disclosure of information required to be disclosed by the *TLCA* and for the identification of potential conflict of interest situations, and, in that regard, to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; and,

(c) stipulates that no provision in any contract, in any resolution or in the by-laws of BMO Trust relieves any director, officer or employee of BMO Trust from the duty to act in accordance with the *TLCA*.

48. Rule 31-505, 2.1 of the Ontario Securities Commission stipulates that as a condition of registration, a registered dealer or advisor "shall deal fairly, honestly and in good faith with its clients".

FX TRANSACTIONS IN MACDONALD'S TRUST ACCOUNTS

49. During the Class Period, MacDonald, from time to time, instructed Nesbitt to purchase and sell securities denominated in a foreign currency in his Trust Accounts.

50. For example, during the Class Period, MacDonald directed Nesbitt to effect the following trades in his RRSP account:

(a) March 3, 2003 - Buy 500 shares of Tyco International Ltd. at $14.89 USD. MacDonald was charged a fee of 1.502 on the conversion of funds to US dollars which included the Bank Foreign Exchange Rate and the Foreign Exchange Fee. The total amount paid by MacDonald was $11,317.57 (The Foreign Exchange Transaction).

(b) May 12, 2003 – Sell 500 shares of Tyco International Ltd. at $16.04 USD. MacDonald was charged a fee of 1.381 on the unauthorized conversion of the sale proceeds to Canadian currency, which included the Bank Foreign Exchange Rate and the Foreign Exchange Fee. The total amount received by MacDonald after deduction of these fees was $10,950.81 (The Unauthorized Foreign Exchange Transaction).

51. As illustrated by MacDonald's transactions, above, after each sale of a foreign denominated security, the defendants systematically and automatically undertook a second transaction to convert the foreign currency to Canadian currency, without any instructions, authorization or consent from MacDonald. On each such Unauthorized Foreign Exchange Transaction, MacDonald was charged a secret, undisclosed fee (which included the Bank Foreign Exchange Rate and the Foreign Exchange Fee) which was automatically withdrawn from his Trust Account for the benefit of the defendants.

52. In respect of each purchase of a foreign denominated security, MacDonald authorized the conversion of Canadian funds to the appropriate foreign currency; however, in effecting each such Foreign Exchange Transaction, the defendants charged

a secret, undisclosed fee (The Foreign Exchange Fee) which was automatically withdrawn from MacDonald's Trust Accounts for the benefit of the defendants.

FX TRANSACTIONS IN MRS. ZOPPA'S TRUST ACCOUNT

53. Similar transactions to those described above in respect of MacDonald were also effected in the Trust Account held by Mrs. Zoppas.

54. For example, on or about December 13, 2002, Mrs. Zoppas was granted a cash dividend by Walt Disney Co. Holding Co. in respect of the 100 shares of this US security held by Mrs. Zoppas in her RRSP Account. The dividend was received by BMO Trust on December 13, 2002, and on January 9, 2003, it was converted to Canadian currency and deposited into Mrs. Zoppas' account. There is no indication on Mrs. Zoppas' account statement that shows how much the original amount of the dividend was in US dollars or the fees or exchange rate applied by the defendants in effecting the conversion. Mrs. Zoppas did not authorize the conversion of the dividend to Canadian currency. BMO Trust appropriated to itself the use and benefit of the dividend from December 13, 2002 to January 9, 2003, in breach of its fiduciary duty to Mrs. Zoppas, and it earned a secret profit thereon.

55. As with MacDonald, after the sale of foreign denominated securities, the defendants systematically and automatically undertook a second transaction to convert the foreign currency to Canadian currency, without any instructions, authorization or consent from Mr. or Mrs. Zoppas. On the Unauthorized Foreign Exchange Transactions, Mrs. Zoppas was charged a secret, undisclosed fee (which included the Bank Foreign Exchange Rate and the Foreign Exchange Fee) which was automatically withdrawn from her Trust Account for the benefit of the defendants.

56. On receipt of foreign denominated cash dividends, the defendants charged a secret, undisclosed fee (the Foreign Exchange Fee) which was automatically withdrawn from Mrs. Zoppas' Trust Account for the benefit of the defendants.

FX TRANSACTIONS IN HALASZ'S TRUST ACCOUNT

57. During the Class Period, Halasz instructed InvestorLine to purchase and sell a security denominated a foreign currency in the Halasz RRSP. On or about July 15, 2009, Halasz instructed the defendants to purchase shares in a US security, iShares S&P Global Infrastructure Index Exchange Traded Fund (the "iShares ETF"), in the Halasz RRSP. On or about December 31, 2009, June 25, 2010 and December 30, 2010, the iShares ETF paid dividends into the Halasz RRSP. On or about June 27, 2011, Halasz instructed the defendants to sell fifty shares of the iShares ETF. The defendants sold those shares and obtained proceeds of $36.37 per share. The defendants charged Halasz the Bank Foreign Exchange Fee and the Foreign Exchange Fee on those proceeds. Halasz did not authorize or consent to the conversion of proceeds of the sale to Canadian currency.

