

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )

TUESDAY, THE 18<sup>TH</sup>

JUSTICE BENJAMIN T. GLUSTEIN )

DAY OF MAY, 2021

(signed July 6, 2021)

BETWEEN:

NAHEED GILANI

Plaintiff

- and -

BMO INVESTMENTS INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**ORDER  
(CERTIFICATION)**

**THIS MOTION**, by the Plaintiff for an order certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6 (“CPA”) was heard on April 1, 2021 by video conference.

**ON READING** the materials filed on this motion, the Motion Record of the Plaintiff, the Supplemental Motion Record of the Plaintiff, the Responding Motion Record of the Defendant, the Reply Motion Record of the Plaintiff, the Factum of the Plaintiff, the Responding Factum of the Defendant, the Reply Factum of the Plaintiff, the Sur-Reply Factum of the Defendant, the Book of Authorities of the Plaintiff, the Condensed Book of Authorities of the Plaintiff (Non-Hyperlinked Sources), the Book of Authorities of the Defendant, the Transcript Brief of the Plaintiff, the Compendium of the Plaintiff, the



Compendium of the Defendant, the pleadings of the Plaintiff and the Defendant, and on hearing the submissions of the lawyers for the Plaintiff and the Defendant with reasons for decision having been reserved until this day:

1. **THIS COURT ORDERS** that for the purposes of this order, except to the extent that they are modified in this order, the definitions set out in the Fresh as Amended Statement of Claim filed on July 27, 2020 (“**Claim**”), attached hereto as **Schedule “A”**, apply to and are incorporated into this order.

2. **THIS COURT ORDERS** that the within action is certified as a class proceeding pursuant to the *CPA* as against the Defendant, subject to the provisions of this order.

3. **THIS COURT ORDERS** that the Class is defined as:

All persons, wherever they may reside or be domiciled, who held or hold, at any time on or prior to May 18, 2021, units of a BMO Mutual Fund through a Discount Broker, except for the Excluded Persons\*.

\* Excluded Persons means the Defendant; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of the Defendant; and the past and present members of the independent review committee of each BMO Mutual Fund.

4. **THIS COURT ORDERS** that the following issues are certified as common issues for the entire Class:

Having regard to the allegations of the Plaintiff and the Defendant in the pleadings:

***Breach of Trust***

1. Did the Defendant, as the trustee of the BMO Mutual Funds, breach the “Standard of Care of Trustee” set out in the Trust Instruments? If so, when and how?

***Breach of Fiduciary Duty***

2. Did the Defendant, as the trustee of the BMO Mutual Funds, owe a fiduciary duty? If so, to whom was the duty owed?

3. Did the Defendant, as the manager of the BMO Mutual Funds, owe a fiduciary duty? If so, to whom was the duty owed?
4. If the answer to the first question in (2) and/or (3) is yes, did the Defendant breach its fiduciary duty? If so, when and how?

***Breach of Contract***

5. Did the Defendant, as the manager of the BMO Mutual Funds, breach the Management Agreements? If so, when and how?

***Section 23.1 of the Trustee Act***

6. Should the payment of the Unearned Management Fees by the Defendant be disallowed as an expense pursuant to section 23.1 of the *Trustee Act*?

***Prospectus Misrepresentation***

7. Did the Fund Facts Documents, and the Simplified Prospectuses which incorporate the Fund Facts Documents, contain a misrepresentation within the meaning of the *OSA* (and, as applicable, the Other Canadian Securities Legislation)?
8. If the answer to (7) is yes, is the Defendant liable to the Class Members pursuant to section 130 of the *OSA* (and, as applicable, the equivalent provisions of the Other Canadian Securities Legislation)?

***Unjust Enrichment***

9. Has the Defendant been enriched?
10. If the answer to (9) is yes, have the Class Members suffered a corresponding deprivation?
11. If the answer to (10) is yes, is there a valid juristic reason for the enrichment of the Defendant?

***Remedies***

12. Is the Defendant liable to account to the Class Members?
13. If the Defendant is found liable on any claims asserted by the Class Members, as set out above, what remedies, including damages and/or equitable remedies, are the Class Members entitled to receive?
14. How should recoveries under each type of remedy be measured?

15. Can the amount of any monetary relief be determined on an aggregate basis? If so, what is the amount and what is the appropriate method or procedure for distributing that amount to the Class Members?

***Interest***

16. Should the Defendant be ordered to pay an equitable rate of interest and/or pre-judgment and post-judgment interest pursuant to the *CJA*? If so, what is the appropriate measure or amount of such interest?

***Administration and Distribution***

17. Should the Defendant pay the costs of administering and distributing the recovery? If so, what amount should the Defendant pay?

***Release***

18. Have Class Members who have redeemed their units in a BMO Mutual Fund released some or all of their claims against the Defendant? If so, to what extent?
5. **THIS COURT ORDERS** that Naheed Gilani is appointed as the representative plaintiff for the Class.
  6. **THIS COURT ORDERS** that the relief sought by the Class is as set out in the Claim.
  7. **THIS COURT ORDERS** that the nature of the claims asserted on behalf of the Class are relief arising out of or under: (i) breach of trust; (ii) breach of fiduciary duty; (iii) breach of contract; (iv) section 23.1 of the *Trustee Act*; (v) section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation); and (vi) unjust enrichment.
  8. **THIS COURT ORDERS** that the Litigation Plan attached hereto as **Schedule “B”** is hereby approved.
  9. **THIS COURT ORDERS** that any other proceeding relating to the subject matter of this action is hereby stayed, except for (1) *Michaud et al. v BBS Securities Inc. et al.*,

Supreme Court of British Columbia, Court File No. VLC-S-1912710; (2) *Frayce et al. v BMO InvestorLine Inc. et al.*, Ontario Superior Court of Justice, Court File No. CV-20-00638868-00CP; and (3) *Frayce v BMO InvestorLine Inc. et al.*, Ontario Superior Court of Justice, Court File No. CV-20-00634551-00CP.

10. **THIS COURT ORDERS** that no other proceeding relating to the subject matter of this action may be commenced without leave of the Court, excluding any proceeding that may be commenced by the Bank of Montreal, its subsidiaries and/or affiliates.

11. **THIS COURT ORDERS** that, in respect of the relief sought in paragraphs 1(h) to (k) of the Plaintiff's Notice of Motion dated July 31, 2020, the motion is adjourned *sine die*.

12. **THIS COURT ORDERS** that the Court shall, on subsequent motion brought by the Plaintiff, approve a form of notice of certification of this action as a class proceeding ("**Notice**"), the manner of dissemination of the Notice, the procedure by which Class Members may opt out of the class proceeding, and the party or parties responsible for the costs of disseminating the Notice and receiving opt outs.

13. **THIS COURT ORDERS** that, on or before August 21, 2021, the Defendant will pay to the Plaintiff the all-inclusive amount of \$215,000.00 for the costs of the motion, inclusive of the costs of the sequencing motion awarded to the Plaintiff on November 9, 2020.



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The Honourable Justice Benjamin T. Glustein

# SCHEDULE

"A"

Court File No. CV-18-00611748-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

NAHEED GILANI

Plaintiff

- and -

BMO INVESTMENTS INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**FRESH AS AMENDED STATEMENT OF CLAIM**

Notice of action issued on December 28, 2018

AMENDED THIS July 27, 2020 PURSUANT TO  
MODIFIÉ CE \_\_\_\_\_ CONFORMÉMENT À  
 RULE/LA RÈGLE 26.02 ( A )  
 THE ORDER OF \_\_\_\_\_  
L'ORDONNANCE DU \_\_\_\_\_  
DATED / FAIT LE \_\_\_\_\_  
Stisbonds  
REGISTRAR GREFFIER  
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

## CURRENCY AND DEFINITIONS

1. Unless otherwise stated, all dollar amounts stated herein are in Canadian dollars.
2. In this Fresh as Amended Statement of Claim, in addition to the terms that are defined elsewhere herein, the following definitions apply:
  - (a) “**Bank of Montreal**” means the Bank of Montreal;
  - (b) “**BMO Investments**” means the Defendant, BMO Investments Inc. (and including all predecessor amalgamating entities, including, without limitation, each of BMO Investments Inc. and Guardian Group of Funds Ltd. prior to their amalgamation on or around November 1, 2009 to form BMO Investments Inc.);
  - (c) “**BMO InvestorLine**” means BMO InvestorLine Inc.;
  - (d) “**BMO Mutual Funds**” means all mutual fund trusts (including, without limitation, all series of units thereof) of which **BMO Investments** is trustee, was trustee or may be trustee at any time prior to the conclusion of the trial of the common issues in this proceeding (but only in respect of the period during which **BMO Investments** is trustee, was trustee or may be trustee, as applicable), including, for greater certainty, (i) those mutual funds that have been or may be terminated, (ii) those mutual funds that have been or may be merged into other mutual funds, and (iii) those mutual funds that have undergone or may undergo name changes;
  - (e) “**CJA**” means the *Courts of Justice Act*, RSO 1990, c C-43, as amended;
  - (f) “**Class**” and “**Class Members**” means, collectively, all persons, wherever they may reside or be domiciled, who held or hold, at any time prior to the conclusion of the trial of the common issues in this proceeding, units of a **BMO Mutual Fund** through a **Discount Broker**, except for the **Excluded Persons**;
  - (g) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
  - (h) “**CSA**” means the Canadian Securities Administrators;
  - (i) “**Current Guardian DOT**” means the Amended and Restated Master Declaration of Trust for certain BMO Mutual Funds (formerly, the BMO Guardian Funds) dated as of May 4, 2018, as amended and supplemented from time to time;
  - (j) “**Current Guardian Management Agreement**” means the Amended and Restated Master Management and Distribution Agreement between **BMO Investments** and BMO Monthly Dividend Fund Ltd. dated May 4, 2018, as amended and supplemented from time to time;



- (k) “**Current LifeStage Plus DOT**” means the Amended and Restated Master Declaration of Trust for the BMO LifeStage Plus Mutual Funds dated as of April 3, 2014, as amended and supplemented from time to time;
- (l) “**Current Retail and Advisor DOT**” means the Amended and Restated Master Declaration of Trust for the BMO Mutual Funds dated as of May 4, 2018, as amended and supplemented from time to time;
- (m) “**Current Retail and Advisor Management Agreement**” means the Amended and Restated Master Management Agreement between **BMO Investments** and BMO Corporate Class Inc. dated May 4, 2018, as amended and supplemented from time to time;
- (n) “**Defendant**” means the Defendant, **BMO Investments**;
- (o) “**Discount Brokers**” means entities providing “order-execution only services” as defined in Rule 3200 of the **IROC Rules** or entities performing a function similar to “order-execution only services” prior to the introduction of that definition in Rule 3200 of the **IROC Rules**, including (without limitation) **BMO InvestorLine**;
- (p) “**Excluded Persons**” means the **Defendant**; the past and present parents, subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors and assigns of the **Defendant**; and the past and present members of the independent review committee of each **BMO Mutual Fund**;
- (q) “**Form 81-101F1**” means Form 81-101F1 – *Contents of Simplified Prospectus*, as amended;
- (r) “**Form 81-101F2**” means Form 81-101F2 – *Contents of Annual Information Form*, as amended;
- (s) “**Form 81-101F3**” means Form 81-101F3 – *Contents of Fund Facts Document*, as amended;
- (t) “**Fund Facts Document**” means a fund facts document as referred to in **NI 81-101** and **Form 81-101F3**;
- (u) “**IROC**” means the Investment Industry Regulatory Organization of Canada;
- (v) “**IROC Rules**” means the **IROC Dealer Member Rules**, as amended;
- (w) “**Management Agreements**” means, collectively, all management agreements pursuant to which **BMO Investments** acts, has acted or may act as manager of the **BMO Mutual Funds**, including, without limitation, the **Current Retail and Advisor Management Agreement** and the **Current Guardian Management Agreement**;

- (x) “**Manager’s Standard of Care**” has the meaning given to that term in paragraph 71 hereof;
- (y) “**Manager’s Compliance with Law Duty**” has the meaning given to that term in paragraph 72 hereof;
- (z) “**NI 81-101**” means National Instrument 81-101 – *Mutual Fund Prospectus Disclosure*, as amended;
- (aa) “**NI 81-107**” means National Instrument 81-107 – *Independent Review Committee for Investment Funds*, as amended;
- (bb) “**OSA**” means the *Securities Act*, RSO 1990, c S.5, as amended;
- (cc) “**Other Canadian Securities Legislation**” means, collectively, the *Securities Act*, RSA 2000, c S-4; the *Securities Act*, RSBC 1996, c 418; *The Securities Act*, CCSM c S50; the *Securities Act*, SNB 2004, c S-5.5; the *Securities Act*, RSNL 1990, c S-13; the *Securities Act*, SNWT 2008, c 10; the *Securities Act*, RSNS 1989, c 418; the *Securities Act*, S Nu 2008, c 12; the *Securities Act*, RSPEI 1988, c S-3.1; the *Securities Act*, RSQ, c V-1.1; *The Securities Act, 1988*, SS 1988-89, c S-42.2; and the *Securities Act*, SY 2007, c 16, all as amended;
- (dd) “**Plaintiff**” means the Plaintiff, Naheed Gilani;
- (ee) “**Simplified Prospectus**” means a simplified prospectus as referred to in **NI 81-101** and **Form 81-101F1**;
- (ff) “**Trustee Act**” means the *Trustee Act*, RSO 1990, c T.23, as amended;
- (gg) “**Trust Instruments**” means, collectively, all declarations of trust or similar trust instruments that govern, have governed or may govern the **BMO Mutual Funds**, including, without limitation, the **Current Retail and Advisor DOT**, the **Current Guardian DOT** and the **Current LifeStage Plus DOT**; and
- (hh) “**Unearned Management Fees**” means, in respect of management fees that have been paid or may be paid out of the assets of the **BMO Mutual Funds**, the portion of those management fees that has been paid or may be paid to **Discount Brokers** as trailing commissions, and any taxes relating to those trailing commissions.

### **RELIEF SOUGHT**

3. The Plaintiff claims on his own behalf and on behalf of the other Class Members:
  - (a) an order certifying this action as a class proceeding pursuant to the *CPA* and appointing the Plaintiff as the representative plaintiff for the Class;

- (b) a declaration that the Defendant committed breaches of trust and/or breached its fiduciary duties to the Plaintiff and the other Class Members;
- (c) a declaration that the Defendant is liable to the Plaintiff and the other Class Members for breach of contract;
- (d) a declaration that the Defendant made one or more misrepresentations within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation), and that the Defendant is liable to the Plaintiff and the other Class Members pursuant to section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation);
- (e) a declaration that the Defendant was unjustly enriched by the acts and omissions pleaded herein;
- (f) an order requiring the Defendant to account to the Plaintiff and the other Class Members for the Unearned Management Fees;
- (g) damages and/or equitable compensation in the sum of \$200 million (or such other sum as this Court finds appropriate at the trial of the common issues or at a reference or references) to restore the Plaintiff and the other Class Members to the position they would have been in had the Unearned Management Fees not been paid;
- (h) if necessary, an order compelling the Defendant to compensate the Plaintiff and the other Class Members in respect of the Unearned Management Fees by means of litigation trusts to be established pursuant to the *CPA*;
- (i) an order disallowing the payment of the Unearned Management Fees as expenses pursuant to section 23.1 of the *Trustee Act* (and, if necessary, the equivalent

provisions of comparable Canadian legislation) and requiring the Defendant to repay the expenses to the Plaintiff and the other Class Members or to the BMO Mutual Funds;

- (j) an interim and permanent order prohibiting the Defendant from seeking or obtaining indemnity or reimbursement from the assets of the BMO Mutual Funds in respect of monetary relief paid or payable to the Plaintiff and the other Class Members in this action or their costs and expenses of this action;
- (k) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (l) an equitable rate of interest on all sums found due and owing to the Plaintiff and the other Class Members to compensate them for the diminution in the value of their units of the BMO Mutual Funds resulting from payment of the Unearned Management Fees;
- (m) pre-judgment and post-judgment interest pursuant to the *CJA*;
- (n) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity;
- (o) pursuant to section 26(9) of the *CPA*, the costs of notice and of administering the plan of distribution of the recovery in this action plus applicable taxes; and
- (p) such further and other relief as this Honourable Court may deem just.

#### **OVERVIEW**

4. This class proceeding arises out of the payment of excessive, inflated and/or unearned management fees to the Defendant in respect of the BMO Mutual Funds. The management

fees are excessive, inflated and/or unearned because unearned trailing commissions are included in, or embedded into, those management fees.

5. The Defendant is the trustee and manager of the BMO Mutual Funds.
6. The Class Members are persons who hold or held units of a BMO Mutual Fund through a Discount Broker, as distinct from other distribution channels through which BMO Mutual Funds are sold to investors. Discount Brokers are also commonly referred to as “order-execution only”, “DIY” and “online” brokers. Under the IIROC Rules, Discount Brokers are prohibited from providing investment advice to investors.
7. The BMO Mutual Funds are trusts governed by the Trust Instruments. The assets of the BMO Mutual Funds are trust property that the Defendant, as trustee and a fiduciary, has undertaken to hold for the exclusive benefit of the beneficiaries, being the Class Members and the other unitholders of the BMO Mutual Funds. The Defendant has a duty to preserve the trust property and maximize the value of units of the BMO Mutual Funds.
8. The Defendant receives management fees out of the assets of the BMO Mutual Funds. The management fees are excessive, inflated and/or unearned because a portion — described herein as the Unearned Management Fees — is collected by the Defendant for the purpose of paying trailing commissions to Discount Brokers. The Defendant has paid, and continues to pay, trailing commissions to Discount Brokers through which the Class Members held or hold the BMO Mutual Funds.
9. The purpose of a trailing commission on a mutual fund is to compensate the dealer (through whom the mutual fund is sold) for providing their client with ongoing investment advice about the client’s investment in the mutual fund in respect of which the trailing commission

is paid. As Discount Brokers do not and cannot provide investment advice to investors, the payment of trailing commissions to Discount Brokers in respect of the BMO Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by BMO Investments of the Unearned Management Fees on account of those trailing commissions, and their receipt by BMO Investments, is improper, unreasonable and unjustified.

10. From 2011 until May 4, 2018, the Fund Facts Documents that the Defendant prepared and filed with securities regulators to permit the sale of units of the BMO Mutual Funds (other than Fund Facts Documents for Series D units of the BMO Mutual Funds after around November 2017) have acknowledged the purpose of trailing commissions as compensation for advice. Those Fund Facts Documents stated that trailing commissions are paid to dealers for the “services and advice” provided by those dealers to their clients. As of May 4, 2018, the Fund Facts Documents for the BMO Mutual Funds (other than Fund Facts Documents for Series D units of the BMO Mutual Funds after around November 2017) were amended to refer to “services and/or advice”. By making that amendment to the Fund Facts Documents, the Defendant acknowledged that the reference to “services and advice” in the previous Fund Facts Documents was false, misleading and/or inaccurate.
11. The term “services and advice” refers to a dealer providing ongoing advice to a client with respect to the client’s investment in the BMO Mutual Funds in respect of which the trailing commission is paid, and services that are specifically connected with that advice, namely determining the suitability for the client of the investment in that BMO Mutual Fund in light of the personal circumstances of the client (including the client’s other investment holdings). However, Discount Brokers do not and cannot provide investment advice to clients and they do not provide suitability determinations for their clients. Accordingly, the

payment of trailing commissions to Discount Brokers in respect of the BMO Mutual Funds is improper, unreasonable and unjustified. Consequently, the payment by BMO Investments of the Unearned Management Fees on account of those trailing commissions, and their receipt by BMO Investments, is improper, unreasonable and unjustified.