58. The account statement for the Halasz RRSP did not disclose the amount of the proceeds of the sale of the iShares ETF in U.S. dollars, and did not disclose that the defendants charged the Bank Foreign Exchange Fee or the Foreign Exchange Fee, which were automatically withdrawn from the Trust Account for the benefit of the defendants.

FX TRANSACTIONS IN CLASS MEMBERS' TRUST ACCOUNTS

59. Similar Unauthorized Foreign Exchange Transactions were effected in the Trust Accounts of the Class Members, without their knowledge or consent. In respect of each such unauthorized transaction, the defendants charged the Class Member a secret, undisclosed fee which was automatically withdrawn from the Class Member's Trust Account for the benefit of the defendants. In addition, the same type of undisclosed Foreign Exchange Fee was charged and collected by the defendants in respect of all Foreign Exchange Transactions in the Class Members' Trust Accounts, and BMO Trust earned secret profits in respect of its delay in depositing dividends to Class Members' accounts.

60. The defendants have profited and continue to profit from Foreign Exchange Transactions and Unauthorized Foreign Exchange Transactions by secretly charging and collecting the Foreign Exchange Fee.

61. The Foreign Exchange Fee was collected by or paid to BMO Trust, Nesbitt, and/or InvestorLine. The recipient(s) of the Foreign Exchange Fee is not known to the plaintiffs; but is known to the defendants.

62. BMO Bank of Montreal acts as a clearinghouse for all companies affiliated with it for the purpose of effecting the purchase and sale of currencies. It uses an electronic network computer system, and buys and sells currency in bulk, after "netting out" all intrabank same day conversions. The bulk of currency conversions for which the Class Members were charged conversions fees, including the Foreign Exchange Fee, do not actually involve the purchase or sale of any currency. Regardless, the defendants charge the fee on all FX Transactions in the Trust Accounts. There is no relationship between any purported "transaction cost" to the defendants or the value of the transaction of itself in respect of the Foreign Exchange Fee. It is imposed solely for the purpose of generating profits for the defendants at the expense of the Class Members.

63. The Foreign Exchange Fee is not and has never been disclosed to the plaintiffs and the other Class Members. Instead, the transaction confirmation forms and other account statements delivered to them by the defendants in relation to the Foreign Exchange Transactions and Unauthorized Foreign Exchange Transactions disclose a "conversion rate", comprised of the total rate charged to them. The plaintiffs and the other Class Members were never informed that there was a difference between what BMO Trust, Nesbitt, InvestorLine or BMO Bank of Montreal paid for the foreign currency and what the Class Members were charged, and that the defendants (or any of them) profited the difference. The Foreign Exchange Fee is and was intentionally hidden and kept secret from the Class Members, in breach of the defendants' contractual and fiduciary duties. The Class Members never approved or authorized payment from their Trust Accounts of the Foreign Exchange Fee.

64. The Foreign Exchange Fees are the source of enormous profits for the defendants. Hence, when the *Income Tax Act* was amended to permit Trust Accounts to hold foreign currencies, the defendants intentionally chose not to change the manner in which they operate the Trust Accounts or to otherwise stop the automatic conversion of foreign currencies to Canadian currency, so that they could continue to charge and collect the Foreign Exchange Fee and derive profits therefrom, at the expense of the Class.

LIABILITY AND DAMAGES

65. As a result of the dealings by the defendants in respect of the Trust Accounts described above, the plaintiffs and the other Class Members have suffered damages for which the defendants are liable on the basis of:

(a) breach of fiduciary duty;

(b) breach of duty as agent or as undisclosed principal;

(c) breach of contract;

(d) unjust enrichment; and

(e) negligence.

Breach of Fiduciary Duty

66. The defendants are fiduciaries of the plaintiffs and other Class Members with respect to dealings in the Trust Accounts by virtue of the contractual, statutory and regulatory framework in which they operate, as set forth above, and, specifically:

(a) the terms of the Trust Agreement, by which BMO Trust agrees to act as trustee of the Trust Accounts and requires the plaintiffs and other Class Members to deal with Nesbitt not only as agent for BMO Trust but also as their Investment Advisor;

(b) the terms of the Account Operating Agreement by which Nesbitt commits to putting the interests of the plaintiffs and others Class Members ahead of its own;

(c) the statutory prohibition against the plaintiffs and the other Class Members holding title to their own Trust Accounts, and the requirement that such accounts be held by one of a select group of entities, of which BMO Trust is one; and,

(d) BMO Trust has legal title to and effective control over the Trust Accounts, and utilized the services of Nesbitt, InvestorLine and BMO Bank of Montreal to carry out its trust obligations in operating the Trust Accounts.