12. The reality is that trailing commissions function as sales commissions paid on an ongoing basis by the Defendant to Discount Brokers in consideration for services provided by the Discount Brokers to the Defendant, not services provided by the Discount Brokers to the Class Members. The trailing commissions incentivize the Discount Brokers to offer for sale, or provide “shelf space” for, BMO Mutual Funds on their trading platforms. This is to the detriment of the Class Members (who suffer reduced investment returns), while accruing to the benefit of: the Defendant (which receives increased management fees as the assets of the BMO Mutual Funds grow through new investment capital); the Defendant’s affiliate, BMO InvestorLine, and other Discount Brokers (which receive the trailing commissions); and the Defendant’s ultimate parent company, Bank of Montreal (which enjoys the benefits flowing to the Defendant and BMO InvestorLine). The Defendant misused trust property belonging to the Class Members for the purpose of benefiting itself, its affiliates and others.
13. Further or in the alternative, the payment of trailing commissions to Discount Brokers cannot be justified on the basis of purported “services” because, among other things:
  - (a) the Defendant does not impose an obligation on Discount Brokers to provide particular services to Class Members in respect of the BMO Mutual Funds in consideration for the trailing commissions;

- (b) the Defendant does not conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers are providing particular services to Class Members in respect of the BMO Mutual Funds; and
  - (c) the Defendant does not conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers use or apply the trailing commissions for the purpose of providing particular services to Class Members in respect of the BMO Mutual Funds.
14. In fact, Discount Brokers do not provide Class Members with any services that are specific to the BMO Mutual Funds in respect of which the trailing commissions are paid and that are provided on an ongoing basis. The services provided by Discount Brokers to their clients (such as research and educational tools) are provided regardless of whether the clients hold BMO Mutual Funds. Those general services available to all Discount Broker clients do not justify the payment of trailing commissions to Discount Brokers in respect of the BMO Mutual Funds. Accordingly, the payment of trailing commissions to Discount Brokers on account of “services” is improper, unreasonable and unjustified. Consequently, the payment by BMO Investments of the Unearned Management Fees on account of those trailing commissions, and their receipt by BMO Investments, is improper, unreasonable and unjustified.
15. The Unearned Management Fees represent significant sums of money and are paid on a continuous basis. The wasting of the assets of the BMO Mutual Funds by the payment of the Unearned Management Fees has unjustly enriched BMO Investments and decreased the value of the units of the BMO Mutual Funds held by the Class Members. The Class



Members have suffered, and continue to suffer, significant loss and damage as a result of the Defendant's acts and omissions pleaded herein.

## **THE PARTIES**

### ***The Plaintiff***

16. The Plaintiff is an individual residing in Calgary, Alberta.
17. The Plaintiff held units of the BMO Asian Growth and Income Fund – Advisor Series (GGF120) (previously called the BMO Guardian Asian Growth and Income Fund and the GGOF Asian Growth And Income Fund), a BMO Mutual Fund, in an account with Scotia iTRADE, a Discount Broker, from on or around March 4, 2011 until on or around October 17, 2018.

### ***The Class***

18. The proposed Class on whose behalf this proceeding is brought is comprised of all persons, wherever they may reside or be domiciled, who held or hold, at any time prior to the conclusion of the trial of the common issues in this proceeding, units of a BMO Mutual Fund through a Discount Broker, except for the Excluded Persons.

### ***The Defendant***

19. BMO Investments is a corporation incorporated under the laws of Canada.
20. BMO Investments is, and was at all material times, the trustee and manager of the BMO Mutual Funds.
21. BMO Investments is an indirect wholly-owned subsidiary of Bank of Montreal.

22. BMO Investments is, and was at all material times, an “investment fund manager” as defined in the *OSA*. As an investment fund manager, BMO Investments is, and was at all material times, subject to the duty under section 116 of the *OSA* and/or section 2.1 of NI 81-107 to (a) exercise the powers and discharge the duties of its office honestly, in good faith and in the best interests of the BMO Mutual Funds, and (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

#### **THE BMO MUTUAL FUNDS**

23. Each of the BMO Mutual Funds is or was a trust governed by the terms of one of the Trust Instruments.
24. Each of the BMO Mutual Funds is or was an “investment fund” and a “mutual fund” as those terms are defined in the *OSA*.
25. Each of the BMO Mutual Funds is or was a reporting issuer in Ontario and in all other provinces of Canada.
26. To the best of the Plaintiff’s knowledge, the current BMO Mutual Funds are listed in **Schedule “A”** hereto.

#### **TRUST INSTRUMENTS AND MANAGEMENT AGREEMENTS FOR THE BMO MUTUAL FUNDS**

27. The BMO Mutual Funds are currently governed by the Current Guardian DOT, the Current LifeStage Plus DOT and the Current Retail and Advisor DOT.
28. Under each of the Trust Instruments, BMO Investments holds in trust all property of the BMO Mutual Funds for the benefit of the unitholders of the BMO Mutual Funds.

29. Pursuant to section 14.6 of the Current Retail and Advisor DOT, section 12.6 of the Current Guardian DOT and section 12.6 of the Current LifeStage Plus DOT (and the equivalent provisions of other Trust Instruments applicable at material times), BMO Investments, as trustee, is and was at all material times required to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each applicable BMO Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.
30. Pursuant to section 14.3 of the Current Retail and Advisor DOT, section 12.3 of the Current Guardian DOT and section 12.3 of the Current LifeStage Plus DOT (and the equivalent provisions of other Trust Instruments applicable at material times), BMO Investments, as trustee, has delegated to itself, as manager, authority and responsibility for providing managerial, supervisory, administrative and investment advisory services to the applicable BMO Mutual Funds.
31. Pursuant to section 9 of the Current Retail and Advisor Management Agreement and section 9 of the Current Guardian Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), BMO Investments, as manager, is and was at all material times required to exercise its powers and discharge its duties as manager honestly, in good faith and in the best interests of each applicable BMO Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Section 11 of the Current Retail and Advisor Management Agreement and section 11 of the Current Guardian Management Agreement (and the equivalent provisions of other Management Agreements applicable at

material times) make BMO Investments, as manager, responsible for any loss arising out of its failure to adhere to the standard of conduct.

32. Pursuant to section 8 of the Current Retail and Advisor Management Agreement and section 8 of the Current Guardian Management Agreement (and the equivalent provisions of other Management Agreements applicable at material times), BMO Investments, as manager, is and was at all material times required to comply with securities legislation in Canada, including regulations, rules, national policies, national instruments and any decision of Canadian securities regulatory authorities, which includes the obligations under section 116 of the *OSA* and/or section 2.1 of NI 81-107.
33. Pursuant to section 14.3(b) of the Current Retail and Advisor DOT, section 12.3(b) of the Current Guardian DOT and section 12.3(b) of the Current LifeStage Plus DOT (and the equivalent provisions of other Trust Instruments applicable at material times), BMO Investments is entitled to receive a management fee out of the assets of each applicable BMO Mutual Fund as set out in the Current Guardian Management Agreement and/or the Current Retail and Advisor Management Agreement (or the other Management Agreements applicable at material times). Section 14.1(b) of the Current Retail and Advisor DOT, section 12.1(b) of the Current Guardian DOT and section 12.1(b) of the Current LifeStage Plus DOT (and the equivalent provisions of other Trust Instruments applicable at material times) requires all remuneration paid by BMO Investments, as trustee, for services provided to the BMO Mutual Funds, including by managers, to be reasonable.
34. BMO Investments, as manager, receives management fees out of the assets of the BMO Mutual Funds. The management fees are calculated as a percentage of the net asset value

of each series of each BMO Mutual Fund (which management fees accrue daily and are payable monthly).

35. The payment of management fees to BMO Investments out of the assets of the BMO Mutual Funds reduces the net asset value of the BMO Mutual Funds, which in turn reduces the value of the units of the BMO Mutual Funds. As stated in one or more Simplified Prospectuses disseminated by the Defendant in respect of the BMO Mutual Funds, management fees are among the fees and expenses that are paid by such BMO Mutual Funds which “indirectly reduce the value of your investment.” As stated in one or more Fund Facts Documents disseminated by the Defendant in respect of the BMO Mutual Funds, fund expenses, including management fees, “affect you because they reduce the returns of this series of the fund.”
36. Section 8.6 of the Current Retail and Advisor DOT, section 6.6 of the Current Guardian DOT and section 6.5 of the Current LifeStage Plus DOT (and the equivalent provisions of other Trust Instruments applicable at material times) provide for BMO Investments to accept a lower management fee with respect to units of a series of an applicable BMO Mutual Fund held by a unitholder, and the amount of any reduction in the management fee must be distributed to the unitholder as a “Management Fee Distribution”.
37. BMO Investments may also waive all or a portion of its management fees in respect of the BMO Mutual Funds. BMO Investments waived portions of the management fees in respect of certain BMO Mutual Funds during the material time.
38. Section 3.2(j) of the Current Retail and Advisor DOT, section 3.2(i) and (j) of the Current Guardian DOT and section 3.2(i) and (j) of the Current LifeStage Plus DOT (and the equivalent provisions of other Trust Instruments applicable at material times) allow for the

redesignation of units of one series of a BMO Mutual Fund as units of another series of the same BMO Mutual Fund.

#### **TRAILING COMMISSIONS AND DISCOUNT BROKERS**

39. BMO Investments has paid and continues to pay a portion of the management fees that it receives out of the assets of the BMO Mutual Funds to dealers, including Discount Brokers, as trailing commissions. The quantum of the trailing commission payable to a dealer is determined as a percentage of the value of the units of the BMO Mutual Funds held by the dealer's clients (which trailing commission is paid monthly or quarterly).
40. The payment of management fees, within which the trailing commissions payable to Discount Brokers are embedded, depletes the assets of the BMO Mutual Funds and reduces the value of the Class Members' units of those BMO Mutual Funds and thereby diminishes their return on investment in the BMO Mutual Funds.
41. Among other dealers, the BMO Mutual Funds are sold through Discount Brokers. Discount Brokers are entities that provide order execution only services to investors. They are regulated by IIROC as "Dealer Members". Under the IIROC Rules, Discount Brokers apply to IIROC for approval to offer an "order-execution only service", which is defined as "the acceptance and execution of orders from customers for trades that the Dealer Member has not recommended and for which the Dealer Member takes no responsibility as to the appropriateness or suitability of orders accepted or account positions held." Such approval provides Discount Brokers with an exemption from compliance with IIROC Rules that impose requirements to assess the suitability of a client's orders and account positions. Accordingly, as a condition of the approval provided by IIROC to Discount

Brokers to operate their discount brokerage businesses, Discount Brokers are prohibited from providing investment recommendations or advice to clients.

42. One of the Discount Brokers through which BMO Mutual Funds are sold is BMO InvestorLine, which is an indirect wholly-owned subsidiary of Bank of Montreal. BMO Investments is also an indirect wholly-owned subsidiary of Bank of Montreal. BMO InvestorLine and BMO Investments are affiliates of each other. Some of the Unearned Management Fees have been paid to BMO InvestorLine, which is to the ultimate benefit of Bank of Montreal.
43. The Defendant knew, or ought to have known, that the Unearned Management Fees were being paid to Discount Brokers as trailing commissions, thereby reducing the value of the Class Members' units, in circumstances where those trailing commissions were not earned by the Discount Brokers because they are not providing services and advice to the Class Members.
44. Prior to a change in the language of the documents in 2019, the Simplified Prospectuses and Fund Facts Documents issued by the Defendant to permit the offering of units of the BMO Mutual Funds set out, as a maximum, the annual percentage rates for trailing commissions payable in respect of the BMO Mutual Funds. Class Members are entitled to expect that the Defendant will comply with its duties to the Class Members and will not pay the maximum rate of trailing commission both to dealers that provide full advisory services to their clients and to Discount Brokers who provide no services or advice to their clients. Yet, the trailing commissions paid by the Class Members on each series of the BMO Mutual Funds are identical to the trailing commissions paid on those same series by investors who hold their BMO Mutual Funds through a full-service account.

45. The Defendant never disclosed to the Plaintiff the dollar amount of the trailing commissions paid to the Plaintiff's Discount Broker in respect of the units of the BMO Mutual Fund held by the Plaintiff.
46. The Defendant continues the practice of paying trailing commissions to Discount Brokers in respect of the BMO Mutual Funds despite criticism of the practice and the imminent prohibition of the practice by regulators.
47. On January 10, 2017, the CSA released CSA Consultation Paper 81-408 – *Consultation on the Option of Discontinuing Embedded Commissions*, which addresses issues relating to mutual fund fees, including the payment of trailing commissions to dealers. In relation to the Canadian mutual fund industry generally, CSA Consultation Paper 81-408 states that, as at December 2015, “data suggests that \$25 billion of the total \$30 billion held in mutual funds in the [discount broker] channel (83%) remains in the full trailing commission paying fund series”. It concludes that “[t]he majority of DIY investors investing in mutual funds pay full trailing commission despite not receiving advice” and “many DIY mutual fund investors in the online/discount brokerage channel indirectly pay for services they do not receive.”
48. In a press release issued on May 8, 2017 entitled “Limit Series A Sales to Channels that Permit Advice: IFIC”, the Investment Funds Institute of Canada, which styles itself as the “voice of Canada’s investment funds industry”, called on regulators to ensure that mutual funds that carry a trailing commission are not sold through the Discount Broker channel. The press release stated that:

The Investment Funds Institute of Canada (IFIC) is calling on regulators to establish rules to ensure that mutual funds carrying an embedded advisor fee are sold only in channels where advice is permitted.



“Investors who buy funds directly, for example through a discount broker, should be confident that they are not inadvertently overpaying by selecting a series that includes fees for services that are not available through that platform,” says Paul C. Bourque, Q.C., IFIC’s president and CEO.

Series A mutual funds bundle an advice fee within the product. Most companies already provide other series of funds with no or nominal trailer fees that investors can purchase if they are do-it-yourself investors or want to pay for advice separately. The industry’s proposal would advance the goal of ensuring that low-trailer or no-trailer funds are available to these types of investors in a more uniform and transparent way.

“IFIC members believe that consumers should be able to choose for themselves the products, services and payment methods that best meet their needs and preferences,” Bourque stated. “Today’s proposal would help to achieve a goal that the industry shares with our regulators: to ensure that fees are aligned with the services that investors receive. It reflects the industry’s commitment to provide Canadian consumers with real and meaningful investment choices.”

49. On April 9, 2018, IIROC released its final guidance regarding order-execution only services offered by Discount Brokers. In Notice of Implementation 18-0075 dated April 9, 2018, IIROC stated that Discount Brokers face a conflict of interest by making available on their platforms mutual funds that pay a trailing commission for ongoing advice (e.g. Series A mutual funds). The Notice of Implementation stated:

We acknowledge that funds that pay an ongoing trailing commission to registrants (often described as a payment for advice and services provided to the investor by the registrant), and are made available by OEO firms (e.g., a Series A fund), raise a conflict of interest. Under our rules, a Dealer Member must address conflicts of interest considering the best interests of the client or clients.

In the Guidance, we indicate that OEO firms should consider how they will address any compensation-related conflicts when deciding which series (or series equivalent in the case of a PTF) of a fund to make (or not make) available on their platforms. We recognize that many OEO firms have already implemented practices to address this conflict.

We expect that OEO firms will make available, whenever possible, funds that do not pay a trailing commission for ongoing advice (often referred to as a Series D fund).

When a Series D fund is not available (e.g., because a fund family does not offer that type of series) and an OEO firm makes available another series that pays a trailing commission, we also expect the firm to address the conflict by rebating to the client the portion of the trailing commission for ongoing advice, or taking other similar steps.

A large majority of the publically available funds include a trailing commission. Management of the conflicts of interest relating to trailing commissions by OEO firms allows investors continued access to the widest possible range of investments.

50. On June 21, 2018, the CSA released CSA Staff Notice 81-330 – *Status Report on Consultation on Embedded Commissions and Next Steps*, in which the CSA announced its intention to publish rule changes that will prohibit the payment of trailing commissions to, and the solicitation and acceptance of trailing commissions by, dealers who do not make a suitability determination (e.g. Discount Brokers) in connection with the distribution of prospectus qualified mutual fund securities. The CSA stated in CSA Staff Notice 81-330 that:

In our view, the fees paid by a vast majority of DIY investors in this channel [*i.e.* the discount brokerage channel] do not appear to align with the execution-only nature of the services they receive. We also observe no justifiable rationale for the practice of paying discount brokerage dealers an ongoing trailing commission for the sale of a mutual fund. For example, other securities including most ETFs are commonly purchased and sold by way of an upfront transaction fee. This ongoing payment may therefore be viewed as one that incentivizes the distribution of mutual funds that pay such an ongoing fee over those that do not (*i.e.* a payment for shelf space), giving rise to a conflict of interest. This is especially the case when the discount brokerage receives the same trailing commission as that of full-service dealers (which rate is typically intended to compensate full service dealers for the costs associated with providing investment advice). Moreover, in our view this fee also limits investor awareness and understanding of the fees associated with the purchase of such products in the discount brokerage channel.

51. Further to the announcement by the CSA on June 21, 2018, on September 13, 2018 the CSA published proposed amendments to securities regulatory instruments that will, when the amendments come into force, prohibit the payment of trailing commissions by fund organizations (which includes mutual fund managers) to dealers who do not make a suitability determination, such as order-execution-only dealers (*i.e.* Discount Brokers). The proposed amendments will prohibit the payment of mutual fund trailing commissions to Discount Brokers in any amount. The CSA stated that fund organizations will need to make available to Discount Brokers a class or series of securities of a mutual fund that does not pay a trailing commission, which will result in a corresponding reduction in the rate of the management fee charged on that class or series. Existing holdings of mutual funds will

also need to be switched to the class or series of securities of the mutual fund that does not pay a trailing commission. The CSA also commented that the prohibition on the payment of trailing commissions by fund organizations to Discount Brokers will eliminate “a longstanding conflict between IFMs [investment fund managers] (who have been reluctant to offer non trailing commission-paying fund series in this channel), online/discount brokerages (who have been satisfied to accept full trailing commission-paying funds), and DIY investors.”

52. On December 19, 2019, the CSA published CSA Staff Notice 81-332 announcing that all members of the CSA will publish for adoption final amendments later in 2020 to ban payments of trailing commissions to dealers who do not make a suitability determination (including Discount Brokers).
53. As alluded to in the above-noted press release of the Investment Funds Institute of Canada, some mutual fund families offer a series of their funds, typically called Series D, that is sold only through Discount Brokers. Series D (or similar discount series) pay a lower management fee than traditional retail series (*e.g.* Series A) because they include a reduced trailing commission to partially reflect the fact that “services and advice” are not being provided to investors through a Discount Broker.
54. Since around November 2017, the Fund Facts Documents that the Defendant has prepared and filed to permit the sale of Series D units of the BMO Mutual Funds acknowledge that advice is not provided to investors in BMO Mutual Funds through Discount Brokers by stating that trailing commissions are paid for “services” (not “services and advice”) provided by Discount Brokers to investors.

55. While the Defendant currently offers Series D units on most of the BMO Mutual Funds, other series of the BMO Mutual Funds that carry a higher trailing commission have been held, and continue to be held, by Class Members through Discount Brokers. When the Defendant introduced Series D units of the BMO Mutual Funds, it failed to advise, permit and/or cause the Class Members to switch their existing units into Series D units.
56. In any event, the payment of any trailing commissions to Discount Brokers in respect of the BMO Mutual Funds, including on Series D units of the BMO Mutual Funds, was in breach of the Defendant's duties to the Class Members, as pleaded herein.

## **RIGHTS OF ACTION**

### ***Breach of Fiduciary Duty***

57. As trustee of the BMO Mutual Funds, the Defendant is and was at all material times in a fiduciary relationship with the Class Members and owes, or owed at the material times, fiduciary duties to the Class Members.
58. As stated in one or more Simplified Prospectuses disseminated by the Defendant in respect of the BMO Mutual Funds: "The trustee [...] has a fiduciary responsibility to act in the best interest of the unitholders."
59. As manager of the BMO Mutual Funds, the Defendant is, and was at all material times, a trustee *de son tort* of the BMO Mutual Funds. Pursuant to the Trust Instruments and the Management Agreements, the Defendant at all material times undertook full responsibility for the administration of the day-to-day business and affairs of each BMO Mutual Fund. To carry out that responsibility as manager, the Defendant has possession or control of the property of the BMO Mutual Funds and administers that property. As trustee *de son tort*

of each of the BMO Mutual Funds, the Defendant is, and was at all material times, in a fiduciary relationship with the Class Members and owes, or owed at the material times, fiduciary duties to the Class Members. As a trustee *de son tort* of the BMO Mutual Funds, the Defendant also has or had an obligation to abide by the duties and obligations of the trustee set out in the Trust Instruments.

60. Further or in the alternative, as manager of each of the BMO Mutual Funds, the Defendant has significant discretion, power or control in relation to the business and affairs of the BMO Mutual Funds and the assets of the BMO Mutual Funds. The Defendant can unilaterally exercise that discretion, power or control so as to affect the Class Members' legal or substantial practical interests, including the Class Members' financial interests arising from their ownership of units of the BMO Mutual Funds, the value of which is tied to the value of the assets of the BMO Mutual Funds. The Class Members are particularly vulnerable to the Defendant holding that discretion, power or control as manager of the BMO Mutual Funds.
61. The Defendant as manager has expressly or impliedly undertaken to act in the best interests of the Class Members, including as follows:
  - (a) by the standard of care binding on the Defendant as manager under the Management Agreements and section 116 of the *OSA* and/or section 2.1 of NI 81-107; and
  - (b) the Defendant is a founding signatory to the United Nations-supported Principles for Responsible Investment, pursuant to which the Defendant (under the brand name "BMO Global Asset Management"), in the signatory category of investment manager, signed a declaration in which it acknowledges its "duty to act in the best

long-term interests of our beneficiaries” and affirmed its “fiduciary role” and “fiduciary responsibilities”.