67. As fiduciaries and by virtue of Rule 31-505, 2.1 of the Ontario Securities Commission, the defendants owe the plaintiffs and the other Class Members the following duties (the "Fiduciary Duties") including:

(a) a duty to act in good faith, in the best interests of the plaintiffs and the other Class Members;

(b) a duty to operate the Trust Accounts in a manner consistent with the public policy objective of maximizing the retirement income or educational savings of the Class Members.

(c) a duty to not allow their personal interests to conflict with the interests of the plaintiffs and the other Class Members in the absence of full and fair disclosure of all material facts relative to the FX Transactions, including their interest in the FX Transactions and the consent of the plaintiffs and the Class Members thereto;

(d) a duty to not take or be paid or permit their affiliates to take or be paid secret, hidden or undisclosed fees or charges out of the Trust Accounts;

(e) a duty to not operate the Trust Accounts in any way that results in a benefit to them, and a detriment to the Class Members without full, frank

and plain disclosure to the Class and the approval or consent of the Class Members;

(f) a duty to disclose whether they or any affiliated companies act as principals in relation to any FX Transactions;

(g) a duty to disclose any arrangements that they or their affiliated companies may have for conducting the FX Transactions that directly or indirectly benefit them or their affiliated companies;

(h) a duty to disclose, in a transparent manner, the basis upon which they or any of their affiliated companies set the foreign exchange rate for FX Transactions including a duty to disclose and obtain the Class Members' consent to the Foreign Exchange Fee;

(i) a duty to ensure that Class Members receive the benefit of the best possible price for foreign currency in relation to the Foreign Exchange Transactions; and

(j) a duty to deal fairly, honestly and in good faith with Class Members.

68. The defendants have, by their conduct as described above, breached their Fiduciary Duties, and, as a result, the plaintiffs and the other Class Members have suffered a loss during the Claim Period, and claim damages:

(i) in respect of the Unauthorized Foreign Exchange Transactions in an amount equal to the total sum withdrawn from their Trust Accounts in relation thereto; and

(ii) in respect of the Foreign Exchange Transactions in an amount equal to the Foreign Exchange Fee they were charged for each of those transactions, together with pre- and post-judgment interest on such amount.

69. Further, the plaintiffs and the Class are entitled to an accounting and disgorgement of all profits earned by the defendants on said amounts as a result of their breaches of trust and breaches of fiduciary duty.

Breach of Duty in Principal and Agent Relationship

70. Further, or in the alternative, the relationship between the defendants and the plaintiffs and the other Class Members is a principal and agent relationship, and, accordingly, the defendants owed the following duties to the plaintiffs and the other Class Members (the "Agency Duties"):

(a) a duty to act in the best interests the plaintiffs and the other Class Members;

(b) a duty to not allow their personal interests to conflict with those of the plaintiffs and the other Class Members in the absence of full and fair disclosure of all material facts relative to the FX Transactions, including their interest in the FX Transactions through the charging of the Foreign Exchange Fee;

(c) a duty not to take any undisclosed profits, fees or charges from the Trust Accounts including the Foreign Exchange Fee; and,

(d) a duty not to engage in any unauthorized transactions in the Trust Accounts, including a duty to not effect unauthorized conversions of foreign currency and a duty to not charge addition, undisclosed fees including the Foreign Exchange Fee in relation thereto.

71. In the further alternative, even if the relationship between the defendants and the plaintiffs and the other Class Members is not a principal and agent relationship, the defendants acted as undisclosed principals, and had a duty to disclose such conduct to the plaintiffs and the other Class Members and a duty not take or be paid or permit their affiliates to take or be paid secret, hidden or surprise fees and charges out of the Trust Accounts or to engage in unauthorized transactions in the Trust Accounts or to

systematically give misleading, inaccurate and incorrect justifications for such transactions (the "Undisclosed Principal Duties").

72. The defendants have, by their conduct described above, breached their Agency Duties and Undisclosed Principal Duties, and, as a result, the plaintiffs and the other Class Members have suffered and claim the relief described above in paragraphs 68 and 69.