62. Accordingly, as manager of each of the BMO Mutual Funds, the Defendant is, and was at all material times, in a fiduciary relationship with the Class Members and owes, or owed at the material times, fiduciary duties to the Class Members.
63. By its acts and omissions, the Defendant has breached its fiduciary duty to the Class Members. The Defendant’s breaches include (without limitation):
  - (a) paying and/or receiving the Unearned Management Fees out of the assets of the BMO Mutual Funds;
  - (b) failing to preserve the property of the BMO Mutual Funds;
  - (c) failing to maximize the value of the units of the BMO Mutual Funds;
  - (d) paying the Unearned Management Fees to the Discount Brokers for no purpose;
  - (e) failing to ascertain the nature of any services being provided by Discount Brokers to the Class Members and to ascribe a reasonable value to those services, to ensure that the assets of the BMO Mutual Funds are being used for proper purposes and in a reasonable amount;
  - (f) failing to impose an obligation on Discount Brokers to provide particular services to Class Members in consideration for the trailing commissions;
  - (g) failing to conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers are providing particular services to Class Members in respect of the BMO Mutual Funds;

- (h) failing to conduct any auditing or inquiries, or any adequate auditing or inquiries, into whether Discount Brokers use or apply the trailing commissions for the purpose of providing particular services to Class Members in respect of the BMO Mutual Funds;
- (i) permitting series of units of the BMO Mutual Funds carrying a trailing commission to be acquired and/or held through Discount Brokers;
- (j) failing to create and make available to Class Members through Discount Brokers a series of units of the BMO Mutual Funds that carries no trailing commission;
- (k) failing to advise, permit and/or cause Class Members to re-designate or reclassify their units of the BMO Mutual Funds into a series of units that carries no trailing commission;
- (l) in the alternative to paragraphs 63(i) to 63(k):
  - (i) permitting non-Series D (or similar discount series) units of the BMO Mutual Funds to be acquired and/or held through Discount Brokers;
  - (ii) failing to create and make available to Class Members through Discount Brokers Series D (or similar discount series) units of all of the BMO Mutual Funds; and
  - (iii) failing to advise, permit and/or cause Class Members to re-designate or reclassify their non-Series D units of the BMO Mutual Funds into Series D (or similar discount series) units of the BMO Mutual Funds;
- (m) acting in a conflict of interest by simultaneously acting as both the trustee and the manager of the BMO Mutual Funds, and thus paying the Unearned Management

Fees to itself and negotiating the Management Agreements for the BMO Mutual Funds and management fees with itself;

- (n) acting in a conflict of interest by paying trailing commissions to Discount Brokers for the Defendant's own benefit, effectively as a marketing expense to secure access to the Discount Brokers' clients, resulting in increased management fees for the Defendant as the assets of the BMO Mutual Funds grow through new investment capital from the Discount Broker platforms;
- (o) acting in a conflict of interest by failing to make available to Class Members holding BMO Mutual Funds through Discount Brokers a series of units of the BMO Mutual Funds that pays no trailing commission, or alternatively a reduced trailing commission, because of a concern that it would adversely affect the distribution of BMO Mutual Funds through the full-service or advisory distribution channels and thereby reduce the Defendant's management fees;
- (p) acting in a conflict of interest by receiving a portion of the Unearned Management Fees for the purpose of paying such amount to BMO InvestorLine (an indirect wholly-owned subsidiary of Bank of Montreal), for the ultimate benefit of Bank of Montreal, when such amount could have been retained in the BMO Mutual Funds for the benefit of Class Members;
- (q) failing to pay and/or accept a management fee reduced by the amount of the Unearned Management Fees and distributing (rebating) that amount to the Class Members as a "Management Fee Distribution";
- (r) failing to waive payment of the Unearned Management Fees; and



(s) BMO Investments, as trustee of the BMO Mutual Funds, failing to adequately supervise BMO Investments, as manager of the BMO Mutual Funds, and failing to prevent and/or rectify the misconduct of BMO Investments, as manager of the BMO Mutual Funds, as particularized herein, in breach of the manager's standard of care set out in the Management Agreements and section 116 of the *OSA* and/or section 2.1 of NI 81-107.

64. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's breach of fiduciary duty as particularized herein.

***Breach of Trust***

65. Under the Trust Instruments governing the BMO Mutual Funds, BMO Investments, as trustee of the BMO Mutual Funds, has and had at all material times a duty to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each BMO Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

66. The duty under the Trust Instruments is a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the BMO Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.

67. Alternatively, the duty under the Trust Instruments includes a duty to act honestly, in good faith and in the best interests of the Class Members and the other unitholders of the BMO Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably

prudent person would exercise in the circumstances. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.

68. Alternatively, the duty under the Trust Instruments is a duty to act honestly, in good faith and in the best interests of the BMO Mutual Funds, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances. The BMO Mutual Funds are trust relationships between the Defendant and the unitholders in respect of property held for the benefit of the unitholders. Any breach of the duty to the BMO Mutual Funds causes direct loss and damage to the Class Members and the other unitholders of the BMO Mutual Funds. That duty is enforceable by the Class Members and breaches of that duty are actionable by the Class Members.
69. By its acts and omissions, including (without limitation) its acts and omissions set out in paragraph 63 hereof, the Defendant, as trustee of the BMO Mutual Funds, has breached its duty under the Trust Instruments and committed breaches of trust.
70. The BMO Mutual Funds, the Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's breach of trust as particularized herein.

***Breach of Contract***

71. Under the Management Agreements, BMO Investments, as manager of the BMO Mutual Funds, has and had at all material times a duty to exercise its powers and discharge its duties honestly, in good faith and in the best interests of each BMO Mutual Fund, and to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances (the "**Manager's Standard of Care**"). The Management

Agreements make BMO Investments responsible for any loss that arises out of the failure to act in accordance with the Manager's Standard of Care.

72. Under the Management Agreements, BMO Investments, as manager of the BMO Mutual Funds, is and was at all material times required to comply with securities legislation in Canada, including regulations, rules, national policies, national instruments and any decision of Canadian securities regulatory authorities, which includes the obligations under section 116 of the *OSA* and/or section 2.1 of NI 81-107 (the "**Manager's Compliance with Law Duty**").
73. The Plaintiff and other Class Members are third party beneficiaries of the Management Agreements, and in particular, the Manager's Standard of Care and the Manager's Compliance with Law Duty contained therein.
74. The Management Agreements, and the Manager's Standard of Care and the Manager's Compliance with Law Duty contained therein, explicitly or implicitly evidence an intention to extend the benefit of those provisions to the Class Members.
75. The Manager's Standard of Care and the Manager's Compliance with Law Duty in the Management Agreements are for the protection and benefit of the unitholders of the BMO Mutual Funds. They are intended to ensure that the manager acts in accordance with a minimum standard of care and complies with the law in administering the business and affairs of the BMO Mutual Funds and dealing with the property of the BMO Mutual Funds that is held for the benefit of the unitholders of the BMO Mutual Funds, and that the manager is accountable for any loss that arises if the manager does not comply with the Manager's Standard of Care.

76. Further, the unitholders of the BMO Mutual Funds are intended beneficiaries of the Manager's Standard of Care and the Manager's Compliance with Law Duty in the Management Agreements as they have the only realistic interest in enforcing those provisions against the manager. BMO Investments is both trustee and manager of the BMO Mutual Funds. BMO Investments will not realistically seek recovery against itself for breaches of the Management Agreements in respect of the BMO Mutual Funds.
77. By its acts and omissions, including (without limitation) the acts and omissions set out in paragraph 63 hereof, BMO Investments, as manager, has breached the Manager's Standard of Care in the Management Agreements and is responsible for the losses arising from the breach. BMO Investments' acts and omissions fall within the scope of the Manager's Standard of Care and provisions dealing with liability for losses in the Management Agreements.
78. By its acts and omissions, including (without limitation) the acts and omissions set out in paragraph 63 hereof, BMO Investments, as manager, has breached section 116 of the *OSA* and/or section 2.1 of NI 81-107 and therefore breached the Manager's Compliance with Law Duty in the Management Agreements. BMO Investments' acts and omissions fall within the scope of the Manager's Compliance with Law Duty.
79. Alternatively, the Plaintiff and the other Class Members seek recovery from BMO Investments, as manager of the BMO Mutual Funds, for breach of contract on the basis of the cause of action accruing to BMO Investments, as trustee of the BMO Mutual Funds.
80. BMO Investments, as trustee, has failed and/or refused to take steps to enforce compliance by BMO Investments, as manager, with the Management Agreements and/or seek compensation for breaches thereof.

81. There are special circumstances justifying the Plaintiff and the other Class Members making a claim against BMO Investments, including, among other things, that:

- (a) BMO Investments is both the trustee and the manager of the BMO Mutual Funds. BMO Investments will not realistically seek recovery against itself for breaches of the Management Agreements. It is, therefore, impossible or difficult for BMO Investments, as trustee, to seek recovery from BMO Investments, as manager;
- (b) BMO Investments, as trustee, colluded with BMO Investments, as manager, to pay and receive the Unearned Management Fees;
- (c) the Plaintiff and the other Class Members seek recovery of trust property in the form of the Unearned Management Fees; and
- (d) BMO Investments, as trustee, has failed to protect the beneficiaries in that it paid the Unearned Management Fees to BMO Investments, as manager, and failed to take steps to recover compensation for BMO Investments' contractual breaches as manager.

82. The Plaintiff and the other Class Members have suffered loss and damage as a result of BMO Investments' acts or omissions.

***Disallowance of Improper Expenses under Section 23.1 of the Trustee Act***

83. The Unearned Management Fees are expenses paid by BMO Investments from the trust property of the BMO Mutual Funds.

84. The expenses are not properly incurred in carrying out the trust because they are on account of trailing commissions paid or payable to Discount Brokers, and such trailing

commissions are not properly paid or payable to Discount Brokers because the Discount Brokers do not provide services or advice to the Class Members.

85. The payment of the expenses ought to be disallowed pursuant to section 23.1(2) of the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation).

***Prospectus Misrepresentation***

86. The Plaintiff asserts the right of action for prospectus misrepresentation in section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation) on his own behalf and on behalf of the Class Members.
87. The Defendant has prepared, filed and disseminated Simplified Prospectuses and, since January 1, 2011, Fund Facts Documents, to permit the continuous offering to the public of units of the BMO Mutual Funds.
88. The Fund Facts Documents are incorporated by reference into the relevant Simplified Prospectuses and form part of those Simplified Prospectuses.
89. Pursuant to section 56(1) of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation), the Simplified Prospectuses are and were required to provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed under the Simplified Prospectuses.
90. The Simplified Prospectuses are prospectuses for the purposes of section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
91. The Fund Facts Documents prepared, filed and disseminated by the Defendant in respect of the BMO Mutual Funds (other than Fund Facts Documents for Series D units of the

BMO Mutual Funds after around November 2017) prior to May 4, 2018 contained a common statement that trailing commissions are paid to dealers for the “services and advice” provided by those dealers to their clients.

92. That common statement is a misrepresentation within the meaning of the *OSA* (and, if necessary, the Other Canadian Securities Legislation). It falsely represents that trailing commissions are only paid to dealers that provide services and advice to investors, whereas in fact trailing commissions are also paid to Discount Brokers even though they do not provide services or advice to their clients. The statement is, and was at all material times, material to the Class Members.
93. As of May 4, 2018, the Fund Facts Documents for the BMO Mutual Funds (other than Fund Facts Documents for Series D units of the BMO Mutual Funds after around November 2017) were amended to refer to “services and/or advice”. By making that amendment to the Fund Facts Documents, the Defendant acknowledged that the reference to “services and advice” in the previous Fund Facts Documents was false, misleading and/or inaccurate.
94. The Defendant certified and signed the Simplified Prospectuses as required by NI 81-101 and Form 81-101F2, and is liable pursuant to section 130 of the *OSA* (and, if necessary, the equivalent provisions of the Other Canadian Securities Legislation).
95. The offering of units of the BMO Mutual Funds to which the Simplified Prospectuses and Fund Facts Documents related constituted distributions of the units in Ontario and/or distributions of units from Ontario to persons outside of Ontario. The offering was governed by the *OSA* and its subsidiary instruments and regulations, and was carried out under Ontario securities laws.

96. The Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant's acts and omissions as particularized herein.

***Unjust Enrichment***

97. BMO Investments has been unjustly enriched through the receipt of the Unearned Management Fees out of the assets of the BMO Mutual Funds, and the payment of that money to Discount Brokers as trailing commissions. BMO Investments misused trust property belonging to the Class Members for its own benefit. The trailing commissions paid from assets held for the benefit of the Class Members incentivize the Discount Brokers to offer for sale, or provide "shelf space" for, BMO Mutual Funds on their trading platforms. As such, those funds are paid to secure a benefit for BMO Investments. In exchange for the trailing commissions, BMO Investments receives access to the Discount Brokers' clients. The trailing commissions therefore fund a marketing expense that BMO Investments would otherwise need to pay itself in order to secure that access. BMO Investments is enriched by, among other things, increased management fees as the assets of the BMO Mutual Funds grow through new investment capital from the Discount Broker platforms and the saving of the marketing expense that it would otherwise have to pay itself to secure access to the Discount Brokers' clients.
98. The Class Members have suffered a corresponding deprivation by the reduction in the value of their units of the BMO Mutual Funds arising from the payment of the Unearned Management Fees out of the assets of the BMO Mutual Funds.
99. As stated in one or more Simplified Prospectuses disseminated by the Defendant in respect of the BMO Mutual Funds, management fees are among the fees and expenses that are paid by such BMO Mutual Funds and they "indirectly reduce the value of your investment."



Similarly, as stated in one or more Fund Facts Documents disseminated by the Defendant in respect of the BMO Mutual Funds, fund expenses, including management fees, “affect you because they reduce the returns of this series of the fund.”

100. There is no juristic reason for the enrichment of the Defendant, which resulted from its own wrongful acts and omissions. Further, any contracts upon which the Defendant purports to rely to justify the enrichment do not require the enrichment or, alternatively, are void and illegal.

#### **DAMAGE SUFFERED BY THE CLASS MEMBERS**

101. The BMO Mutual Funds, the Plaintiff and the other Class Members have suffered loss and damage as a result of the Defendant’s acts and omissions particularized herein.
102. As a result of the payment of the Unearned Management Fees out of the assets of the BMO Mutual Funds, the value of the assets of the BMO Mutual Funds has been significantly reduced.
103. As a result of the payment of the Unearned Management Fees out of the assets of the BMO Mutual Funds, there has been a significant reduction in the value of the units of the BMO Mutual Funds held by the Class Members and/or the value of the distributions received by the Class Members on their units of the BMO Mutual Funds (whether received in cash or reinvested in additional units).
104. The Plaintiff and the other Class Members have also suffered loss and damage as a result of the loss of opportunity to earn a reasonable return on investment if the Unearned Management Fees had not been paid out of the assets of the BMO Mutual Funds.

105. The Plaintiff and the other Class Members who continue to hold units of the BMO Mutual Funds are suffering ongoing loss and damage as a result of the Defendant's acts and omissions particularized herein.
106. The Defendant knew, or ought to have known, that as a result of its acts and omissions particularized herein, the Class Members would suffer loss and damage.

**REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO**

107. The Plaintiff pleads that this action has a real and substantial connection with Ontario because, among other things:
- (a) the Defendant is domiciled in Ontario;
  - (b) the Defendant carries on business in Ontario;
  - (c) each of the BMO Mutual Funds is, or was at material times, a reporting issuer in Ontario;
  - (d) each of the BMO Mutual Funds is formed pursuant to Trust Instruments governed by the law of Ontario;
  - (e) the Simplified Prospectuses and Fund Facts Documents referred to herein were disseminated in Ontario;
  - (f) a substantial portion of the Class Members reside in Ontario; and
  - (g) a substantial portion of the damages sustained by the Class were sustained by persons and entities domiciled in Ontario.

**RELEVANT LEGISLATION**

108. The Plaintiff pleads and relies on the *CJA*, the *CPA*, the *Trustee Act* (and, if necessary, the equivalent provisions of comparable Canadian legislation) and the *OSA* (and, if necessary, the Other Canadian Securities Legislation).

**PLACE OF TRIAL**

109. The Plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario, as a proceeding under the *CPA*.

January 28, 2019

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*Lawyers for the Plaintiff*

**SCHEDULE "A"**  
**CURRENT BMO MUTUAL FUNDS**

1. BMO Aggressive Growth Solution
2. BMO AIR MILES Money Market Fund
3. BMO Ascent Balanced Portfolio
4. BMO Ascent Conservative Portfolio
5. BMO Ascent Equity Growth Portfolio
6. BMO Ascent Growth Portfolio
7. BMO Ascent Income Portfolio
8. BMO Asian Growth and Income Fund
9. BMO Asset Allocation Fund
10. BMO Balanced ETF Portfolio
11. BMO Balanced Solution
12. BMO Balanced Yield Plus ETF Portfolio
13. BMO Bond Fund
14. BMO Canadian Diversified Monthly Income Fund
15. BMO Canadian Equity ETF Fund
16. BMO Canadian Equity Fund
17. BMO Canadian Large Cap Equity Fund
18. BMO Canadian Small Cap Equity Fund
19. BMO Canadian Stock Selection Fund
20. BMO Concentrated Global Balanced Fund
21. BMO Concentrated Global Equity Fund
22. BMO Concentrated U.S. Equity Fund
23. BMO Conservative ETF Portfolio
24. BMO Conservative Solution
25. BMO Core Bond Fund
26. BMO Core Plus Bond Fund

27. BMO Covered Call Canada High Dividend ETF Fund
28. BMO Covered Call Canadian Banks ETF Fund
29. BMO Covered Call Europe High Dividend ETF Fund
30. BMO Covered Call U.S. High Dividend ETF Fund
31. BMO Crossover Bond Fund
32. BMO Diversified Income Fund
33. BMO Diversified Income Portfolio
34. BMO Dividend Fund
35. BMO Emerging Markets Bond Fund
36. BMO Emerging Markets Fund
37. BMO Enterprise Fund
38. BMO Equity Fund
39. BMO Equity Growth ETF Portfolio
40. BMO Equity Index Fund
41. BMO European Fund
42. BMO Fixed Income ETF Portfolio
43. BMO Fixed Income Yield Plus ETF Portfolio
44. BMO Floating Rate Income Fund
45. BMO Fossil Fuel Free Fund
46. BMO FundSelect Aggressive Growth Portfolio
47. BMO FundSelect Balanced Portfolio
48. BMO FundSelect Equity Growth Portfolio
49. BMO FundSelect Growth Portfolio
50. BMO FundSelect Income Portfolio
51. BMO FundSelect Security Portfolio
52. BMO Global Absolute Return Fund
53. BMO Global Balanced Fund
54. BMO Global Diversified Fund

55. BMO Global Dividend Fund
56. BMO Global Equity Fund
57. BMO Global Growth and Income Fund
58. BMO Global High Yield Bond Fund
59. BMO Global Infrastructure Fund
60. BMO Global Monthly Income Fund
61. BMO Global Multi-Sector Bond Fund
62. BMO Global Science & Technology Fund
63. BMO Global Small Cap Fund
64. BMO Global Strategic Bond Fund
65. BMO Growth and Income Fund
66. BMO Growth ETF Portfolio
67. BMO Growth Opportunities Fund
68. BMO Growth Solution
69. BMO High Yield Bond Fund
70. BMO Income ETF Portfolio
71. BMO Income Solution
72. BMO Income Trust Fund
73. BMO International Equity ETF Fund
74. BMO International Equity Fund
75. BMO International Index Fund
76. BMO International Value Fund
77. BMO Japan Fund
78. BMO Japanese Fund
79. BMO Laddered Corporate Bond Fund
80. BMO LifeStage Plus 2015 Fund
81. BMO LifeStage Plus 2017 Fund
82. BMO LifeStage Plus 2020 Fund

83. BMO LifeStage Plus 2022 Fund
84. BMO LifeStage Plus 2025 Fund
85. BMO LifeStage Plus 2026 Fund
86. BMO LifeStage Plus 2030 Fund
87. BMO Low Volatility Canadian Equity ETF Fund
88. BMO Low Volatility U.S. Equity ETF Fund
89. BMO Money Market Fund
90. BMO Monthly High Income Fund II
91. BMO Monthly Income Fund
92. BMO Mortgage and Short-Term Income Fund
93. BMO Multi-Factor Equity Fund
94. BMO North American Dividend Fund
95. BMO Precious Metals Fund
96. BMO Preferred Share Fund
97. BMO Premium Money Market Fund
98. BMO Principle Balanced Portfolio
99. BMO Principle Conservative Portfolio
100. BMO Principle Growth Portfolio
101. BMO Principle Income Portfolio
102. BMO Resource Fund
103. BMO Retirement Balanced Portfolio
104. BMO Retirement Conservative Portfolio
105. BMO Retirement Income Portfolio
106. BMO Risk Reduction Equity Fund
107. BMO Risk Reduction Fixed Income Fund
108. BMO SelectTrust Balanced Portfolio
109. BMO SelectTrust Conservative Portfolio
110. BMO SelectTrust Equity Growth Portfolio