Breach of Contract

73. The defendants have breached their obligations under the Trust Agreement and the Account Operating Agreement, set forth above, by:

(a) taking, or permitting their affiliates to take hidden and unauthorized Foreign Exchange Fees in respect of the Transactions;

(b) failing to maintain an account and provide Class Members with periodic statements of the account showing all losses, transfers and withdrawals from each Trust Account;

(c) failing to notify Class Members of the change to the definition of "qualified investment" in the Deferred Income Arrangement Division of the *Income Tax Act* and failing to modify their account operating procedures to eliminate the automatic conversion of foreign currency to Canadian currency;

(d) making an independent determination of whether a Class Member's investment is or remains a qualified investment or whether any investment is foreign property for the purposes of the Deferred Income Arrangement Division of the *Income Tax Act* and converting foreign currency to Canadian funds without instructions from the account holder; and,

(e) generally, putting their interests ahead of those of Class Members through their conduct, as described herein.

74. The plaintiffs and the other Class Members have suffered damages as a result of the breaches of the Trust Agreement and Account Operating Agreement and claim:

(a) damages in an amount equal to the total sum withdrawn from their Trust Accounts in relation to each Unauthorized Foreign Exchange Transaction effected during the Class Period;

(b) damages in an amount equal to the Foreign Exchange Fee for each of the Foreign Exchange Transactions during the Class Period,

Unjust Enrichment

75. As a result of the conduct described above, the defendants have been enriched, and the Class Members have suffered a corresponding deprivation.

76. There is no juridical reason for the enrichment of any of the defendants.

77. The plaintiffs claim on their own behalf and on behalf of the Class Members restitution in an amount equal to

(i) the Foreign Exchange Fee for each of the Foreign Exchange Transactions during the Class Period;

(ii) the total sum withdrawn from the Trust Accounts (based on the Bank Foreign Exchange Rate and the Foreign Exchange Fee) for each Unauthorized Foreign Exchange Transaction during the Class Period; and

(iii) an accounting of any profit made by the defendants from the Foreign Exchange Fees, and from effecting the unauthorized Foreign Exchange Transactions,

and further seeks a declaration that all such amounts are held by the defendants in a constructive trust in favour of the Class.

Negligence

78. The defendants owe the plaintiffs and the other Class Members a duty to exercise such care, diligence and skill in the administration of the Trust Accounts as would a reasonably prudent person in comparable circumstances.

79. The defendants were negligent in their administration of the Trust Accounts, for the reasons stated herein. Further particulars include:

(a) despite the 2001 Amendments, the defendants' computer systems automatically and systematically effected the Unauthorized Foreign Exchange Transactions in the Trust Accounts; and

(b) the defendants failed to update and/or modify their infrastructure to permit foreign currency holdings in the Trust Accounts in accordance with the amended definition of qualified investment as a result of the 2001 Amendments.

80. But for the aforesaid defendants' negligent conduct, the FX Transactions would not have occurred and the plaintiffs and the other Class members would not have incurred damages as a result of the automatic withdrawal of secret fees from the Trust Accounts. The plaintiffs and the Class have suffered damages and claim an amount equal to the Foreign Exchange Fee for each of the Transactions, together with pre and post judgment interest on such amount.

Punitive Damages

81. The defendants have known, and had a positive obligation as trustees of the Trust Accounts to know, that the definition of "qualified investment" in the *Income Tax Act* had changed as of June 14, 2001, and that from and after that date there was no need whatsoever to convert foreign currency in a Trust Account to Canadian currency. The defendants intentionally disregarded the change in the *Income Tax Act* and failed to take any action to change their method of administering the Trust Accounts to terminate the automatic conversion of foreign currency, and continued to systemically advise the

Class that the conversions were necessary for the sole and intended purpose of enriching themselves through the continued levy of the Foreign Exchange Fees in connection with the FX Transactions.

82. The defendants owed and continue to owe the Class a duty of good faith and fair dealing. They intentionally ignored that duty for the purpose of their own benefit.

83. The defendants' conduct was deliberate and with full knowledge of the fact that they were depriving the Class of a portion of their retirement or education income, in breach of their contractual, trust and fiduciary obligations and for the purpose of increasing their own profits. Such high-handed, oppressive and egregious conduct offends the Court's sense of decency and is deserving of the Court's sanction through an award of punitive damages of $10,000,000.00, or such other amount that the Court deems appropriate.

84. Further, or in the alternative, should this Court conclude that the defendants are not required to disgorge the profits earned from The Foreign Exchange Fees levied on the FX Transactions as a remedy for the defendants' breach of trust, it is appropriate to make such an award as part of the punitive damages assessed against the defendants, as this Court should relieve the wrongdoers of the profits earned from their conduct which has been in outrageous disregard of the legal and equitable rights of the Class.

August 2, 2006

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Court File No. 06-CV-316213 CP

JAMES RICHARD MACDONALD et al.
Plaintiffs

-and-

BMO TRUST COMPANY et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

FRESH AS AMENDED STATEMENT OF CLAIM

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