- 111. BMO SelectTrust Fixed Income Portfolio
- 112. BMO SelectTrust Growth Portfolio
- 113. BMO SelectTrust Income Portfolio
- 114. BMO SIA Focused North American Equity Fund
- 115. BMO Special Equity Fund
- 116. BMO Sustainable Opportunities Global Equity Fund
- 117. BMO Tactical Balanced ETF Fund
- 118. BMO Tactical Dividend ETF Fund
- 119. BMO Tactical Global Asset Allocation ETF Fund
- 120. BMO Tactical Global Bond ETF Fund
- 121. BMO Tactical Global Equity ETF Fund
- 122. BMO Tactical Global Growth ETF Fund
- 123. BMO Target Education 2020 Portfolio
- 124. BMO Target Education 2025 Portfolio
- 125. BMO Target Education 2030 Portfolio
- 126. BMO Target Education 2035 Portfolio
- 127. BMO Target Education 2040 Portfolio
- 128. BMO Target Education Income Portfolio
- 129. BMO T-Bill Fund
- 130. BMO U.S. Dividend Fund
- 131. BMO U.S. Dollar Balanced ETF Portfolio
- 132. BMO U.S. Dollar Balanced Fund
- 133. BMO U.S. Dollar Conservative ETF Portfolio
- 134. BMO U.S. Dollar Dividend Fund
- 135. BMO U.S. Dollar Equity Index Fund
- 136. BMO U.S. Dollar Income ETF Portfolio
- 137. BMO U.S. Dollar Money Market Fund
- 138. BMO U.S. Dollar Monthly Income Fund



- 139. BMO U.S. Equity ETF Fund
- 140. BMO U.S. Equity Fund
- 141. BMO U.S. Equity Index Fund
- 142. BMO U.S. Equity Plus Fund
- 143. BMO U.S. Growth Fund
- 144. BMO U.S. High Yield Bond Fund
- 145. BMO U.S. Small Cap Fund
- 146. BMO U.S. Special Equity Fund
- 147. BMO US Dollar Monthly Income Fund
- 148. BMO Women in Leadership Fund
- 149. BMO World Bond Fund

**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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*Lawyers for the Plaintiff*

# SCHEDULE

"B"

**SCHEDULE “B”  
LITIGATION PLAN**

Court File No. CV-18-00611748-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

NAHEED GILANI

Plaintiff

- and -

BMO INVESTMENTS INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**PROPOSED LITIGATION PLAN**

Pursuant to section 5(1)(e)(ii) of the *Class Proceedings Act, 1992* (“*CPA*”), the Plaintiff proposes that this Litigation Plan be followed with respect to these proceedings, subject to the Court’s approval.

**DEFINED TERMS**

1. Capitalized terms that are not defined in this litigation plan (“**Plan**”) have the meanings attributed to them in the Fresh as Amended Statement of Claim filed on July 27, 2020 (“**Amended Statement of Claim**”).

**REPORTING AND COMMUNICATION**

2. Siskinds LLP (“**Class Counsel**”) has posted information about the nature and status of this action on its website, <https://www.siskinds.com/mutual-fund-trailing-commissions>

(“**Website**”). That information will be updated regularly. Copies of important, publicly available court documents, court decisions, notices, documentation, and other information relating to the action are or will be accessible on the Website.

3. The Website also contains a communication webpage, a feature that permits putative Class Members to submit inquiries to Class Counsel, which are sent directly to a designated member of the Class Counsel team, who will promptly respond.

#### **DOCUMENT MANAGEMENT**

4. Class Counsel will use data management systems to organize, code, and manage the documents produced by the Defendant and all relevant documents in the Plaintiff’s possession. The agreement of the Defendant’s counsel will be sought to facilitate the electronic exchange of documents. Once the volume of documents to be produced in this action is determined, Class Counsel may retain the services of a third-party document management firm for assistance.

#### **LITIGATION SCHEDULE**

5. The Plaintiff has brought a motion seeking certification of the action as a class proceeding pursuant to the *CPA* (“**Certification Motion**”).
6. The Plaintiff may ask the Court to order the Defendant to deliver its statement of defence in advance of the hearing of the Certification Motion.
7. Following disposition of the Certification Motion, absent agreement among counsel, the Plaintiff will ask the Court to set a litigation schedule for the remaining steps in the action.
8. From time to time, the Plaintiff may ask that the litigation schedule be amended.

## **RESOURCES AND EXPERTISE**

9. The Plaintiff has retained Class Counsel as his counsel in this action. Class Counsel has the experience, resources and expertise to prosecute this action on behalf of the Class.

## **MEDIATION**

10. The Plaintiff will participate in a mediation if the Defendant is prepared to do so. If the parties reach a proposed settlement of the action and the court approves the settlement, this Plan will require amendment.

## **NOTICE OF CERTIFICATION AND OPT OUT PROCEDURE**

11. If this action is certified as a class proceeding, the Plaintiff proposes that a notice of certification (“**Certification Notice**”) be circulated to advise Class Members, among other things, that:
  - a. the Court certified the action as a class proceeding;
  - b. a person may only opt out of the class proceeding by sending a written opt out election to the recipient designated by the Court, before a date and time fixed by the Court;
  - c. a person may not opt out of the class proceeding after the date fixed by the Court; and
  - d. if the common issues are resolved in favour of the Class, claimants may be required to register, file a claim and submit documentation to a designated person in order to be entitled to any compensation.

12. The Certification Notice, in a form approved by the Court, will be distributed and published in the following manner:
  - a. posted by Class Counsel on the Website, in English and French;
  - b. provided by Class Counsel to any person who requests it;
  - c. posted by the Defendant in a prominent location on its website;
  - d. disseminated as a press release in Canada across Canada Newswire (in English and French);
  - e. published once in the business section of the national edition of *The Globe and Mail*, in English;
  - f. published once in the business section of *La Presse*, in French; and
  - g. sent electronically and/or in paper form to appropriate broker/dealers in Canada, with a cover letter requesting that they bring the Certification Notice to the attention of their clients who may be Class Members.
13. The Plaintiff proposes to appoint an independent person to receive the opt out notices and report to the court the names and addresses of the persons who opt out by the date fixed by the court.
14. In the absence of agreement with the Defendant, the Plaintiff may ask the Court to order that the Defendant pays the costs of disseminating the Certification Notice in the above manner. Alternatively, the Plaintiff will pay the costs in the first instance, reserving the right to seek recovery of these costs from the Defendant by order of the judge presiding at the common issues trial.

## **REFINEMENT OF COMMON ISSUES**

15. Following the completion of discovery, the parties may seek an amendment of the order certifying this action to deal with any necessary refinements to the common issues.

## **TRIAL OR SUMMARY JUDGMENT ON THE COMMON ISSUES**

16. If appropriate, the Plaintiff may seek summary judgment on one or more of the common issues.
17. If the Plaintiff does not seek summary judgment on common issues, or if any common issues remain following a motion for summary judgment, the Plaintiff will seek the early appointment of the common issues trial judge. The Plaintiff will address issues of trial management in advance of the trial to ensure the orderly and efficient determination of any remaining common issues.
18. The Plaintiff will ask the Court to hold the hearing on the merits (whether a motion for summary judgment or common issues trial) no later than one (1) year after the completion of the examinations for discovery and the production of information required by undertakings and any motions.

## **INDIVIDUAL CLASS MEMBER PARTICIPATION AFTER JUDGMENT ON THE COMMON ISSUES**

19. If the Plaintiff obtains judgment on some or all of the common issues, then it will ask the Court to appoint a claims administrator (“**Administrator**”) and a referee (“**Referee**”), with such rights, powers, and duties as the Court directs, to receive and evaluate claims (including submissions and evidence) with respect to any outstanding individual issues and the assessment of damages pursuant to section 25 of the *CPA* (“**Claims Process**”).



20. Class Members will be required to complete and submit a Claim Form to the Administrator in order to participate in the Claims Process. The structure and content of the Claim Form will depend upon the findings of the judge(s) on summary judgment or the common issues trial.
21. The Plaintiff will ask the Court to approve the form, content and method of distribution of the notice of resolution of the common issues (“**Common Issues Notice**”). The Common Issues Notice will advise Class Members of the claims filing procedure and requirements as set out herein.
22. In order to simplify the claims process, the Administrator and Referee will, wherever practical, utilize:
  - a. a paperless, electronic state-of-the-art web-based technology system that will include a secure database incorporated into the Website;
  - b. standardized claims forms and filing procedures for evidence and submissions; and
  - c. summary methods of introducing documentary evidence.
23. Each claimant will be required to provide, with the completed Claim Form, (i) full particulars of each unit of BMO Mutual Funds held during the relevant period; and (ii) information relating to any individual issues (as necessary or required). The types of information or records which shall constitute sufficient proof of a claim shall be specified in a protocol to be approved by the Court.
24. The Plaintiff will seek an order pursuant to section 25(2) and (3) of the *CPA* that the completed and timely submitted Claim Form, with supporting documents, be treated as

*prima facie* evidence of each claimant's eligibility and damages if accepted by the Administrator. The Claim Form must be signed by each claimant as if under oath.

25. The Claim Form will contain an authorization to permit the Administrator to obtain information from each claimant's discount broker(s). This will permit the Administrator to carry out an audit function.
26. The Court will be asked to set a deadline ("**Claims Deadline**") by which Class Members must file their claims with the Administrator.
27. Any person who does not file a claim with the Administrator before the Claims Deadline will not be eligible to participate in the Claims Process without leave of the Court.

#### **THE CLAIMS PROCESS**

28. The structure of the claims process will depend upon the findings of the judge at the common issues trial or summary judgment.
29. With respect to any claims for which an aggregate assessment of damages is made, the Plaintiff will argue that the Claims Process need only deal with the calculation of the claimant's distribution from the gross recovery.
30. If the court does not award an aggregate assessment of damages, the Plaintiff will argue that the claims process need only deal with class membership (i.e. whether the claimant is a Class Member) and the calculation of the claimant's quantum of individual damages.
31. It may be necessary to deal with individual issues regarding reliance, causation, or other matters to establish liability on the common law claims. In such an instance, the Class Members will be given the opportunity to come forward to prove the individual issues and damages.

**Process if there has been an aggregate assessment of damages**

32. This part of the Plan presupposes that the Defendant is found to be liable to the Class Members after judgment on the common issues and the Court awards an aggregate assessment of damages on one or more claims. The Plaintiff will argue that the Defendant is not entitled to participate in the Claims Process if an aggregate assessment of damages has been made.
33. The Administrator's role will be to determine whether (i) each claimant is a Class Member, and (ii) to calculate the claimant's individual distribution in accordance with the protocol approved by the Court.
34. After reviewing the Claim Form, the Administrator shall make a decision and promptly notify the claimant of (i) whether the person is a Class Member and entitled to participate in the recovery; and (ii) the amount of the person's distribution.
35. The Administrator shall communicate its decision electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by the court.
36. The claimant may advise the Administrator, within a time period fixed by the court, of any disagreement with its decision. After being advised of a disagreement, the Administrator shall consider any additional information provided and determine whether to revise its decision on eligibility and/or the damages calculation.
37. If any claimant disagrees with the Administrator's final decision, he/she/it may elect to have the Administrator's decision reviewed by the Referee.

38. The Referee will carry out the review of the Administrator's decision in the least expensive, most summary manner possible in accordance with a protocol to be approved by the court and shall give all necessary procedural directions.
39. The Referee will deliver a written decision. There shall be no right of appeal from the Referee's decision.
40. The Referee, in his or her discretion, may order the Defendant to pay the claimants' costs of the references. A claimant seeking the review of a decision of the Administrator shall be required to make a deposit of \$150, which shall be refunded only in the event that the appeal is determined in the claimant's favor.

**Process if Class Members are not required to prove facts other than class membership and damages**

41. This part of the Plan presupposes that the Defendant is found to be liable to the Class Members after judgment on the common issues and issues other than Class membership and damages need not be addressed on an individual basis.
42. The Administrator's role will be to determine whether (i) each claimant is a Class Member, and (ii) to calculate the claimant's damages in accordance with the formula fixed by the Court.
43. The Defendant will be given an opportunity to review the Claim Forms and to advise the Administrator in writing whether it disputes a claim and the basis for the dispute. The claimant will be entitled to respond in writing to any dispute by the Defendant.
44. After reviewing the Claim Form, the Administrator shall make a decision and promptly notify the claimant of (i) whether the person is a Class Member and entitled to participate in the process; and (ii) the amount of the person's damages.

45. The Administrator shall communicate its decision electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by the court.
46. After the claimant and the Defendant have reviewed the Administrator's decision concerning eligibility and the damage calculation, the claimant or the Defendant can advise the Administrator, within a time period fixed by the court, of any disagreement.
47. After being advised of a disagreement by the claimant or the Defendant within the period fixed by the court, the Administrator shall consider any information provided and determine whether to revise its decision on eligibility and/or the damages calculation.
48. If any claimant or the Defendant disagrees with the Administrator's decision, they may elect to have the Administrator's decision reviewed by the Referee.
49. Class Counsel may assist claimants with these procedures, if requested. The Class Member will pay Class Counsel for these services in addition to the fees, disbursements and taxes approved by the court for the resolution of the common issues.

**Process if Class Members are required to prove facts other than class membership and damages**

50. This part of the Plan presupposes that the common issues are decided in favor of the Class against the Defendant, and individual issues regarding liability (other than class membership and damages) must be proven.
51. The Administrator's role will be to determine (i) whether each claimant is a Class Member; (ii) whether the claimant has proven the remaining individual facts to establish liability on any particular right of action; and (iii) the claimant's damages in accordance with the formula fixed by the Court.

52. The Claim Form will require claimants to particularize the facts and evidence on which they rely to prove the remaining individual issues. The Claim Form and supporting documents will be treated as affidavit evidence and the Defendant may elect to challenge the assertions in writing. The claimant will be entitled to respond in writing to any dispute by the Defendant.
53. The Administrator will evaluate the Claim Form, the supporting evidence, and any submissions by the Defendant and promptly notify the claimant and Defendant of (i) whether the claimant is a Class Member; (ii) whether the claimant has proven the remaining individual facts to establish liability; and (iii) the calculations of the claimant's damages in accordance with the formula fixed by the Court.
54. The Administrator shall communicate its decision electronically or in writing by mail or by fax to the persons affected in accordance with a protocol to be approved by the court.
55. If a claimant or the Defendant disagrees with the Administrator's decision relating only to class membership and/or calculation of damages, he/she/it may ask the Administrator to review its decision. If any claimant or the Defendant disagrees with the Administrator's final decision regarding class membership and/or calculation of damages, he/she/it may elect to have decision reviewed by the Referee.
56. If a claimant and/or the Defendant disagrees with the Administrator's decision regarding whether the claimant has established liability (and, if applicable, class membership and/or damages) she/he/it may elect to have a reference before the Referee.
57. The reference shall be held in the least expensive, most efficient manner. The procedure at the reference will be established by the Referee subject to the following paragraphs.

*Small Claims (under \$35,000)*

58. The Referee's determination of claims of less than \$35,000 requiring individual determination shall proceed in writing. Class Members with claims of less than \$35,000 wishing to proceed with such claims will be required to file affidavit evidence setting out their evidence with respect to the individual issues remaining to be proven. The Defendant may cross-examine affiants on their affidavit by written interrogatories (in accordance with Rule 35 of the *Rules of Civil Procedure*) should the Defendant wish to challenge the evidence. The Referee will then issue a written decision with respect to the Class Member's claim on the basis of the affidavit evidence and the answers to the written interrogatories.

*Simplified Procedure Claims (\$35,000–\$200,000)*

59. Class Members with claims worth between \$35,000 and \$200,000 wishing to proceed with such claims shall proceed by analogy with the simplified procedure set out in Rule 76 of the *Rules of Civil Procedure*. Such Class Members will be required to file:
- a. an affidavit of documents prepared in accordance with Rule 76.03; and
  - b. affidavit evidence relating to the individual issues remaining to be proven.
60. Each party will be permitted to engage in up to two hours of oral examination for discovery.
61. The Referee may make decisions on the claims of the Class Member on the basis of the record or may, in his or her discretion, conduct a summary trial of such claims in accordance with Rule 76.12 of the *Rules of Civil Procedure*. The Referee shall deliver a written decision.

*Full Claims (over \$200,000)*

62. Class Members with claims in excess of \$200,000 wishing to proceed with such claims will be required to:
- a. serve on the Defendant an affidavit of documents prepared in accordance with Rule 30.03 of the *Rules of Civil Procedure*; and
  - b. attend for oral examination for discovery (in accordance with Rule 34 of the *Rules of Civil Procedure*), or provide answers to written interrogatories (in accordance with Rule 35 of the *Rules of Civil Procedure*), as the Defendant may elect.
63. The Referee may, in his or her discretion, make a decision on the individual issues based on the documentary and discovery evidence, or conduct a trial of such claims.
64. The Referee shall deliver a written decision.

*Costs and Appeals*

65. The Referee, in his or her discretion, may order the Defendant to pay the claimants' costs of the references, regardless of the amount at issue. There shall be no costs payable by claimants under any circumstances.
66. If any claimant disagrees with the Referee's decision relating to the determination of issues of liability and the claim is for an amount exceeding \$200,000, they may appeal to the Ontario Superior Court of Justice in respect of such liability issues only within a time period fixed by the Court.
67. Except as provided above, the Referee's decisions will be final and there shall be no right of appeal from such decisions.



## **THE ADMINISTRATOR'S FIRST REPORT TO COURT**

68. The Administrator shall deliver reports to the court as required. The subject matter of the reports will depend on the findings of the common issues trial judge.
69. Copies of the Administrator's reports shall be served on the Defendant and Class Counsel. The Administrator shall also report on a regular basis on the accumulating cost of administration.
70. After the claims procedure is completed, the court will decide the amount the Defendant must pay to the Administrator.
71. The Administrator shall hold all amounts received from the Defendant in trust, in a manner to be approved by the court, until an order of the court authorizes distribution in whole or in part.

## **DISTRIBUTION TO ELIGIBLE CLASS MEMBERS**

72. As soon as practicable after the completion of the claims procedure, the Administrator will, by motion, report to the court the name and address of each Class Member entitled to receive a distribution, the amount of their share of the monies on hand, including their share of prejudgment interest ("**Distribution List**").
73. The Distribution List shall be distributed and/or made accessible in accordance with the court's direction.
74. Each Class Member whose name appears on the Distribution List shall comply with any condition precedent to distribution that the court may impose.
75. The court will authorize payments to those Class Members whose names are on the Distribution List. The court may authorize interim distributions.

76. If the total compensation available for distribution to Class Members is not fully disbursed within a period of time fixed by the Court, the unpaid amount shall be distributed *pro rata* to all Class Members that have filed claims with the Administrator or distributed to designated *cy pres* recipients in such manner and on such terms as the Court may direct.

#### **THE ADMINISTRATOR'S FINAL REPORT TO COURT**

77. After the Administrator makes its final distribution, it shall report to the Court and be discharged as the Administrator.

#### **MOTION FOR DIRECTIONS**

78. Class Counsel, the Defendant and the Administrator may apply at any time to the court for directions.

#### **CLASS COUNSEL'S FEES AND THE COSTS OF ADMINISTRATION**

79. After the trial of the common issues or summary judgment, the Plaintiff will ask the court to approve an agreement respecting fees and disbursements between him and Class Counsel. To the extent that the approved Class Counsel's fees, disbursements and applicable taxes are not completely paid by the costs recovered from the Defendant, the Plaintiff will ask the court to order that the unpaid balance be a first charge on any recovery either by way of aggregate or individual assessment.
80. If the court awards damages in the aggregate, Class Counsel will ask the court to order payment of their fees, disbursements and applicable taxes as a first charge on the aggregate amount.
81. If the court does not award damages in the aggregate and requires the Class Members to prove their damages through individual assessments, Class Counsel will ask the court to

order payment of their fees, disbursements and applicable taxes as a first charge on the awards made at individual assessments.

82. The Plaintiff will ask the Court to order that the Defendant pays all administration costs, including the costs of all notices associated with the process and the fees and disbursements of the Administrator and the Referee as those costs are incurred.

#### **FURTHER ORDERS CONCERNING THIS PLAN**

83. This Plan may be amended from time to time by directions given at case conferences or by further order of the Court.

#### **EFFECT OF THIS PLAN**

84. This Plan shall be binding on all Class Members who do not opt out in accordance with the procedure directed by the Court whether or not they make a claim under the Plan.

NAHEED GILANI  
Plaintiff and  
BMO INVESTMENTS INC.  
Defendant

Court File No. CV-18-00611748-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

**ORDER  
(CERTIFICATION)**

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